



**COUNCIL OF  
THE EUROPEAN UNION**

**Brussels, 13 December 2012**

**17637/12  
ADD 7**

**FISC 196  
ECOFIN 1062**

**COVER NOTE**

---

from: Secretary-General of the European Commission,  
signed by Mr Jordi AYET PUIGARNAU, Director

date of receipt: 6 December 2012

to: Mr Uwe CORSEPIUS, Secretary-General of the Council of the European  
Union

---

No Cion doc.: SWD(2012) 403 final Volume 5/14

---

Subject: Comission Staff Working Document  
Impact Assessment  
Accompanying the document  
the Communication from the Commission to the European Parliament and the  
Council - An Action Plan to strenghten the fight against tax fraud and tax  
evasion  
the Commission Recommendation regarding measures intended to encourage  
third countries to apply minimum standards of good governance in tax matters  
the Commission Recommendation on aggressive tax planning

---

Delegations will find attached Commission document SWD(2012) 403 final Volume 5/14.

---

Encl.: SWD(2012) 403 final Volume 5/14



Brussels, 6.12.2012  
SWD(2012) 403 final

Volume 5/14

**COMMISSION STAFF WORKING DOCUMENT**

**IMPACT ASSESSMENT**

*Accompanying the document*

**the Communication from the Commission to the European Parliament and the Council -  
An Action Plan to strengthen the fight against tax fraud and tax evasion**

**the Commission Recommendation regarding measures intended to encourage third  
countries to apply minimum standards of good governance in tax matters**

**the Commission Recommendation on aggressive tax planning**

{COM(2012) 722 final}  
{SWD(2012) 404 final}



EUROPEAN COMMISSION  
DIRECTORATE-GENERAL  
TAXATION AND CUSTOMS UNION  
Direct taxation, Tax Coordination, Economic Analysis and Evaluation  
**Company Taxation Initiatives**

**Annex 5**

Brussels, 5 July 2012  
TAXUD D1 D(2012)

**Summary report  
of  
the responses received on the public consultation  
on  
factual examples and possible ways to tackle double  
non-taxation cases**



## **Main conclusions**

### **Background**

In a period when Member States are looking for secure and additional tax revenues, it is important for their credibility towards their taxpayers that they take the necessary measures to remove both double taxation and double non-taxation. Both situations can jeopardize the idea of a single market and are therefore unacceptable.

Cross border double non-taxation and double taxation occur when taxpayers trade or invest across the borders. The globalisation, or the increasing economic integration of markets that is being driven by rapid technological change and policy liberalisation, has significantly increased cross-border trade and investments in recent years. It can therefore be feared that the problems with both phenomena have increased.

As the Commission previously has indicated there is - while having full regard to the principle of subsidiarity - a need to ensure more coherence between Member States individual positions in the international tax arena and the good governance principles. This requires a greater degree of coordination at EU level so as to ensure that the momentum towards a more open and constructive tax co-operation continues at a global level.<sup>1</sup>

In November 2011 the Commission stated in the Communication on Double Taxation in the Single Market<sup>2</sup> that it would take some concrete initiatives in order to address double taxation problems and that it would launch a fact-finding consultation procedure in order to gather evidence of double non-taxation.

The Commission launched the public consultation on February 29, 2012.

### **Some highlights from the consultation<sup>3</sup>**

The non-governmental organisations who contributed to the consultation welcomed the consultation but found it difficult to provide factual examples of double non-taxation, although some input was provided. The non-governmental organisations find most of the issues mentioned in the consultation relevant for the future work on double non-taxation.

On the other hand the business community expressed concerns on the scope of the consultation. Many of the contributors from the business community did not provide answers to the specific questions in the public consultation note, but instead provided broader and more general comments on the issues raised in the public consultation note. There were

---

<sup>1</sup> COM(2009)201

<sup>2</sup> COM(2011)712

<sup>3</sup> Annex 1 provides a more detailed presentation of the contributions received.

however some business contributors who provided answers to the different questions in the public consultation.

In the general comments provided by the business community the following points are worth highlighting:

- Several found it important to make a clear distinction between actual double non-taxation (e.g. due to mismatches of hybrid entities and hybrid instruments) and tax competition (low taxation). Others called for a definition of "double non-taxation".
- Most of the organisations stressed that direct taxation falls within the competence of the Member States' sovereignty. Several therefore found that any measures against double non-taxation should be handled at the Member State level, while others found some coordination appropriate (e.g. to avoid mismatches).
- Many of the organisations felt that the issue of double non-taxation should not be addressed separately from that of double taxation. The two phenomena are seen as two sides of the same coin.
- Some organisations stressed that measures against double non-taxation could have an adverse impact on European economic competitiveness.
- Several organisations also called for coordination with other initiatives on EU and international level that address aspects of double (non-) taxation e.g. the EU Code of Conduct Group and the OECD report on Hybrid Mismatches.

### **Summary analysis**

The number of contributions could be perceived as limited if the number of contributions to this public consultation is compared with the number of contributions to previous public consultations, e.g. the consultation on double taxation. It is however not possible to make such a simple comparison.

Firstly, this public consultation only concerns the direct taxation of companies. It does not concern the taxation of individuals. Fewer people are therefore directly affected by the issues examined.

Secondly, the public was asked for contributions on factual examples of double non-taxation for corporate taxpayers. The corporate tax system is a highly technical area where it is very difficult for the public to contribute with factual examples. As stated by Tax Justice Network (TJN):

"One thing we want to address, is that for TJN and its members it is very difficult to identify the concrete examples the European Commission is looking for, since of their nature it is needed to access to internal company accounts."

This is probably also one of the reasons why the contributors in general have only been able to identify concrete factual examples of double non-taxation to a limited extent.

The contributors have on the other hand not been able to identify additional examples of double non-taxation to the ones presented in the consultation paper in the area of direct corporate taxation either. This could perhaps indicate that the Commission have identified those issues that can be perceived as resulting in double non-taxation (or at least the major issues). However it should be noted that some argue that not all of the issues are real double non-taxation cases.

The double non-taxation issue which most contributors find least acceptable is double-non taxation due to mismatches between countries qualification of hybrid entities and hybrid financial instruments. Several contributors also found application of Double Tax Conventions leading to double non-taxation relevant for the future discussions.

On the other issues mentioned in the consultation paper the contributors were divided; while some found the issues relevant for future discussion others found the issues irrelevant.

Furthermore most contributors from the business community would prefer solutions to be found on Member State level as direct taxation falls within the competence of the Member States sovereignty. Several of these organisations however support the Common Consolidated Corporate Tax Base and community action against double taxation.

The Business Community believe that solutions should deal with both double taxation and double non-taxation issues.

## **Follow-up**

Notwithstanding on-going initiatives such as the Common Consolidated Corporate Tax Base (CCCTB) there seems to be a need for a more in-depth analysis of double non-taxation especially on qualification of hybrid entities and hybrid financial instruments.

DG TAXUD agrees with the contributors stating that duplication of work already undertaken in other EU forums, e.g. the Code of Conduct Group (Business Taxation), and in the OECD should be avoided. The OECD has already conducted analysis of arrangements that exploits national differences in the tax treatment of instruments and entities to deduct the same expense in several different countries or to make income "disappear".<sup>4</sup> The Code of Conduct Group has already performed analysis on profit participating loans and has started to work on other mismatches.<sup>5</sup>

DG TAXUD expects that the Code of Conduct Group (Business Taxation) will continue its work regarding anti abuse and mismatches. The Group is expected to take the extensive work already conducted by OECD into account in order to avoid duplication of work. DG TAXUD will discuss with the OECD how best to cooperate on these issues.

