



**COUNCIL OF  
THE EUROPEAN UNION**

**Brussels, 30 April 2014  
(OR. en)**

**9397/14**

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**Interinstitutional File:  
2013/0400 (CNS)**

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**FISC 78**

**NOTE**

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From:	Presidency
To:	Council
No. prev. doc.:	9193/14 FISC 74
No. Cion doc.:	16918/13 - COM(2013) 814 final
Subject:	Proposal for a COUNCIL DIRECTIVE amending Directive 2011/96/EU on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States - Political agreement

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1. On 25 November 2013, the Commission presented a proposal for a Directive amending Directive 2011/96/EU on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States (doc. 16918/13 FISC 237). The proposal seeks to fill a loophole of the current Directive by tackling hybrid financial mismatches within the scope of application of the PSD and to introduce a general anti-abuse rule in order to protect the functioning of this Directive.
2. The European Economic and Social Committee and the European Parliament delivered their opinions respectively on 25 March and 2 April 2014.

3. Member States discussed the proposal in the Working Party on Direct taxation on 10 January, 24 February and 8 April 2014. The debate has shown that there is wide support for closing the 'hybrid loan mismatch' loophole as quickly as possible whereas the part of the proposal dealing with the general anti-abuse rule will require more work.
4. At its meeting on 8 April 2014, the Working Party acknowledged the need to act urgently in order to tackle the revenue losses caused by hybrid loan mismatches. In this context it agreed, without prejudice to the reservations indicated below, to invite Coreper to endorse the split of the proposal and to suggest to the Council to reach political agreement on the part of the proposal relating to the hybrid loan mismatch, while clarifying in a statement to be added to the Council Minutes that the Council will continue to work on the remaining elements of the proposal.
5. During the meeting on 8 April 2014, the FR and UK delegations expressed parliamentary scrutiny reservations. The FR Delegation has lifted its parliamentary scrutiny reservation in the meantime. Furthermore, the LT and SK Delegations maintained a scrutiny reservation on the compromise package. SE expressed specific difficulties with Article 4 and has put forward a document for Coreper (circulated to the Attachés on 11 April 2014) after the Working Party. The document explains the SE position and reiterates its wish to insert an amendment to the text of the Directive itself (Article 4), although this had not been taken on board during the Working Party on 8 April. The Presidency has had bilateral contacts with SE before Coreper in order to explore possible solutions which could be acceptable to all delegations (e.g. by seeking the clarification requested by SE in Recital 3).

6. In Coreper on 30 April 2014 the amended compromise package resulting from the Working Party on 8 April 2014 (doc. 9193/14), including a revised text of the draft Directive (Annex I), accompanied by a draft Council statement (Annex II), was discussed. The LT and SK delegations lifted their reservations and UK indicated that its parliamentary reservation could be lifted in time for ECOFIN. The SE delegation reiterated its difficulties with the compromise text, in particular due to the need for clarification of the scope of the Directive. In response, the Commission noted that the cases raised by Sweden would not fall within the scope of the Directive as defined in the Presidency compromise. The Presidency noted the large support by all other delegations for the compromise proposal, while remaining aware of some concerns expressed by a small number of delegations. Coreper was informed that the Presidency compromise text would be submitted to ECOFIN on 6 May 2014 to seek agreement on this file as requested by the European Council conclusions of 19/20 December 2013 (paragraph 27).

7. Against this background, the Council is invited to:

- endorse the compromise package as set out in Annexes I and II;
- reach political agreement on the Directive (Annex I) and on the draft statement (Annex II) at its meeting on 6 May 2014, with a view to adopting the Directive, after legal/linguistic finalisation, as an "A" item on the agenda of a forthcoming Council;
- inform the European Parliament of its intention to adopt the first part of the proposed Directive, in line with the compromise proposed in Annexes I and II.

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Proposal for a

**COUNCIL DIRECTIVE**

**amending Directive 2011/96/EU on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States**

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 115 thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national Parliaments,

Having regard to the opinion of the European Parliament<sup>1</sup>,

Having regard to the opinion of the European Economic and Social Committee<sup>2</sup>,

Acting in accordance with a special legislative procedure,

Whereas:

- (1) Council Directive 2011/96/EU exempts dividends and other profit distributions paid by subsidiary companies to their parent companies from withholding taxes and eliminates double taxation of such income at the level of the parent company.
- (2) The benefits of Directive 2011/96/EU should not lead to situations of double non-taxation and, therefore, generate unintended tax benefits for groups of parent companies and subsidiaries of different Member States in comparison with groups of companies of the same Member State.
- (3) For the purpose of avoiding situations of double non-taxation deriving from mismatches in the tax treatment of profit distributions between Member States, the Member State of the parent company and the Member State of its permanent establishment should not allow those companies to benefit from the tax exemption applied to received distributed profits, to the extent that such profits are deductible by the subsidiary of the parent company.
- (4) It is appropriate to update Annex I, Part A to that Directive to include other forms of companies which have been introduced in the company laws of Romania and made subject to corporation tax in Poland.

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<sup>1</sup> OJ C, , p. .

<sup>2</sup> OJ C, , p. .

(5) Directive 2011/96/EU should therefore be amended accordingly,

HAS ADOPTED THIS DIRECTIVE:

### **Article 1**

Directive 2011/96/EU is amended as follows:

1. In Article 4, paragraph 1, point (a) is replaced by the following:  
"(a) refrain from taxing such profits to the extent that such profits are not deductible by the subsidiary, and tax such profits to the extent that such profits are deductible by the subsidiary; or "
2. In Annex I, part A, point (w) is replaced by the following:  
"(w) companies under Romanian law known as: ‘societăți pe acțiuni’, ‘societăți în comandită pe acțiuni’, ‘societăți cu răspundere limitată’, ‘societăți în nume colectiv’, ‘societăți în comandită simplă’;"
3. In Annex I, part A, point (u) is replaced by the following:  
"(u) companies under Polish law known as: ‘spółka akcyjna’, ‘spółka z ograniczoną odpowiedzialnością’, ‘spółka komandytowo-akcyjna’;"

### **Article 2**

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 31 December 2015 at the latest. They shall forthwith communicate to the Commission the text of those provisions.

When Member States adopt those provisions, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. Member States shall determine how such reference is to be made.

2. Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this Directive.

### **Article 3**

This Directive shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.

### **Article 4**

This Directive is addressed to the Member States.

**Draft Council Statement**  
**(to be entered in the Council Minutes)**

The Council:

- recalls its willingness to fight aggressive tax planning and Base erosion and profit shifting (BEPS) at EU and international level and stresses that this work should consider the compatibility of ongoing OECD work with the EU legal framework;
- stresses the urgent need to close tax loopholes in the Parent-Subsidiaries Directive generated by exploiting the differences in national tax systems, in order to prevent Member States from losing significant revenues and to ensure fair competition between businesses in the Single Market;
- takes notes that all Member States agree that the tax loophole generated by Hybrid loans arrangements resulting in a double non-taxation should be addressed by the amending Directive;
- acknowledges that a splitting of the amending Proposal is necessary in order to allow for early progress in the field of hybrid loans, while noting that the other proposed part of the amending Directive requires further discussion since so far different views have been expressed by Member States and several Member States have raised concerns on this part of the proposal;
- underlines the need to continue to work on the remaining part of the amending Proposal and notes the intention of the incoming Italian presidency to allow for in depth discussion of further cases of double non taxation in the Council.