

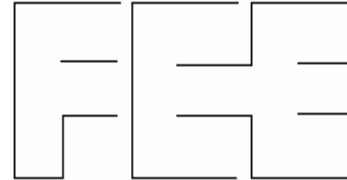
Date
8 February 2008

Le Président

Fédération
des Experts
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Européens
AISBL

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Mr. André van Aken
DG Taxation and Customs Union
European Commission
Brussels



Email: andre.van-aken@ec.europa.eu

Dear Mr. van Aken,

Re: Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee dated 10 December 2007 regarding the application of anti-abuse measures in the area of direct taxation – within the EU and in relation to third countries and the issues raised therein

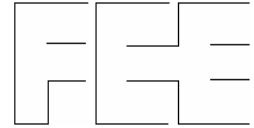
FEE (Fédération des Experts Comptables Européens) is the representative organisation for the accountancy profession in Europe. FEE's membership consists of 44 professional institutes of accountants from 32 countries, which represent more than 500,000 accountants in Europe.

FEE has considered the Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee dated 10 December 2007 regarding the application of anti-abuse measures in the area of direct taxation – within the EU and in relation to third countries and the issues raised therein (EC anti-abuse communication).

A. General comments

FEE welcomes the initiative to strike a proper balance between the public interest of combating abuse and the need to avoid disproportionate restrictions on cross-border activity within the EU and for better coordination of the application of anti-abuse measures in relation to third countries in order to protect the Member States tax bases.

From our point of view, there is room for improvement concerning a more targeted and better-coordinated application of Member States' anti-abuse rules. Anti-abuse measures regarding tax avoidance vary broadly within the Member States. Some Member States apply anti-abuse measures such as Controlled Foreign Company (CFC) legislation and thin capitalisation rules, which may restrict the fundamental freedoms of establishment or capital movement and have led to numerous ECJ decisions. Furthermore, the consequences of tax avoidance concerning interest and penalties are regulated differently within the Member States, which also should be taken into account in the further debate.



B. Anti-abuse measures

I. FEE position regarding CFC legislation

First of all, we refer to the previous FEE position paper on CFC legislation in the EU and the FEE observations on the then pending ECJ case Cadbury Schweppes, where FEE already recommended:

- No CFC legislation should be applicable within the internal market, provided that the tax regime of the subsidiary is in line with the prescriptions of the Code of Conduct.
- A better coordination among the different CFC legislations in place in the Member States, to avoid international double or multiple taxations.
- A better coordination in the tax treaty policy towards non-EU countries with regard to the application of CFC rules, to avoid distortions in the allocation of resources within the internal market.

FEE still holds this position, which is in line with the EC anti-abuse communication and does not contradict settled ECJ case law.

II. ECJ case-law

During the last few years, the ECJ had to deal with an increasing number of cases where anti-abuse measures of the Member States, e.g. CFC legislation, had to be examined.

On the one hand, the ECJ has clearly pointed out that domestic anti-abuse measures can restrict the freedom of establishment, in particular when profits made by a controlled foreign company in another Member State are included in the tax base of a company in its Member State of residency. Such restrictions can in principle be justified if designed to prevent tax avoidance or abuse. However, the restriction must be aimed at “wholly artificial arrangements”. The respective law must also be proportionate so that it is commensurate with the abuse that it is seeking to prevent.

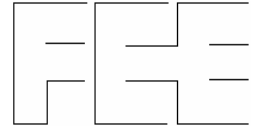
On the other hand, the ECJ denied a restriction of the freedoms of establishment and capital movement in case of a partnership resident in one Member State with partners resident in another Member State. The partnership was classified and taxed as a legal entity in its Member State of residency. However, in the partners Member State of residency, its profits and losses were assessed as foreign branch profits and assets of the partners and a switch from the exemption to the credit method was applied. The switch led to a higher taxation of the partner's income in comparison with the taxation of the partnership in the other Member State but to the same taxation of the partner's income in comparison with income derived from a partnership resident in the same Member State.

There is a substantial difference between those cases:

In the first case, the resident company is taxed on profits made by another legal person resident in the other Member State, which would not happen in case the other legal person would be resident in the same Member State. Such legislation can dissuade companies from establishing, acquiring or maintaining a subsidiary in another Member State and therefore restrict the freedom of establishment.

In the second case, the profits made by a partnership established in another Member State are attributed to the partners and taxed in the same way as profits made by a partnership established in the same Member State. Such legislation does therefore not dissuade taxpayers from establishing, acquiring or maintaining a partnership in another Member State and does not restrict the freedom of establishment.

The difference results in principle from the diversity of civil and tax legislation regarding corporations and partnerships within the Member States.



However, the respective case law also clearly shows that anti-abuse measures lead to a substantial legal uncertainty and that there is a strong need for coordination between the Member States.

III. Wholly artificial arrangements

According to ECJ case law the justification of anti-abuse measures designed to prevent tax avoidance requires – amongst others – that the restriction must be aimed at “wholly artificial arrangements”. Therefore, a kind of business test has to be carried out.

FEE appreciates the Commission’s initiative to explore the practical application of this principle to different types of business activities and structures and the scope for establishing a non-exhaustive inventory of fact patterns.

We agree that different types of business activities require different criteria, and will contribute in due course to the debate.

C. Penalties

The consequences of tax avoidance concerning interest and penalties are regulated differently within the Member States and should be reviewed and coordinated within the Member States.

In some Member States, tax avoidance leads to the subsequent payment of the tax and to interest calculated on the basis of the respective tax. In contrast, only tax fraud is threatened with penalties such as fine or imprisonment.

However, in other Member States, such as in Italy, both tax fraud and tax avoidance may lead to tax, interest and penalties.

FEE doubts that such legislation is compatible with the principle of proportionality as interpreted by the ECJ. Furthermore, the respective legislation could serve as one of the criteria for “tax shopping”. Therefore, this issue also should be taken into account in the further debate regarding anti-abuse measures.

We would be pleased to discuss any aspect of this letter you may wish to raise with us.

Yours sincerely,

A handwritten signature in blue ink, appearing to read 'Jacques Potdevin', written over a horizontal line.

Jacques Potdevin
President