DG TAXUD will also – building on the positive Joint Transfer Pricing Forum (JTPF) experiences - continue to examine the potential benefits of setting up a Forum on double taxation for purely EU tax matters and will examine whether it should also cover double non-

---

<sup>4</sup> OECD report on "Hybrid Mismatch Arrangements: Tax Policy and Compliance Issues".

<sup>5</sup> Report to the Council (ECOFIN) on 11 June 2012 (doc.10903/12 FISC 77, par 17-18)

taxation. This could be relevant for a possible examination of issues of double taxation and double non-taxation arising from the application of double tax conventions.

The Commission intends to publish a Communication on good governance in the tax area in relation to tax havens and aggressive tax planning before the end of 2012.



## **The internal market: factual examples of double non-taxation cases**

### **INTRODUCTION**

The Commission launched this fact-finding public consultation in order to establish evidence concerning double non-taxation within the EU and in relation with Third Countries. Members of the public were encouraged to provide factual examples of cases of double non-taxation on cross-border activities that they have encountered or have knowledge of.

This Consultation had been announced in the Communication on Double Taxation in the Single Market.<sup>6</sup>

The key issues to which stakeholders were invited to reply were the following<sup>7</sup>:

*Issue 1 – Mismatches of entities*

*Issue 2 – Mismatches of financial instruments*

*Issue 3 – Application of Double Tax Conventions leading to double non-taxation*

*Issue 4 – Transfer Pricing and unilateral Advance Pricing Arrangements*

*Issue 5 – Transactions with associated enterprises in countries with no or extremely low taxation*

*Issue 6 – Debt financing of tax exempt income*

*Issue 7 – Different treatment of passive and active income*

*Issue 8 – Double Tax Conventions with third countries*

*Issue 9 – Disclosure*

*Issue 10 – Other issues?*

The dead-line for contributions was on 30<sup>th</sup> May 2012. Later answers were also accepted.

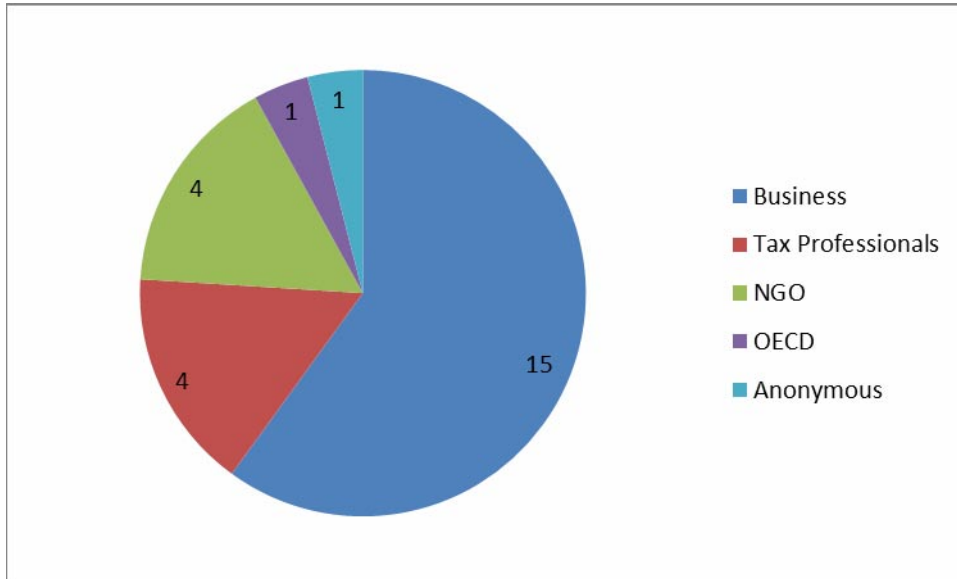
The Commission have received 25 contributions to the public consultation - 15 from Business Community (Business and Accounting Organisations), 4 from Tax Advisors or Tax Practitioners, 4 from Non-Governmental Organisations (NGOs), 1 from an International Organisation (OECD) and 1 Anonymous<sup>8</sup>.

---

<sup>6</sup> COM(2011)712 final

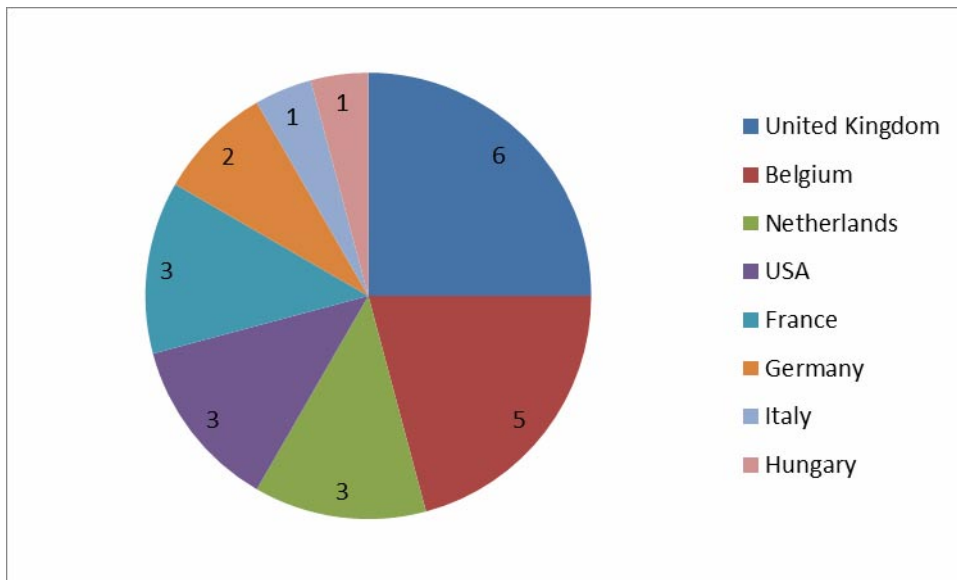
<sup>7</sup> The issues were briefly described in the consultation paper.

<sup>8</sup> This presentation does not include remarks or comments received in the anonymous contribution.



16 of the contributors are registered at the Interest Representative Register.

6 of the contributors are resident in the United Kingdom, 5 in Belgium, 3 in France, the Netherlands and USA, 2 in Germany and 1 in Italy and Hungary.<sup>9</sup>



The list of contributors can be found in Annex 2.

<sup>9</sup> In fact, many of the contributors are international organised (e.g. OECD and a number of business and professional associations and NGOs)



## General remarks

In the contributions received there were numerous general remarks on the consultation especially by the business community. In the following these general remarks are divided into the general remarks by the business community and the general remarks by non-governmental organisations and others. The reason for this split is that the general remarks by the business community are quite similar and many of the positions are shared among the business contributors. The general remarks by non-governmental organisations are in general shorter than the ones from the business community as all of the non-governmental organisations concentrated on the questionnaire.

### Non-Governmental organisations and others

The non-governmental organisations concentrated their contributions on the questionnaire in the consultation and did not provide many general comments. They did however welcome this consultation on double non-taxation. One contributor [EURODAD] wrote:

"[The contributor] welcomes this consultation on double non-taxation. Given the devastating consequences of double non-taxation within the EU and not least across developing countries and the enormous potential for domestic resource mobilisation that lays in taxation, we highly appreciate this initiative and would like to thank you for the opportunity to contribute to shaping EU policies on this specific area."

