Federation of European Accountants
Fédération des Experts comptables Européens

Mojca Kleva Kekuš
Committee on Economic and Monetary Affairs (ECON)
European Parliament
Bât. Altiero Spinelli
60 rue Wiertz / Wiertzstraat 60
B-1047 - Bruxelles/Brussels

21 March 2014

Ref.: WPS/DTI/AKI/PGI

Dear Ms Kleva Kekuš,

Re: FEE comments on the proposed Council Directive amending EU Directive 2011/96/EU on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States

(1) FEE (the Federation of European Accountants[1], www.fee.be) is pleased to provide you below with our comments on the proposals published in 2013/0400 (CNS) pertaining to the proposal to amend Directive 2011/96/EU (hereafter referred to as the Parent-Subsidiary Directive, "PSD").

(2) FEE welcomes this review of the PSD and its objective of preventing unintended tax benefits arising from the use of hybrid financial instruments by cross-border groups.

(3) FEE is also broadly supportive of the proposals to strengthen the anti-abuse rule in the Directive as a measure to combat double non-taxation but we do question whether this aim could be better achieved via targeted anti-abuse provisions. Additionally, we have concerns that some of the wording in the proposed Article could lead to unintended consequences and also that there could be inconsistency in application arising out of its interacting with general anti-abuse rules (GAAR) that are in force in Member States.

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[1] [1] FEE is the Fédération des Experts comptables Européens (Federation of European Accountants). It represents 48 professional institutes of accountants and auditors from 36 European countries, including all of the 28 EU Member States. In representing the European accountancy profession, FEE recognises the public interest. It has a combined membership of more than 800.000 professional accountants, working in different capacities in public practice, small and big firms, government and education, who all contribute to a more efficient, transparent and sustainable European economy. FEE is registered in the EU Transparency Register (no. 4713568401-18) and a member in the European Commission´s Platform for Tax Good Governance.

(4) It is apparent that when double non-taxation arises from deliberately using the provisions of this Directive in a manner that was not intended then cross-border groups are put at advantage when compared to national groups of companies. FEE welcomes measures that prevent distortions of competition.

(5) However, FEE would like to reaffirm the underlying principle of this Directive, which is to prevent double taxation arising on the profits of cross-border groups. There are instances where double non-taxation is not a result of abuse but rather a side effect of the interaction of the structure chosen, for legitimate reasons, by a business and national tax legislation.

(6) Consequently, we believe that the Directive should clearly state that these proposed amendments should not lead to the double taxation that the Directive was originally introduced to avoid.

(7) Apart from the concerns that we have over the anti-abuse rule mentioned above, we are also concerned that the proposed date of entry into force may cause significant problems for the groups affected.

(8) Additionally, we have concerns regarding several of ECON's proposed amendments. In particular, we believe that the proposals to increase the requirements under which the benefits of this Directive can be obtained and the link to the average corporation tax rate could cause many problems in practice and produce unanticipated results for many cross-border groups, if enacted in their current form.

(9) FEE believes that the Directive is a very important part of European tax legislation that allows European groups to benefit from the Single Market without suffering double taxation. This stimulates cross-border trade and aids in the creation of new employment opportunities. The Directive is essential to protect cross-border groups from double taxation and to keep them competitive in global markets. Consequently, FEE believes that it is vital that any amendments made to the Directive are only made after careful consideration, full consultation and risk assessment and after due consideration of their practical consequences.

(10) We have set out below FEE's views on specific articles arising from the proposed revision to EU Directive 2011/96/EU.

Anti-abuse rule

(11) Whilst we would see some benefits in a European general anti-abuse rule (GAAR), as mentioned above, we have some concerns about the proposed new Article 1a introducing a mandatory anti-abuse rule into the Directive.

(12) FEE believes that it is the responsibility of individual Member States to decide whether they introduce anti-abuse rules and consequently believe that the proposed anti-abuse rule in the Directive should be a Member State option rather than mandatory. This would enable Member States to ensure that the proposed anti-abuse rule was consistent with their existing regulatory framework and did not produce any unintended interactions with the GAAR that they may already have in force.

(13) By their very nature, anti-abuse rules require the potential exercise of judgement and as such introduce a degree of uncertainty as to whether transactions will be accepted by tax authorities. It is not always possible to obtain advance rulings from all tax authorities on cross-border transactions, which are often technically complex. We are concerned that relying on an anti-abuse rule in cross-border transactions could increase the risk of unnecessary investigations and litigation.

(14) Consequently, we question whether introducing an anti-abuse rule is the most effective way of combatting the use of hybrid financial instruments and whether they would be more effectively dealt with by specific anti-avoidance provisions. We believe that such provisions would definitely provide more clarity and certainty for groups engaged in or considering cross-border transactions.

(15) In respect of the proposed anti-abuse rule, we welcome of the Commission's work in defining "artificial arrangements" but would suggest that certain other terms also be as equally well defined. For example terms such as "improper tax advantage", "unreasonable business conduct" and "significant tax benefit" all require the exercise of judgement and which may be interpreted differently across Member States, thereby leading to an inconsistency in application. We would ask that such terms be clearly defined in the directive or replaced with more objective terms or criteria.

(16) We note that an amendment tabled in the ECON committee meeting proposes an additional section that must be considered in deciding whether an arrangement is artificial. The proposed amendment ("Article 1a paragraph 2 point (ea)") adds an additional test whereby a group must calculate whether the ratio of economic characteristics and profits between different members of the same group are "disproportionate".

