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Opinion Statement FC 10/2014
on the proposal COM(2013)814
for a revised Parent-Subsidiary Directive

Prepared by the CFE Fiscal Committee

Submitted to the European Commission,

the European Parliament and the Council of the EU

in May 2014

CFE (Confédération Fiscale Européenne) is the umbrella organisation representing the tax profession in Europe. Our members are 32 professional organisations from 25 European countries (22 EU member states) with 180,000 individual members. Our functions are to safeguard the professional interests of tax advisers, to assure the quality of tax services provided by tax advisers, to exchange information about national tax laws and professional law and to contribute to the coordination of tax law in Europe.
CFE is registered in the EU Transparency Register (no. 3543183647-05).

We will be pleased to answer any questions you may have concerning CFE's comments outlined below. For further information, please contact Mr. Piergiorgio Valente, Chairman of the CFE Fiscal Committee or Rudolf Reibel, Fiscal and Professional Affairs Officer of the CFE, at brusselsoffice@cfe-eutax.org.

Sincerely yours,
Confédération Fiscale Européenne

Background:

On 25 November 2013, the European Commission has proposed a revision of the Directive 2011/96/EU on the common system of taxation applicable in the case of parent companies and subsidiaries of different member states (in the following: Parent-Subsidiary Directive or PSD), including a subject to tax clause to ensure that distributed profits are either taxed in the (source) state of the subsidiary or in the (residence) state of the parent company. Moreover, the Commission has proposed a harmonised anti-abuse rule (AAR), disallowing member states the application of their domestic anti-abuse rules.
In the course of the discussions in the EU Council, it has been proposed by the Greek Council presidency to split the proposal in order to seek early agreement on the subject to tax clause, while continuing negotiations on the anti abuse rule[1].
CFE is very much concerned that such split will result in abandoning the idea of a single harmonised anti-abuse rule in the context of the PSD. As we will explain below, experience has shown that a harmonised anti-abuse rule is needed to render effectiveness to the PSD.

I. Subject to tax clause

a) Do not forget about double taxation

The main purpose of the Parent-Subsidiary Directive is and will be to ensure a level playing field between groups of companies (parent and subsidiaries) of different Member States and groups of parent companies and subsidiaries of the same Member State - neutrality. "*To achieve the aimed neutrality, the PSD provided for the (i) abolition of withholding taxes on profit distributions and (ii) prevention of economic double taxation of the distributed profits through either tax exemption or tax credit in the Member States of the parent companies*[2]" . Therefore, one of the aims of the Directive is the elimination of double taxation. We understand that there is now a political will to fight "double non-taxation" as well. This does and should not compromise the Directive´s original aim. Despite the

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[1] Statement of Commissioner Šemeta at the press conference after the Ecofin Council meeting on 6 May 2014.
[2] COM(2013) 814, 25.11.2013final, available at: http://ec.europa.eu/taxation_customs/resources/documents/taxation/vat/key_documents/legislation_proposed/com(2013)814_en.pdf

PSD, double taxation of (deemed) profit distributions from subsidiaries to parent companies still exists, where an interest payment is requalified as a profit distribution.

Our preferred solution for the PSD would be a definition of what is a dividend, based on the definition in Art.10 (3) of the OECD Model Tax Treaty. The OECD definition refers to the classification by the law of the source country. As a result of this, the treatment of the payment by the source country would determine whether the PSD applies: If a payment is treated as a dividend, the PSD would apply.

On a separate note, we would like to remark that a comprehensive solution to double taxation would also require an amendment of the Interest & Royalties Directive, making sure that any interest payment by a subsidiary or other affiliated entity which is not deductible in the source state (due to national thin cap or (other) base erosion rules that do not or not explicitly requalify an interest payment as a profit distribution) is not taxed in the residence state; this should also be complemented by a harmonised anti abuse rule in the Interest & Royalties Directive.

b) Should the residence country have a choice (not) to tax?