Another non-governmental organisation [Tax Justice Network] made the general comment that they found it difficult to contribute concrete examples:

"One thing we want to address, is that for [the contributor] and its members it is very difficult to identify the concrete examples the European Commission is looking for, since of their nature it is needed to access to internal company accounts. We have called on the advisory and accountancy sector (notably the Big 4) to deliver these examples, which the[y] advice and account on. We hope they did so in a large extent."

A third non-governmental organisation [HU IFA branch] found that double non-taxation should be solved together with double taxation:

"From the point of view of taxpayers, double non-taxation is not really a problem. Most taxpayers would actually strive to exploit these possibilities. Therefore, tax advisors, we would generally be reluctant to comment on these issues. However, we believe that where double non-taxation occurs, double taxation could also usually occur in the reverse situation. Therefore, we would welcome and promote an approach whereby double non-taxation issues are solved together with (and not instead of) double taxation problems. This is a major driver for us to participate in this process."

A tax professional (Jarass) found that tackling double non-taxation for fairer and more robust tax systems is very important. The contributor therefore proposes to tax earnings before interests and taxes (EBIT) instead of profit in order to tax all income once and only once. The contributor believes:

"Our proposal would systematically tax all income once and only once. Double as well as non taxation would be systematically avoided"

## Business

### *Scope of the consultation*

A number of contributors belonging to the Business Community criticized the structure of the public consultation. Many of the contributors therefore only made general remarks on the public consultation. One contributor [AmCham] wrote:

"The consultation identifies a number of issues where different cases of double non-taxation could occur based on various sources including international tax literature, articles and lectures and presents a 'non-exhaustive' list of examples in a questionnaire format. However, this structure does not allow for comments on whether the examples listed present a problem or not, which makes it very difficult to respond in a meaningful way. Therefore, rather than answering the questions within the consultation document, this position paper provides broader comments on the arguments against a general prohibition of double non-taxation."

Another contributor [CBI] found it:

"somewhat disturbing that normal EC procedures have not been followed, and anonymous submissions have been invited. As a result, there will be no way to check the accuracy of any assertions or allegations made in such anonymous submissions. [The contributor] has been publicly supportive of ending aggressive, artificial tax schemes. This consultation, however, will damage that process by its confusion – perhaps especially in anonymous replies – between aggressive schemes, normal tax planning and, legitimate responses to government-enacted incentives."

Some contributors were also calling for a wider perspective on the issues as they believe tax cannot be considered in isolation. One contributor [AmCham] wrote:

"Even though the scenarios discussed in the consultation may arise because of asymmetry in tax treatment, the consultation needs to look wider than just tax and include an understanding of the associated legal and accounting analysis before concluding on the impact of targeting double non-taxation. The latter cannot be considered in isolation without understanding the interaction with other legislative systems."

### *Double non-taxation or tax competition*

Most contributors from the business community found it important to define 'double non-taxation or to make a clear distinction between double non-taxation and tax competition. One contributor [BusinessEurope] wrote:

"the questions in the consultation paper go beyond what we normally consider to be double non-taxation. We believe it is important to make a clear distinction between actual double non-taxation cases (e.g. due to mismatches of hybrid entities and hybrid instruments) and tax competition (low taxation). However, some of the questions in the Consultation paper seem to relate to the latter."

Similarly another contributor [CBI] wrote:

"Although the consultation only covers direct taxes, the paper defines double non-taxation much more broadly than simply the use of hybrid instruments and entities which comprise true "double non-taxation". In fact the consultation seeks to include examples of territorial non-taxation (or relatively low taxation) of specific activities compared to other Member States."

A third contributor [CIOT] asked for a definition of "double non-taxation":

"it would have been helpful if, before this consultation was undertaken, more consideration had been given to the precise meaning of double non-taxation. A limited definition of double non-taxation in an effort to narrow the scope so that only the most egregious schemes with artificiality were targeted would have been preferable. Currently the extremely broad definition of double non-taxation in the consultation document seems to be targeting both such 'schemes' and genuine tax planning by EU multi-national companies in member states who choose to structure their EU operations efficiently to remain competitive."

Several contributors stressed that Member States have the right within the rules on state aid to adapt more or less attractive tax regimes. One contributor [BusinessEurope] stressed that non-taxation therefore often is intentional.

"It must be recognized that non-taxation is not always a result of aggressive tax planning. On the contrary, non-taxation is often an intentional consequence of national tax policy objectives. A general prohibition of double non-taxation would depart from such national objectives.

It is therefore crucial to have a very clear notion of "double non-taxation". Some fiscal administrations consider e.g. tax incentives for research and development or notional interest deductions as double non-taxation. [The contributor] considers that tax measures that have been introduced by national legislators to incentivize certain behaviour of tax payers should not be stigmatized. Otherwise every deviation between two national tax systems (e.g. differences in depreciation rules) would have to be regarded as double non-taxation."

Several contributors are supportive of fighting artificial tax schemes. They stressed that the European Court of Justice has allowed genuine economic establishment. They also stressed that the court clearly ruled in support of the right to take advantage of lower rates, unless "the arrangements are wholly artificial". One contributor [TEI] further explained that it

"wholly supports focused action dealing with abusive structuring that takes advantage of double non-taxation. [The contributor] welcomes the opportunity to discuss the conditions and consequences of such abuse with the Commission. We regret, however, that developing various instruments and requirements for Member States to include in

their local legislation to deal with the consequences of tax competition (such as the examples given under points 5 through 8 of the Consultation) would create tax uncertainty and limit competitiveness and growth within the EU. The recent ECJ decision in favour of 3M Italia SpA held that there is no EU law obligation for a Member State to enact anti-avoidance provisions where there is no abuse of EU law."

### *Member States sovereignty*

According to several contributors any measures against double non-taxation should be handled at Member States level. One contributor [AmCham] wrote:

"EU Member States retain extensive competences in direct tax matters and can determine the scope of their tax jurisdiction, either unilaterally or bilaterally. This allows Member States to introduce domestic rules on anti-avoidance, which we believe remains the better approach to address double non-taxation rather than a new EU-wide regime. If EU-wide restrictions were to go ahead, they would constrain normal commercial transactions and also reduce the attractiveness of Europe as a place to invest."

The same contributor [AmCham] pointed out that Member States already have national rules that deal with avoiding double non-taxation:

"The UK anti-arbitrage rules, introduced in 2005, apply to both deductions of interest and receipts, and are designed to counter artificial arrangements avoiding UK tax. The deduction rules apply to companies within the charge to corporation tax, which includes UK resident companies and the UK permanent establishments of overseas companies. Likewise, many other EU jurisdictions already have a limitation on exempt dividends derived from passive income along with limitations on deductible interest on acquisition of subsidiaries which generate tax exempt dividends. These are all relevant examples of how things can and do work at individual Member State level."

Another contributor [NFTC]

"believes that bilateral tax treaties remain the only appropriate tool to address differences between independent sovereigns' tax rules on income from cross-border activities, and in doing so, are the appropriate mechanism for separating the permissible from the impermissible tax arbitrage."

On the other hand a third contributor [BusinessEurope] wrote:

"There is an obvious risk that there will be a variety of national non coordinated initiatives in this area. In order to avoid double taxation as well as double non-taxation it is of utmost importance that countries can agree on a common set of principles and apply them consistently."

