



**COUNCIL OF
THE EUROPEAN UNION**

**Brussels, 3 June 2014
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**FISC 92
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NOTE

From:	Presidency
To:	Council
No. prev. doc.:	9926/14 FISC 80 ECOFIN 493
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

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 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 December 2013 European Council called for further progress at the global and EU levels in the fight against tax fraud and evasion, aggressive tax planning, base erosion and profit shifting (BEPS) and it stated that progress should also be made quickly towards agreement on amending the Parent-Subsidiary Directive.¹
3. The European Economic and Social Committee and the European Parliament delivered their opinions respectively on 25 March and 2 April 2014.
4. Member States discussed the proposal in the Working Party on Direct taxation during the Hellenic Presidency. 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.
5. The Working Party therefore agreed to a 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.
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 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 case 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.

¹ doc. EUCO 217/13 CO EUR 15 CONCL 8; par. 27.

7. A Presidency compromise text² of the above-mentioned Commission proposal has been discussed at the ECOFIN meeting of 6 May 2014, where the required unanimity could not be reached, as SE and MT delegations raised concerns that prevented them from agreeing the text.
8. Following that debate, and in view of the ECOFIN meeting of 20 June 2014, the Presidency, at the Working Party on Direct taxation on 14 May 2014, has further explored avenues for an agreement and proposed further changes to the compromise text on the amendments to the Parent Subsidiary Directive (PSD).
9. In Coreper on 28 May 2014 Sweden indicated that it could lift its reservations due to the readiness of the Commission to enter a statement in the Council Minutes in relation to Article 4.1(a) of the revised PSD (doc. 10419/14, Annex III). Malta maintained its reservation (objecting to a wording which clearly states an obligation to tax). All other delegations reiterated their clear preference for the Presidency compromise.

² Doc. 9397/14 FISC 78.

10. Against this background the Presidency recommends to the Council (ECOFIN) to:
- a) discuss the only remaining issue raised by Malta;
 - b) reach political agreement on the Directive (Annex I) and on the draft statement (Annex II) at its meeting on 20 June 2014 (doc. 10419/14), with a view to adopting the Directive, after legal/linguistic finalisation, as an "A" item on the agenda of a forthcoming Council;
 - c) enter the statement by the Commission as set out in Annex III (doc. 10419/14) in the Council Minutes;
 - d) 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, II and III (doc. 10419/14).
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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 Parliament³,

Having regard to the opinion of the European Economic and Social Committee⁴,

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.

³ OJ C, , p. .

⁴ 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, **while direct taxation falls within the competence of Member States**, 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.

Draft Statement by the Commission
(to be entered in the Council Minutes)

The Commission:

- Stresses that the proposed amendments to Article 4.1 (a) of the Parent subsidiary directive are applicable in situations of double non-taxation deriving from mismatches in the tax treatment of profit distributions between Member States which generate unintended tax benefits;
- Confirms that the proposed amendments to Article 4.1 (a) of the Parent Subsidiary directive are not intended to be applicable if there is no double non-taxation or if their application would lead to double taxation of the profit distributions between parent and subsidiary companies.
