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"A" ITEM NOTE

From: General Secretariat of the Council
To: Council

No. prev. doc.: 15941/14 FISC 206 ECOFIN 1079
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 March¹ and 2 April 2014.

¹ OJ C 226, 16.7.2014, p. 40.

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. 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 arrangements². The amending Directive has already entered into force and Member States have to transpose its provisions into national law by 31 December 2015.³
4. 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 of the ECOFIN Council of 8 July 2014.⁴

II. STATE OF PLAY

5. During the term of the Italian Presidency, this dossier has been examined at the following meetings:
 - four meetings of the Working Party on Tax Questions - WPTQ (on 24 July, 17 September, 16 October and 13 November 2014);
 - two Fiscal Counsellors/Attachés meetings (on 24 October and 3 November);
 - the Committee of Permanent Representatives (on 30 October 2014 and 3 December);
 - and
 - the ECOFIN Council (on 7 November 2014).

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.

⁴ Doc. 11684/14 PV/CONS 39 ECOFIN 736 ADD1.

6. At the ECOFIN of 7 November all delegations supported the objective of reaching a political agreement on this dossier by the December ECOFIN. The large majority of the delegations could support the Presidency compromise text set out in doc. 14531/1/14 REV 1 FISC 165 ECOFIN 953. However, a few Member States had some unresolved concerns and could not lift their remaining reservations.
7. To follow up on the ECOFIN of 7 November 2014, the Presidency organised a WPTQ on 13 November 2014 and this dossier has been also further examined at the meeting of Committee of Permanent Representatives of 3 December.
8. In order to address the remaining concerns by some delegations, the Presidency has proposed the following:
 - a) a modification to recital 8 of the Presidency compromise text with a view to including one example of the application of the proposed “to the extent approach”, and
 - b) that a political agreement is accompanied by two Council statements:
 - i) a statement that Member States will take into consideration the anti-abuse provision in the PSD in its future work on a possible anti-abuse provision to be included in the Interests and Royalties Directive; and
 - ii) a statement that in applying the anti-abuse provision in PSD, Member States will endeavour to inform each other, under the existing EU legal instruments, when information may be useful to the other Member State.
9. Following the meeting of the Committee of Permanent Representatives of 3 December, all delegations have expressed their readiness to reach a political agreement on the text set out in Annex I to this report and that the political agreement is accompanied by two Council statements, set out in Annex II to this report, as well as the Commission statement set out in Annex III to this report. All the remaining reserves have been lifted in preparation of ECOFIN meeting of 9 December 2014.

III. THE WAY FORWARD

10. Against this background the Council is invited to:

- i) reach a political agreement on the Directive, as set out in the Annex I to this report, with a view to adopting the Directive, subject to legal-linguistic revision, as an "A" item on the agenda of a forthcoming Council;
 - ii) enter into the minutes of its meeting the three statements set out in the Annex II and III to this report.
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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 Parliament⁵,

Having regard to the opinion of the European Economic and Social Committee⁶,

Acting in accordance with a special legislative procedure,

⁵ Opinion of 2 April 2014 (not yet published in the Official Journal).

⁶ Opinion of 25 March 2014 (not yet published in the Official Journal).

Whereas:

- (1) Council Directive 2011/96/EU⁷ exempts dividends and other profit distributions paid subsidiary companies to their parent companies from withholding taxes and eliminates double taxation of such income at the level of the parent company.
- (2) It is necessary to ensure that this Directive is not abused by taxpayers who fall within the scope of its application.
- (3) Some Member States apply domestic or agreement-based provisions aimed at tackling tax evasion, tax fraud or abusive practices in a generic or more specific way.
- (4) However these provisions may have different severity and, in any case, they are designed to reflect the specificities of each Member State's tax system. Moreover, there are Member States which do not have any domestic or agreement-based provision for the prevention of abuse.
- (5) Therefore, the inclusion in Directive 2011/96/EU of a common minimum anti-abuse rule would be very helpful to prevent misuses of this Directive and to ensure a greater consistency in its application in different Member States.
- (6) The application of anti-abuse rules should be proportionate and should serve the specific purpose of tackling an arrangement or a series of arrangements that are not genuine, that is which do not reflect economic reality.

⁷ Council Directive 2011/96/EU of 30 November 2011 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States (OJ L 345, 29.12.2011, p. 8).

- (7) To this end, when assessing whether an arrangement or a series of arrangements are abusive, Member States' tax administrations should undertake an objective analysis of all relevant facts and circumstances.
- (8) While Member States should use the anti-abuse clause to tackle arrangements which are, in their entirety, not genuine, there may be cases where single steps or parts of an arrangement are, on a stand-alone basis, not genuine. Member States should be able to use the anti-abuse clause also to tackle these specific steps or parts, without prejudice to the remaining genuine steps or parts of the arrangement. This would maximise the effectiveness of the anti-abuse clause while guaranteeing its proportionality. The "to the extent approach" can be effective in cases where the entities concerned as such are genuine but where, for example, shares from which the distribution arises are not genuinely attributed to a taxpayer that is established in a Member States i.e. if the arrangement based on its legal form transfers the ownership of the shares but its features do not reflect economic reality.
- (9) This Directive should not affect in any way Member States' ability to apply their domestic or agreement-based provisions aimed at preventing tax evasion, tax fraud or abuse.
- (10) 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 1, paragraph 2 is replaced by the following paragraphs:

“2. Member States shall not grant the benefits of this Directive to an arrangement or a series of arrangements that, having been put into place for the main purpose or one of the main purposes of obtaining a tax advantage which defeats the object or purpose of this Directive, are not genuine having regard to all relevant facts and circumstances.

An arrangement may comprise more than one step or part.

3. For the purposes of paragraph 2, an arrangement or a series of arrangements shall be regarded as not genuine to the extent that they are not put into place for valid commercial reasons which reflect economic reality.

4. This Directive shall not preclude the application of domestic or agreement-based provisions required for the prevention of tax evasion, tax fraud or abuse.”

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.

Done at Brussels,

For the Council
The President

1. Draft Council Statement

"In applying the anti-abuse provision in Directive 2011/96/EU, Member States will endeavour to inform each other, under the existing EU legal instruments, when information may be useful to the other Member State."

2. Draft Council Statement

"The Council will take into consideration the anti-abuse provision in Directive 2011/96/EU in its future work on a possible anti-abuse provision to be included in Directive 2003/49/EC."

STATEMENT BY THE COMMISSION

"The Commission confirms that the proposed amendments to Article 1, paragraph 2 of the Parent Subsidiary directive are not intended to affect national participation exemption systems in so far as these are compatible with the Treaty provisions"