The same contributor [BusinessEurope] also wrote:

"The only way such mismatches (double non-taxation but also double taxation) could be avoided would be for governments to liaise on their tax policy with other governments to mutually agree a policy to avoid these mismatches. Such a review would also need to consider how to avoid any unintended consequences and in particular any double taxation caused by any actions considered. In these circumstances it is difficult to see how business could comment on the policy changes that would need to be considered as changes could be made in either national context."

A fourth contributor [ICAEW] also believes there could be some co-ordination:

"it is appropriate for the European Commission to undertake work to ensure that the tax systems of the member states are co-ordinated to achieve agreed policy objectives. It is, however, important to ensure that the tax systems of the member states remain competitive in the current world where business is genuinely global and has real choices between different geographical locations."

A contributor [EBIT] believes that the EU should also recognise the sovereignty of third countries. The contributor wrote

"that Third Countries are free to design their own tax systems including the provision of tax incentives and that the EU should target only those Third Countries which maintain or introduce harmful tax practices. In practice this should lead the EU to at least exclude from the scope of the Consultation's outcome any genuine economic activities which are taxed at a low effective tax rate."

#### *Double taxation and double non-taxation*

Several contributors see double non-taxation and double taxation as two sides of the same coin. They therefore stressed that double taxation should also be addressed by the Commission. One contributor [STEP] wrote:

"We would begin by noting that double non-taxation arises in the same manner as double taxation as a result of a lack of co-ordination between national tax authorities regarding the basis on which taxes are levied. The problems of double non-taxation and double taxation should therefore be addressed via similar remedies."

Another contributor [PwC] stressed that

"The crucial point is that the phenomena of both double taxation and double non-taxation – are inevitable consequences of the fact that the corporate income tax systems of EU Member States have not been harmonised. There are strong arguments both for and against such harmonisation and there seems limited desire by many Member States at present to move in that direction. In our view, both phenomena – double taxation and double non-taxation – are two sides of the same coin. One should not be addressed without the other."

#### *Coordination with other international initiatives*



A number of the contributors from the business community pointed out that any initiative should be coordinated with other relevant international initiatives: A contributor [EBIT] wrote:

"[The contributor] is concerned that the Commission initiative duplicates other pre-existing initiatives such as those of the Code of Conduct Group.

The same contributor also wrote:

"[The contributor] was concerned that the Consultation document has apparently not been coordinated with the OECD's report on Hybrid Mismatch Arrangements, and vice versa. This is a very worrying development as the phenomena of double taxation and double non-taxation are global issues which should be addressed globally in a coordinated way."

Another contributor [CIOT] similarly drew the attention to

"the OECD document on Hybrid Mismatch Arrangements published very shortly after this consultation (March 2012). It advocates a different approach to countering these situations. We agree with the OECD that the better way to address these issues is with specific domestic anti avoidance rules and/or rules specifically addressing hybrid mismatch arrangements rather than harmonisation. This is the only way in which problems can be addressed without interfering with the rights of member states to set their own tax policy.

Where there are cases of countries applying different policies and tax rates (for example where participation exemption is given to very low or nil taxed dividends), this should be left to each EU Member State to decide how to implement tax policy; to do otherwise will equate to tax harmonisation.

We would also mention that the Code of Conduct Group has also recently considered hybrid instruments (PPLs). We are surprised, therefore, to see this parallel initiative from the Commission without reference to the Code of Conduct Group's prior and ongoing work in this area."

### *Impact on European economic competitiveness*

There were several contributors who were concerned with the impact on European economic competitiveness. One contributor [EBIT] stated that:

"[The contributor] considers that care should be taken that the current initiative will not adversely impact the European economy's competitiveness which would be the case if measures were unilaterally introduced in Europe whilst -ideally- still building on an international consensus within the OECD regarding their parallel initiative in respect of hybrid mismatch arrangements and the fight against harmful tax competition.

Should the EU adopt any new rule targeting double non-taxation, especially as regards transactions with non-EU Third Countries, this should in [the contributor's]

view be applicable only to the extent that those countries would apply the same principles (as done in the EU Savings Directive approach). The key word is reciprocity here, and the application of the same principles in non-EU Third Countries should not be simply aspirational as it currently is (see the Commission's strategy to promote "good governance" with Third Countries), otherwise EU-based companies will be subject to stricter rules than companies located in most non-EU countries and therefore disadvantaged competitively. So, any action should be undertaken in cooperation with relevant Third Countries."

Another contributor [CIOT] wrote:

"Another significant omission from the consultation is any consideration of the impact that the proposals would have on EU headquartered multi-national companies. If all of the situations addressed in the consultation were prohibited, this would result in an increase in the tax base of all EU Member States, which would significantly impact the ability of multi-national companies headquartered in the EU to remain globally competitive unless statutory headline tax rates were lowered. It would also hinder legitimate business restructuring and constrain normal commercial transactions both within and outside the EU."

## Responses to the questions in the consultation paper

### Issue 1 – Mismatches of entities

***Question A - Do you find such mismatches of entities relevant in the future discussions on double non-taxation?***

Yes	6
No	0
Do not Know	0

***Question B – Are you aware of mismatches of entities between member states or towards third countries?***

Yes	5
No	1
Do not Know	0

***Question C – Please give relevant details about these mismatches of entities***

It should be noted that several of the contributors who only provided general remarks acknowledged that hybrid entity mismatches can lead to double non-taxation (see also the summary of the general remarks).

One contributor informed that there is a mismatch as the French SNC (société en nom collectif) are transparent for tax purposes in the United Kingdom and can opt to be subject to corporate tax in France. The contributor however stressed that such mismatches do not necessarily lead to double non-taxation.

Another contributor also gives the example of an entity that can opt for transparency: Amongst the transparent entities, there could be some entities having the same legal nature in two countries but which, in one country only, can be treated as transparent entities by option. E.g., under Italian tax legislation (Art. 115 and 116 of the TUIR- Unified Direct Taxation Code) private limited liability companies meeting some conditions relating to their members can opt for the same tax transparency regime applicable to partnerships. This possibility was introduced in order to eliminate economic double taxation in the event of dividends distribution, as in Italy the distribution of dividends is taxed in the hands of receiving shareholders. There could according to the contributor lead to both economic double non-taxation and juridical double non-taxation of dividends whenever the Member State of residence of the (two or more) corporate shareholders applies a total participation exemption regime. A regime – the optional tax transparency for certain private limited companies – which was introduced to prevent economic double taxation in light of the tax treatment of domestic dividends could thus be used beyond its purpose and could give rise to unintentional double non-taxation. The contributor thus believe that, amongst the “hybrid entities”, it would be necessary to include also those entities that can benefit from tax transparency by virtue of an option, and not only those that have access to this regime by their own legal nature.

A third contributor has certain doubts as to whether the example quoted by the public consultation is really relevant. In any case, they feel that in order for double non-taxation to occur in the given example, a number of specific circumstances must be present: Country A

must not regard the “hybrid” to be a PE of the Parent (as otherwise, it would probably not allow the deduction of interest, save for special circumstances such as cross-border tax grouping), and Country B must have in place a group relief regime, which, for instance, Hungary does not have. Notably, as a Hungarian registered partnership is fiscally opaque, interest deduction with a Hungarian partnership as a debtor is available irrespective of the fact that the same entity is treated as a transparent entity from the perspective of the parent company’s jurisdiction. As such, interest deduction could be possible with the parent as well. Hungarian tax deduction cannot be denied for this reason.

