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REPORT

From:	Presidency
To:	Council
No. prev. doc.:	14532/14 FISC 166 ECOFIN 954
No. Cion doc.:	16918/13 FISC 237 - 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

I. INTRODUCTION

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 (PSD) (doc. 16918/13 FISC 237). The proposal had two main objectives:
   a) to fill a loophole of the current PSD text by tackling hybrid loan mismatches within the scope of its application, and
   b) to introduce a general anti-abuse rule in order to protect the functioning of the PSD.

2. The European Economic and Social Committee and the European Parliament delivered their opinions respectively on 25 March[1] and 2 April 2014.

3. In the course of the negotiations, Member States deemed splitting of the Commission proposal necessary, in order to allow for early progress in the field of hybrid loan mismatches, while noting that the part of the proposal relating to the general anti-abuse rule required further discussion, since Member States had expressed different views on it.

4. As a result, on 8 July 2014, the Council adopted the Directive, amending the PSD, which contained provisions aimed at closing the tax loophole generated by hybrid loans arrangements[2]. The amending Directive has already entered into force and Member States have to transpose its provisions into national law by 31 December 2015.[3]

5. Since the adoption of the first part of the Commission proposal, the work on the general anti-abuse rule for the purposes of the PSD has continued, as set out in the Council statement to the minutes.

II. STATE OF PLAY

6. During the term of the Italian Presidency, the Working Party on Tax Questions (WPTQ) has met three times, on 24 July, 17 September and 16 October 2014, and a Fiscal Counsellors/Attachés meeting took place on 24 October, to discuss the Presidency's compromise text aimed at addressing the concerns raised by a number of delegations on the original Commission proposal. The Committee of Permanent Representatives has examined the open issues relating to this file in its meeting of 30 October. Following the Committee of Permanent Representatives meeting, another Fiscal Counsellors/Attachés meeting took place on 3 November.

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[1] OJ C 226, 16.7.2014, p. 40.

[2] Council Directive 2014/86/EU of 8 July 2014 amending Directive 2011/96/EU on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States (OJ L 219, 25.7.2014, p. 40).

[3] Article 2(1) of the amending Directive.

7. At experts level, all delegations have in principle supported the approach proposed by the Italian Presidency: a *de minimis* anti-abuse provision, which would not affect Member States' ability to apply domestic or agreement-based provisions aimed at preventing tax evasion, tax fraud or abuse, provided that they are at least as strict as the proposed *de minimis* rule.

8. Following the Fiscal Counsellors/Attachés meeting of 24 October 2014, the Presidency proposed a slightly revised compromise text to reflect some of the comments made by Member States at that meeting.

III. OPEN ISSUE *(Article 1(2) and 1(3) of the PSD)*

9. At the meeting of the Committee of Permanent Representatives on 30 October 2014 the large majority of the Member States confirmed their support for the Presidency compromise text set out in doc. 14531/14 FISC 165 ECOFIN 953, which they found clear, proportionate and effective in tackling abuse. However, five Member States continued to raise the following concerns that block them from accepting the Presidency compromise text:
   - some of those Member States maintained their reservations on the expression "to the extent" in Article 1(3) of the PSD, as set out in the Presidency compromise text; and
   - some insisted that the anti-abuse clause lacks legal certainty and should be fully in line with the wording of the case-law of the CJEU.

10. Following the meeting of the Committee of Permanent Representatives, a Fiscal Counsellors/Attachés meeting took place on 3 November 2014, to explore avenues for further clarification of the text that would facilitate an agreement by the Council. At that meeting, four of the delegations that still had remaining concerns have proposed the following solutions:
   - additional clarifications in recitals 6 and 8 of the Presidency compromise on how the anti-abuse provision could work in practice;

- to supplement the amending provisions of the PSD with an obligation for the competent authority of a Member State to consult with the competent authority of the other Member State involved, before applying the PSD anti-abuse provision;
- to introduce in the PSD a mutual agreement procedure, including arbitration, following the language used in relevant OECD documents.

11. As a result of that meeting, the Presidency has observed that any of the alterations to the substantive part of the Presidency compromise text, as suggested by some delegations, would not be acceptable to many other Member States that continue to support the Presidency compromise. The majority of delegations took the view that such modifications would not increase legal certainty but would only complicate and delay the application of the anti-abuse provision and increase administrative burden. These Member States pointed out that existing EU administrative cooperation tools already enable Member States' competent authorities to cooperate with each other and that the correct application of the anti-abuse provision by Member States will be checked by the CJEU.

12. From the suggestions referred to in point 10 of this report, delegations could only support the proposed adjustment of recital 6 as it would clarify the compromise text. However, Member States could not agree on the proposed amendments to recital 8 as it would narrow down the scope of the current Presidency compromise text.

13. On this basis, the Presidency intends to submit the compromise text, as set out in doc. 14531/1/14 REV 1 FISC 165 ECOFIN 953, to Ministers on 7 November 2014. The Presidency stays aware of the remaining concerns expressed by some delegations as set out above.

IV. THE WAY FORWARD

14. Against this background the ECOFIN Council is invited to:

    i) resolve the open issue, as set out in this report;

    ii) reach a Council political agreement on the Directive, as set out in doc. 14531/1/14 REV 1 FISC 165 ECOFIN 953, with a view to adopting the Directive, subject to legal-linguistic revision, as an "A" item on the agenda of a forthcoming Council;

    iii) inform the European Parliament of its intention to adopt the draft Directive, as set out in this report.