(17) We believe that this proposed amendment would cause considerable difficulties in practice. Defining what is "disproportionate" is very judgemental and is likely to lead to considerable uncertainty in practice. Additionally, the proposed amendment is likely to be difficult to apply where a group has different activities in different Member States that may have widely varying inherent levels of profitability, capital employed and workforce requirements.

Removing the exemption from taxation

(18) We note that amendments were tabled in the ECON committee meeting proposing that Article 4 paragraph 1(a), exempting parents from taxation on income received from the subsidiary, be deleted.

(19) Additionally, we note that amendments were tabled in the ECON committee meeting proposing that Article 5, exempting distributions from subsidiary to parents from withholding tax, be deleted.

(20) If enacted, these proposals could lead to the very double taxation that the Directive was originally introduced to prevent. This would particularly be the case if both proposals were enacted together with the proposed amendments described below affecting Article 4 paragraph 1(b). In such circumstances it is entirely possible that the profits distributed by a subsidiary would be subject to withholding tax that would not be recoverable by the parent. The income would then be subject to further taxation in the hands of the recipient parent company, which then may or may not be recoverable in full depending on the tax regime to which it has been subjected.

(21) In summary, FEE believes that there is a strong possibility of potentially unforeseen consequences in passing these particular amendments, which will increase in likelihood and severity if more than one is passed. We would ask that the Parliament defers decision on these particular amendments until a comprehensive risk assessment has been carried out on them and, in particular, how they interact with each other.

Strengthening the definition of a parent

(22) We note that ECON are proposing to amend Articles 3(1)(a) (i) and (ii) to increase the minimum holding from 10% to 15% and introduce a mandatory minimum holding period of two years in order to qualify for the benefits of the Directive. This has been proposed to "prohibit multinational companies from benefiting illicitly and distorting competition".

(23) We are concerned that no firm basis of conclusion or impact assessment has been presented in respect of this amendment and have strong concerns that these provisions may impact arbitrarily on legitimate business structures. We are also concerned that making the current Member State option of a two-year holding period mandatory may adversely impact on genuine cross-border group structures and act as an active disincentive to a group seeking to expand into other Member States.

(24) We therefore suggest that the proposed amendment be re-examined and subjected to a stringent impact assessment before being further considered for inclusion in the Directive.

Statutory corporation tax rate

(25) We note that ECON is proposing an amendment to Article 4 paragraph 1(a) specifying that profits shall not be taxed only where the profits in question "have been taxed in the country of the subsidiary at a statutory corporation tax rate not lower than 75% of the average statutory corporation tax rate applicable in the Member States". This is presumably considered to be a measure that will stop "tax dumping" and contribute to tax harmonisation in the Single Market.

(26) We also note that ECON is proposing an amendment to Article 4 paragraph 1(b) specifying where such profits have been taxed the tax may only be deducted by the parent company where such profits have been taxed " at a statutory corporation tax rate not lower than 75% of the average statutory corporation tax rate applicable in the Member States". A further amendment has been tabled in the ECON committee meeting with the same basic wording but substituting "90%" for "75" above.

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(27) These are presumably considered to be measures that will stop "tax dumping" and contribute to tax harmonisation in the Single Market.

(28) We further note that proposals for a standard rate of corporation tax were already supported by Parliament in 2011[2] but we have strong concerns that the provisions above are contrary to the EU principle of subsidiarity insofar as it applies to tax collection by Member States.

(29) In any event, we believe there are significant problems with the amendments proposed by ECON. The main problem relates to the calculation of the average corporate tax rate of the Member States, which is not addressed in the proposed amendment.

(30) It is not even a simple matter to achieve an average rate of corporation tax in individual Member States. Several Member States have banded rates of corporation tax based on taxable profits or allowances that can be used to reduce the headline rate of corporation tax if the company meets a size criterion and is predominantly family owned.

(31) Additionally, the current proposal specifies that only corporation tax paid be taken into account. Some Member States have quite low rates of corporation tax or corporate income tax but have other taxes of a similar nature, at a regional or cantonal level or targeted at particular sectors, that increase the overall tax paid by businesses. It would produce completely misleading results if such taxes were not taken into account both in producing a Member State average rate and, thereby, in determining the rate of tax that has been applied to the profits in question.

(32) In conclusion, FEE does not believe that this proposal is workable in its current form and is consistent with the concept of subsidiarity.

Date in force

(33) These proposed changes could have a significant impact on some cross-border groups of companies, which may take some time to be resolved. Consequently, we do not believe that the proposed latest date at which Member States must transpose the proposed amendments to the Directive of 31 December 2014 is feasible. Additionally, we consider that the revised date of introduction tabled at the ECON committee meeting of 30 June 2014 would cause enormous practical difficulties for those groups affected. Consequently, we would recommend that this date of introduction of these proposals be reconsidered taking into account the practicalities of cross-border groups having to change business structures or financial instruments as a result of these proposals.

[2] 2011/0058(CNS) regarding the Common Consolidated Corporate Tax Base

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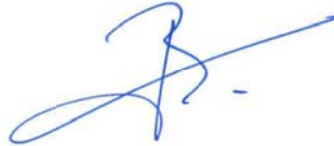
For further information on this letter, please contact Paul Gisby, Manager, from the FEE Team on +32 2 285 40 70 or via e-mail at paul.gisby@fee.be.

Yours sincerely,



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