This contributor however finds that mismatch of entities can be relevant in a number of other cases, the most prominent of which is where Country A (in which the parent is located) considers its hybrid subsidiary in Country B to be a transparent PE whereas Country B regards the same entity as a company. When the hybrid is sold, Country B would generally regard that it is not entitled to tax the capital gains on such a sale whereas Country A does not regard it either as being entitled to tax those gains (treating the gains as the income attributable to the PE). The result will be double non-taxation, and this is indeed a mismatch that has frequently been exploited in the past. Notably, no effective Hungarian double tax treaty has yet had a provision equivalent to Article 23A, Paragraph 4, in the OECD model.

***Question D – Please provide any suggestions you might have for ways in which these mismatches of entities could be tackled***

One contributor thinks that there would be at least two alternative ways to tackle mismatches of entities, which would allow each national authority to immediately identify these mismatches.

The introduction of an “automatic information exchange” mechanism. EU Member States should systematically exchange a list of all entities which, in their respective jurisdictions, are treated as tax transparent. This list should indicate the legal nature and conditions (if any) for transparency, and should include both those entities which are tax transparent by legal nature and those that can be tax transparent by way of option; it should also be updated at the occasion of any tax regime change.

Alternatively, as the forms of business organisations tend to coincide (from the company law viewpoint) from one Member State to another, each Member State could communicate this list to the Commission, which could use it for creating a central database (accessible to any national tax authority) containing an “equivalence matrix” of legal entities, in which each national tax authority could check what legal entities, set up in other Member States, correspond to the entities which are treated as tax transparent in its own jurisdiction, and what is the tax treatment of these correspondent entities.

Another contributor on a similar note believes that an EU-wide list of non-transparent entities for double taxation purposes could go a long way towards solving this problem. The lists in the Merger and Parent-Subsidiary Directives could be used as a very good starting point.

Another contributor believes that in the example given in the Public Consultation, interposing a company can be justified by other reasons (in particular, legal or statutory reasons). If it is not the case, double non-taxation can be tackled by the doctrine of abuse of rights (*abus de droit*). The different treatment of the same entity can be the result of not only differences in

the tax rules, but very profound differences between legal and statutory systems. The debate should therefore be taken within a broader context.

## **Issue 2 – Mismatches of financial instruments**

***Question A - Do you find such mismatches of financial instruments relevant in the future discussions on double non-taxation?***

Yes	5
No	0
Do not Know	0

***Question B – Are you aware of mismatches of financial instruments between member states or towards third countries?***

Yes	4
No	1
Do not Know	0

***Question C – Please give relevant details about these mismatches of financial instruments***

It should be noted that several of the contributors who only provided general remarks acknowledged that hybrid financial instrument mismatches can lead to double non-taxation (see also the summary of the general remarks).

One contributor gives the following example: The treatment of ORA (Obligation Remboursable en Actions) in French-American schemes. These are treated as debt instruments in France allowing the deduction of coupons and as capital instruments in USA generating tax-exempt income.

Another contributor believes that this is one of the most typical and most exploited forms of double non-taxation, and it is impossible to list the many kinds and circumstances. However, most of them do seem to follow the basic pattern as described in the Commission's example. Mismatching is thus not precluded even in Hungary. Participating loan is always considered in Hungary as a loan. The Hungarian debtor can thus get access to interest deduction in the case where the income the creditor receives may be qualified in the non-Hungarian situation as dividends received and exempt from taxation there. Hungarian interest deduction cannot be denied for this reason. Such a scheme has proliferated, for example, in respect of the Netherlands – Hungary double tax convention.

***Question D – Please provide any suggestions you might have for ways in which these mismatches of financial instruments could be tackled***

One contributor believes that double non-taxation results from the different tax and accounting approach.

Another contributor stresses that the underlying problem is that companies can exploit differences in the definition of the tax base, and that tax treaties are an inadequate way of

dealing with this problem. This proves the necessity of a Common Consolidated Corporate Tax Base, and to make it compulsory, not voluntary, to address mismatches within the EU.

Another contributor thinks that the mismatching addressed by Issue 2 goes to the heart of the tax and accounting legislation of each country, which is very difficult to overcome by definitions in any treaties. This issue may primarily be solved by promoting some kind of harmonisation of these rules, such as the CCCTB initiative. Switch-over clauses (as domestic, unilateral measures) could also be a good way of coping with his problem, but those clauses are much more restrictive on taxpayers and therefore on the fundamental freedoms of Community law.

**Issue 3 – Application of Double Tax Conventions leading to double non-taxation**

*Question A - Do you find such cases relevant in the future discussions on double non-taxation?*

Yes	5
No	0
Do not Know	0

*Question B - Are you aware of cases where member states application of double tax conventions lead to double non-taxation?*

Yes	3
No	1
Do not Know	1

*Question C – Please give relevant details about these cases*

A contributor points out that the Tax Convention between France and Italy can lead to a situation of double non-taxation in the case of a French enterprise that has a building site in Italy that lasts slightly less than 12 months. As France adopts the territoriality principle, the building site will not be taxed in either of both countries.

A second example is a triangular situation where a company from State A has its place of effective management in a State with low taxation; like Serbia that exempts the business income.

Another contributor gives the example of the treatment of real estate income and capital gains arising from SPI (Société à Prépondérance Immobilière) in the tax convention between France and Luxembourg. The contributor notes that the DTC between France and Luxembourg has been changed to address this problem.

According to another contributor, one of the problems in relation to Double Tax Conventions is the tension between source and residence taxation, as a result of which double non-taxation can occur. Broadly speaking there is a difference between countries using the model treaties of the United Nations (source-based, used by a lot of developing countries) and the OECD (residence-based). The problem can be clarified in a hypothetical Dutch example. The Netherlands has an extensive network of DTC’s in which the Netherlands strives to lower

(preferably to 0%) the withholding tax levied by source countries on dividends, royalties and interest. The Netherlands themselves don't levy a withholding tax on most interest payments or on royalties. When one takes the hypotheses of a DTC between the Netherlands and source-country X with a 0% withholding tax on interest and royalties, and residence-country Y being a country with no corporate income tax this could lead to the following situation: interest and royalties are not being taxed when entering the Netherlands, nor when leaving the Netherlands. In residence-country Y the income is not taxed. So the hypothetical company could end up untaxed on the income it transfers out of country X through interest and royalty payments via the Netherlands to country Y.

Another contributor believes that this issue is also a typical source of double non-taxation as well as double taxation. From the point of view of the taxpayers, it is mostly problematic where either there is a mismatch of facts or that of timing. The first issue should be easy to avoid by adequate communication between the tax authorities, whereas the second one should be overcome by a less formal application of the concept of "tax period" or "tax year", combined with better communication. Foreign earned business income can be exempted from taxation in a Hungarian treaty situation irrespective of the fact whether the Hungarian beneficiary does or does not pay in fact tax abroad. The Hungarian tax authorities do not usually request the taxpayer to prove that tax has been paid in the other jurisdiction on the income to be exempted from Hungarian taxation. In a few recent cases (see, e.g., the new Hungarian treaty concluded with the US in 2010, and with the UK and Germany in 2011), exemption is subject on the Hungarian side to effective taxation applied in the other contracting state. The contributor reiterates that no effective Hungarian double tax treaty has yet had a provision equivalent to Article 23A, Paragraph 4, in the OECD model.

***Question D – Please provide any suggestions you might have for ways in which this problem could be tackled***

One contributor suggests the renegotiation of tax conventions and need for an agreement between Member States.