Whether the taxation of profit distributions which are deductible in the source country should be optional or mandatory for the residence member states will be a political decision. We would like to limit our comments to the remark that leaving member states the option to apply a subject-to-tax clause raises lesser concerns from a subsidiarity point of view. This may also be the option acceptable for more member states.

c) Choice of credit and exemption method

We would like to recall that in principle, the residence member state is free to apply the exemption method, the credit method or any combination of these. Such clarification would provide legal certainty for member states. We would support such clarification in a recital of the PSD.

II. A harmonised anti-abuse rule

a) A common concept of artificiality

CFE supports a fully harmonised anti-abuse rule in the Parent-Subsidiary Directive which would prevent member states from applying national anti-abuse rules. We observe that some member states[3] apply their national AARs very extensively, leaving only a narrow scope for the PSD. We note with regret that many Supreme Courts are reluctant to refer questions on the relation of national anti-abuse rules and the PSD to the European Court of Justice (ECJ), considering these questions to be solely a matter of national law. We expect that the inclusion of a definition of artificial arrangements in the PSD will encourage member states´ Supreme Courts to refer to the ECJ more

[3] Spain has been mentioned as an example.

frequently, leading to the development of an ECJ case law on this matter and contributing to a uniform interpretation across the EU.
In line with p.4 of the Commission´s Memorandum explaining the proposal, we understand that the definition of artificial arrangements is intended as a full harmonisation, not leaving member states the option to apply more restrictive concepts of artificiality, which would be the case in minimum harmonisation.
The fact that the list of situations included in Art.1a (2) is not exhaustive, as the wording "in particular" reveals, is no invitation to member states to add further examples to the proposed definition but merely aimed at maintaining the flexibility and openness towards newly emerging artificial arrangements that an anti-abuse clause, designed at preventing circumvention, needs.

We see the risk that this is not commonly understood and therefore believe that a recital of the PSD should state that Art.1a contains full harmonisation.

Art.1 (2) of the proposal states that the PSD does not preclude the application of national law or agreements for the prevention of tax evasion. While we do not consider such provision to be necessary, because nobody can fraudulently rely on EU law, it should nevertheless be clear that this relates only to legislation or agreements aimed at fighting illegal arrangements. We would welcome such clarification, e.g. in a recital, to ensure correct implementation by member states, as experience has shown that the concepts of evasion and avoidance can easily be confused, taking into account different legal traditions and translation issues.

b) A workable definition in line with the relevant ECJ case law

Avoiding reference to vague concepts

As to the wording, Art.1a (1) refers to the "object, spirit and purpose" of the tax provisions invoked. Determining these may prove difficult in practice, as legislation seldom has a clear and single purpose but is an agreement of several parties or institutions pursuing different objectives. Moreover, views on the object, spirit and purpose of legislation change over time. To avoid this uncertainty, we suggest that Art.1a (1) refers to the "object, spirit and purpose of the tax provisions invoked as expressed in the relevant legislation".

Avoiding reference to intentions

Where there is substance and hence an exercise of Treaty freedoms, we do not see why the taxpayer´s intentions when setting up an arrangement should play a role. Moreover, we doubt that such criteria are workable in practice. Intentions are difficult to prove. A distinction whether an arrangement has been put into place for the essential, the main or the sole purpose of obtaining an improper tax advantage under the PSD cannot reasonably been drawn.

Sticking to the relevant ECJ case law

As to the examples for artificial arrangements, we believe that the criteria should refer strictly to the relevant ECJ case law. We note that this is not always the case with the proposed examples: for

instance, we do not see how "transactions concluded [which] are circular in nature" could play a role in profit distributions. It appears that this example has inadvertently been taken over from VAT case law.

Allowing a possibility to demonstrate substance

We consider that Art.1a, in line with a number of national (G)AARs, should set forth a provision granting the taxpayer the possibility to demonstrate the economic validity of his arrangements, e.g. "*valid economic reasons*" (as in the Italian tax system[4]), or "*relevant non-tax reasons*" (as in the German tax system[5]).

[4] Art. 37-bis (1) of Presidential Decree No. 600/1973.

[5] § 42 (2) AO (Abgabenordnung / General Fiscal Code): http://www.gesetze-im-internet.de/bundesrecht/ao_1977/gesamt.pdf.