Another contributor believes that in situations where a company is resident in a Member State under the principle of territoriality, the other Member State should not apply the threshold for building sites. As regards, triangular situations where a company has its effective management in a State of low taxation, the solution would be to use the centre of economic interests as the tie-breaker for the tax residence of companies and not the place of effective management.

A third contributor believes that a shift toward a more source-based taxation would be preferred in relation to active corporate income. This way taxes would be levied where real economic activities are located. This is both legally and economically fairer than a predominantly residence based model, which would nonetheless remain applicable to passive income (personal and corporate). It would also help developing countries to close the existing gap with more developed countries. Double taxation can be prevented by the residence country by granting a credit for taxes on income levied by the source state.

Another contributor thinks that a possible solution would be a better communication between the tax authorities, perhaps aided by a permanent forum for solving intra-EU double (non-) taxation issues which could go a long way of solving many issues in a quick and

straightforward manner. Ultimately, though, the solution could only be either the harmonisation of tax rules (e.g., CCCTB) or the application of an EU-wide, multilateral international treaty or a Council Directive on the avoidance of double (non-) taxation.

**Issue 4 – Transfer Pricing and unilateral Advance Pricing Arrangements**

***Question A - Do you find unilateral advance pricing arrangement relevant in the future discussions on double non-taxation?***

Yes	2
No	2
Do not Know	1

***Question B - Are you aware of unilateral advance pricing arrangements that could lead to double non-taxation?***

Yes	2
No	2
Do not Know	1

***Question C – Please give relevant details about these unilateral advance pricing arrangements***

According to one contributor,<sup>10</sup> Energias de Portugal SA has a subsidiary in the Netherlands (EDP Finance BV) that issues publicly traded bonds and lends the proceeds onwards to related entities abroad. In 2007, the subsidiary obtained an APA in the Netherlands that specifies its minimum taxable income as an arms-length return on equity plus a spread of 0.03% on on-lent funds, minus operational costs. At the start of 2010, the subsidiary had total equity of EUR 23 million while it had on-lent over EUR 10 billion. Due to the tax ruling, the subsidiary's tax charge for 2010 was less than EUR 1 million even though it earned net interest income, after operational costs and expenses, of EUR 63 million. This illustrates according to the contributor that unilateral APAs specifying an alternative tax base may result in almost complete double non-taxation of intra-group payments, because the payments may be tax deductible in one member state but largely excluded from the tax base in another member state due to such an APA.

Another contributor stresses that a unilateral APA is regulated in detail in Hungarian statutory law. The local business community has welcomed its introduction. The Arbitration Convention does not seem to be efficient. Formation of arbitration panels has not yet been known in Hungary, although Hungarian experts have been listed with the Joint Transfer Pricing Forum to work as arbiters.

***Question D – Please provide any suggestions you might have for ways to tackle unilateral advance pricing arrangements leading to double non-taxation.***

---

<sup>10</sup> The contributor (Tax Justice Network) has confirmed that the information in the example is publicly available in the annual accounts.



According to one contributor, the suggestion that unilateral advance pricing arrangements (APAs) may result in 'double non-taxation' may be correct in theory but it is, in their experience, generally not correct in practice and could lead to the conclusion that APAs are a bad thing. By contrast, APAs can be an important element in providing the certainty to business that is so essential in encouraging the investment required for economic growth.

Another contributor adds that in their day-to-day business experience there have been very few instances where unilateral APAs have resulted in a tax advantage due to a different transfer pricing method being applied in the country of the counterparty company compared to the method adopted by the company which has negotiated the unilateral APA. In any event, to the extent that this is an issue, it should wherever possible be addressed via the relevant tax treaty mutual agreement procedure, rather than being categorised as double non-taxation. Within the framework of the Code of Conduct Group, a solution to combat unilateral APAs has been found by relying upon the spontaneous exchange of information, which is now compulsory under the new EU Directive on the exchange of information.

A third contributor believes that APAs should preferably be bilateral to avoid that they result in unintended double non-taxation in combination with, for example, double tax conventions. In the contributors view more openness at the European level would be desirable. APAs should be made public, so that public scrutiny of the agreement is possible as a safeguard against secret deals that deviate from normal tax rules. If public disclosure is not possible, the minimum that should be aimed at is information exchange between Tax Authorities on APAs being agreed with business. This could be achieved with a European database that is accessible by all European Tax Authorities and other cooperating tax authorities.

Another contributor feels that this is one of those issues where existing and/or purely unilateral measures should be enough to tackle the problem, and should be left out of the scope of the present consultation. Better use of MAPs, better use of the exchange of information clauses should be enough to eliminate most of these issues, or simply a better unilateral regulation of the APA processes. Ultimately, though, the elimination of transfer pricing problems could only come through the elimination of transaction-based transfer pricing approaches instead of more robust and fail-safe systems (e.g. formulary apportionment) or CCCTB.

**Issue 5 – Transactions with associated enterprises in countries with no or extremely low taxation**

***Question A - Do you find transactions with associated enterprises in no/low tax countries relevant for the future discussions on double non-taxation?***

Yes	3
No	2
Do not Know	0

***Question B - Are you aware of transactions with associated enterprises in no/low tax countries that could lead to double non-taxation?***

Yes	2
-----	---

No	2
Do not Know	1

***Question C – Please give relevant details about these kinds of transactions***

One contributor explains that the Netherlands is one of the countries not levying withholding tax on most interest and royalties, while striving for a low or 0% source taxation in Double Tax Conventions with third countries. Switzerland is a jurisdiction with low taxes in the heart of the European Union. As KPMG puts it<sup>11</sup>, one of the strategic advantages of Switzerland is its “low taxation with various tax planning possibilities”. Low-tax jurisdictions can be used for diminishing taxation in several ways. For example, shifting corporate income from an EU subsidiary to a Swiss headquarter (or a Swiss subsidiary in charge of "corporate financial services" or a Swiss letterbox) can be achieved not only through "classic" transfer mispricing of traded merchandise, but also through overpriced royalties (for which there is no market based "arms-length" price) and interest payments (in the case of "thin capitalization" of the foreign subsidiary). Notably, EU member states cannot raise a source tax on these transfer payments, as the bilateral Taxation of Savings Income Agreement between the EU and Switzerland stipulates a zero withholding tax on intra-firm dividends, royalties and interest payments. (In the case of developing countries, withholding taxes on dividends, royalties and interest are likewise often abolished, or at least significantly lowered, by means of bilateral double tax agreements.)

Another contributor stresses that the dividends received inside or outside Hungary are exempt from corporate tax. It is not precluded that the taxpayer benefits from this regime irrespective of the fact whether the subsidiary, out of which dividends are paid, is subject to normal taxation. As an example for mismatching that can occur in Hungary, it can be mentioned that interest of the loan can be deducted, which is paid to a creditor subject to low tax or no tax, although the burden of proof is laid on the debtor to prove genuine business purposes, and interest must be consistent with pricing at an arm’s length. Interest deduction cannot yet be denied for the sole reason that the creditor is not subject to taxation comparable to the Hungarian debtor’s tax liability, or is not subject to taxation at all due to the qualification of the other jurisdiction, different from the Hungarian one.

***Question D – Please provide any suggestions you might have for ways in which these kinds of double non-taxation could be tackled***

According to a contributor, the participation exemption for holding companies across most EU Member States seems to be under attack in this issue. This is the cornerstone of the tax systems of most EU Member States so this does seem inappropriate. Many countries place restrictions on certain (usually related-party) acquisitions of subsidiary shares, but if groups could not borrow at all in a tax efficient manner to fund an acquisition of exempt participations, then they would have to look at alternatives e.g. asset purchases or at worst relocate to non-EU jurisdictions.

Another contributor stresses that the exemption method for relief from double taxation of foreign profits and dividends in particular is by far the most common method adopted by OECD countries. Moreover this issue has already been identified by the Code of Conduct

---

<sup>11</sup> The contributor refers to a publication by KPMG.

Group which has adopted specific guidance for EU Member States regarding CFCs or switch-over provisions.

A third contributor reiterates a preference for source taxation for active business profits. The unilateral or treaty-based exemption of withholding taxes on passive income (royalties, dividends and interests) creates strong incentives for profit shifting to non- or low tax jurisdictions and induces tax competition in the rest of the world which backfires on EU competitiveness. This could be achieved by the implementation of the Common Consolidated Corporate Tax Base, and to make it compulsory not voluntary. Second, the European Commission could promote or mandate a differentiation in outgoing payments, following the Brazilian example. When the third country, where interest or royalties are going to, is a low- or non-tax jurisdiction a higher withholding tax rate would be applied. What is needed for this is an independent list of low-tax jurisdictions, for which these stricter requirements would apply. Such a list can be issued independently by the European Union. The report on "Promoting an appropriate policy on tax havens" by the PACE (Parliamentary Assembly of the Council of Europe) could serve as a model. A common list for the entire EU, instead of the different lists that are currently used by national tax authorities, would facilitate cross-border business and enhance the functioning of the single market.

Another contributor points out that these issues should be solved on a unilateral basis (anti-abuse, CFC legislation etc.) and should be left out of the scope of the present consultation.

Another contributor stresses that the fact that interests and royalties are deductible allow companies to move interest and royalties between countries within the Group so that the effective tax rate decreases and results in double non taxation.

**Issue 6 – Debt financing of tax exempt income**

***Question A - Do you find these cases relevant in the future discussions on double non-taxation?***

Yes	2
No	2
Do not Know	1

***Question B - Are you aware of cases where debt financing of tax exempt income is deductible?***

Yes	1
No	1
Do not Know	3

***Question C – Please give relevant details about these cases***

No specific information provided.

***Question D – Please provide any suggestions you might have for ways in which these kinds of double non-taxation could be tackled***

According to one contributor, it is not clear why the consultation document apparently labels the deductibility for taxation purposes of costs made to obtain tax exempt income or gains from assets (such as substantial shareholdings) as 'double non-taxation', where a Member State deliberately has decided that the income or gain should be tax exempt. Real economic costs which negatively impact the commercial profits of a company should in the contributor's view be deductible for taxation purposes.

Another contributor believes that the participation exemption for holding companies across most EU Member States seems to be under attack in this issue (see more details above under issue 5).

Another contributor stresses that this issue targets borrowing via a local acquisition company to acquire and tax group/tax consolidate with a local target company, where a sale of the shares of the resulting acquired sub-group by the investors would be tax free. This is a consequence of tax policy choices made by the countries concerned rather than double non taxation. Moreover, in the scenario used in the Consultation document, the acquisition is financed through a third party loan, that is to say through an economic operator which will itself be subject to tax. In other words, this is not a double non-taxation situation: the profits of a company are matched with the losses of its parent: at group level no profit is realised, so why would it be taxed, and the lending bank is taxable on the interest it receives.

Another contributor reminds that interest deduction is not precluded in Hungary, even if the income received is not taxed, e.g., due to dividends received deduction, although double dip is prohibited by statutory law in general. The benefits of interest deduction and exempted dividends do not derive from the same factual circumstances. Interest deduction is not precluded either where the creditor is a PE of the Hungarian company that operates in a low-tax jurisdiction. For example, privileged Swiss PEs are used by Hungarian companies to generate through it income from private loans. This does not seem to be restricted either by the Hungarian, or the Swiss tax authorities. The interest expense assumed by the holding company of an LBO (leveraged buy-out) scheme can be used to reduce the taxable basis of the target company after merger. This is not prohibited under Hungarian statutory law, although such a scheme can be challenged by the tax authorities, based on a GAAR (general anti abuse rule). Foreign resident corporate taxpayers<sup>12</sup> do not pay tax in Hungary, but in exceptional cases. Therefore, the income of dividends, interest, royalties and capital gains derived from the disposal of shares is widely exempt from Hungarian corporate taxation despite the fact that the beneficiary may operate in a low-tax jurisdiction.

Another contributor suggests possible solutions as to tax interests and royalties at source or to subject the assets to a property tax.

**Issue 7 – Different treatment of passive and active income**

***Question A - Do you find these special regimes relevant in the future discussions on double non-taxation?***

Yes	2
No	2

---

<sup>12</sup> Non-resident companies are taxable in Hungary if it has a permanent establishment.

Do not Know 1

***Question B - Are you aware of such special regimes leading to double non-taxation?***

Yes 2

No 2

Do not Know 1

***Question C – Please give relevant details about these cases***

One contributor reiterates that the Netherlands has an extensive network of DTC's in which the Netherlands strive to lower (preferably to 0%) the withholding tax on dividends, royalties and interest. The Netherlands themselves don't levy a withholding tax on most interest payments or royalties. The contributor also repeats the hypothetical Dutch example already mentioned under Issue 3 above, where the hypothetical company could end up untaxed.

According to another contributor, interest and royalty deduction is independent in Hungary of the fact whether the beneficiary of payment operates in a low-tax jurisdiction. This may cause double non-taxation with the beneficiary because the income the latter derives is exempt from Hungarian taxation (at the moment there is no withholding tax in Hungary that would be applicable to the Hungarian-earned income of foreign enterprises).

***Question D – Please provide any suggestions you might have for ways in which these kinds of double non-taxation could be tackled***

One contributor stressed that it is not clear why Issue 7 of the Consultation Document mentions tax incentives for the promotion of research and development in the context of double non-taxation. The level of taxation is exactly what the EU Member State in question wanted to achieve.

According to another contributor, this Issue amongst other things concerns special regimes for the taxation of income from intellectual property. This contributor considers that it is not a situation of double non-taxation but the result of legitimate policy choices of the Member State concerned, i.e. the promotion of research and development. Some of these tax regimes have been notified in advance to the Commission which decided that they do not amount to State aid within the meaning of Article 107(1) TFEU.

A third contributor reiterates that a shift toward a more source-based taxation would be preferred in relation to distributions of active corporate income (already mentioned above under Issue 5).

Another contributor believes that these issues should be solved on a unilateral basis (anti-abuse, CFC legislation etc.) and should be left out of the scope of the present consultation.

**Issue 8 – Double Tax Conventions with third countries**

***Question A - Do you find double tax conventions with third countries to be relevant in the future discussions on double non-taxation?***

Yes	3
No	0
Do not Know	2

***Question B - Are you aware of double tax conventions with third countries that can be used to achieve double non-taxation?***

Yes	1
No	2
Do not Know	2

***Question C – Please give relevant details about these double tax conventions with third countries***

According to one contributor, the DTC-networks of some EU-countries could be used for low- or double non-taxation, since withholding tax on royalties and interest are not levied. In addition dividend-conduits are possible. This is when a route A-B-C for dividends is more beneficial than a direct A-C route because of beneficial tax treaties between A and B and between B and C. Also DTC's may also lead to double non-taxation with respect to capital gains (for example the India-NL and India-Cyprus treaties, which in many cases give exclusive taxing rights to the low-tax regimes on capital gains on the sale of shares in Indian companies). A couple of clear examples concerning US-corporations have according to the contributor appeared in press articles. In the outlined structures – which lead to a lower overall tax rate – EU-countries like Ireland and the Netherlands play a prominent role.

Another contributor stresses that Hungarian double tax conventions typically do not contain tax sparing clauses. Double non-taxation can still occur in a few cases. For instance, under the Hong Kong – Hungary treaty, Hungary does not require effective taxation while granting exemption on the Hungarian side. At the same time, Hong Kong may exempt from Hong Kong taxation under its national law the passive income derived through a Hong Kong-based PE of a Hungarian enterprise outside Hong Kong.

***Question D – Please provide any suggestions you might have for ways in which these kinds of double non-taxation could be tackled***

A contributor repeats that the European Commission could promote or mandate a differentiation in outgoing capital flows, following the Brazilian example (see above under Issue 5).

According to another contributor, although these issues could be relevant for the future discussion on double non taxation, the EU should at present primarily concentrate on solving double (non-) taxation that occurs within the EU. Given the “four freedoms” regime in an EU context, full elimination of double (non-) taxation within the EU should be a priority. Indeed, we cannot really talk of a true internal market as long as these issues are not solved by either harmonisation measures as the CCCTB, or by adopting a multilateral instrument on the avoidance of double (non-) taxation within the EU.

Another contributor thinks that the tax convention benefits should be conditional to a minimum corporate taxation rate of 25%.

## Issue 9 – Disclosure

***Question A - Do you agree that targeted disclosure initiatives could be a way to tackle double non-taxation?***

Yes	3
No	1
Do not Know	1

***Question B - Do you have knowledge of the experiences with disclosure rules in member states?***

Yes	3
No	2
Do not Know	0

***Question C – If your answer is yes to A, please specify which disclosure initiatives you believe could be a way to tackle double non-taxation***

According to a contributor, it is not relevant in France as the doctrine on abuse of rights (*abus de droit*) tackles these situations.

Another contributor strongly advocates for Automatic Information Exchange between jurisdictions on a multilateral basis. One of the mayor problems with non-automatic information exchange is that information is only exchanged on request. This means one needs to know what one is looking for, before one makes a request for it.

Another contributor thinks that the policy of replacing exchange of information by a withholding tax is dangerous as the tax authorities do not know the identity of the tax payer. As a result, there is a risk that capital gains are not properly taxed.

***Question D – If your answer is yes to B, please specify what the experiences in member states are***

One contributor claims that in the Netherlands the Ministry of Finance has reported repeatedly that TIEA's lead to a low amount of information exchange. In general terms, Nobel Laureate Stiglitz (2001), with his research on market failure due to information asymmetries in market exchanges, provided a convincing theoretical framework to understand the role of public disclosure of relevant information. In its recent report on OECD's Global Forum on Transparency and Exchange of Information for Tax Purposes, the contributor provides evidence based on IRS findings about the crucial role of information reporting for tax compliance. In this framework, country by country reporting is widely believed to create a massive voluntary and anticipatory adjustment in corporate profit shifting because of reputational and audit risks associated with improved taxpayer compliance. Furthermore, Argentina's tax administration AFIP's recent example of clamping down on massive tax evasion by the world's largest grain exporters is an example showing the relevance of intra-firm trading and financial data being included in corporate annual accounts on a country-by-country basis.

Another contributor stresses that Hungary has not yet taken any step to introduce voluntary disclosure rules or apply any method that would be applied with a view to constituting any form of an enhanced relationship to be established under the respective OECD documents. Hungary applies advance rulings, but has not launched so far any project on the horizontal enforcement of taxation rights and liabilities. In general, no special disclosure rules, whether mandatory or voluntary, are aimed at aggressive tax planning.

#### **Issue 10 – Other issues?**

##### ***Question A - Are you aware of double non-taxation not described above?***

Yes	2
No	0
Do not Know	2

##### ***Question B - Please give relevant details about these kinds of double non-taxation cases***

One contributor explains that the Hungarian CFC legislation does not seem to be efficient. Notably, there are no income or asset tests to filter out passive income or tainted assets. The definition on genuine business activity is dubious. As passive income is not excluded from the scope of substantive business activity, it can happen that a CFC operates in a jurisdiction with a ring fencing regime, obtains income from third countries to meet the offshore criterion of the low tax jurisdiction, and yet is still able to show genuine business activity there for the purposes of Hungarian legislation. Interestingly, the Hungarian CFC law does not refer to the lack of the comprehensive exchange of tax information across the border. Besides, there are no comprehensive reporting obligations in Hungary on the offshore activity of business.

According to another contributor, recent events in connection with VAT also fall under double non-taxation.

##### ***Question C – Please provide any suggestions you might have for ways in which these kinds of double non-taxation could be tackled***

No specific information provided.

##### ***Question D – Please provide any other suggestions of increased information measures – not being disclosure – you might have for ways to tackle double non-taxation***

One contributor points out that many of the problems of double taxation or absence of taxation in fact relate to characterisation or anomalies of tax treaties.

One contributor suggests consulting or financial firms could provide their legal opinion on sophisticated schemes to lower taxation or that lead to double non-taxation and disclose these schemes.



## List of Contributors

Name	Sector	Country	Interest Representative Register
OECD	International organisation	France	No
European Network on Debt and Development (EURODAD)	Non-Governmental organisations	Belgium	Yes
IFA Hungarian branch	Non-Governmental organisations	Hungary	Yes
Tax Justice Network	Non-Governmental organisations	Belgium	Yes
Weltwirtschaft, Ökologie & Entwicklung	Non-Governmental organisations	Germany	No
Cerioni, Dr. Luca	Tax advisor or tax practitioner	Italy	No
Fibbe, Gijs	Tax advisor or tax practitioner	Netherlands	No
Grossman, Andrew	Tax advisor or tax practitioner	United Kingdom	No
Jarass, Dr. Lorenz	Tax advisor or tax practitioner	Germany	No
American Chamber of Commerce to the European Union (AmCham)	Trade, business & professionals associations	Belgium	Yes
BusinessEurope	Trade, business & professionals associations	Belgium	Yes
Confederation of British Industry (CBI)	Trade, business & professionals associations	United Kingdom	Yes
European Business Initiative on Taxation (EBIT)	Trade, business & professionals associations	Netherlands	Yes
Federation Bancaire Française	Trade, business & professionals associations	France	Yes
Federation of European Accountants	Trade, business & professionals associations	Belgium	Yes
Institute of Chartered Accountants in England and Wales (ICAEW)	Trade, business & professionals associations	United Kingdom	Yes
MEDEF	Trade, business & professionals associations	France	Yes
National Foreign Trade Council, Inc (NFTC)	Trade, business & professionals associations	USA	Yes

PricewaterhouseCoopers International Limited (PwC)	Trade, business & professionals associations	United Kingdom	Yes
Society of Trust and Estate Practitioners (STEP)	Trade, business & professionals associations	United Kingdom	Yes
Tax Executives Institute, Inc (TEI)	Trade, business & professionals associations	USA	Yes
The Chartered Institute of Taxation (CIOT)	Trade, business & professionals associations	United Kingdom	No
United States Council for International Business	Trade, business & professionals associations	USA	No
VNO-NCW	Trade, business & professionals associations	Netherlands	Yes
Anonymous	Unknown	n/a	No