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May 30, 2012

European Commission
Directorate-General for Taxation and
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VIA EMAIL

RE: Public Consultation Paper – Double non-taxation

Dear Sirs:

On behalf of Tax Executives Institute, Inc., I am writing in response to the European Commission's public consultation regarding double non-taxation, as published on the Commission's website.

Tax Executives Institute (TEI) was founded in 1944 to serve the needs of in-house tax professionals. Today, the organisation has 55 chapters around the world, including one in Europe. As the preeminent association of in-house tax professionals worldwide, TEI has a significant interest in promoting fair tax policy at all levels of government. Our nearly 7,000 members represent 3,000 of the largest companies in Europe, the United States, Canada, and Asia. The Institute is included in the EU Interest Representative Register (Register ID number 52413445902-12; TEI's address is 1200 G Street, N.W., Suite 300, Washington, D.C., U.S.A., 20005-3814).

TEI members are responsible for planning and managing the tax affairs of their employers. Therefore the organisation is dedicated to the development of sound tax policy, compliance with and uniform enforcement of tax laws, and minimisation of administration and compliance costs to the benefit of both government and taxpayers. These goals can be attained only through members' voluntary actions and their adherence to the highest standards of professional competence and integrity.

We welcome the opportunity to comment on the European Commission's consultation on "The internal market: factual examples of double non-taxation cases," published 29 February 2012 (Consultation), to gather evidence of double non-taxation within the EU and with Third Countries, with the aim of identifying and developing the appropriate

policy response to double non-taxation. Because the questionnaire format of the consultation does not allow us to provide our views on the issue of double non-taxation in a meaningful way, we are providing our input more generally in the form of this letter.

First, the scope of the Consultation goes well beyond what is generally understood as double non-taxation (such as the use of hybrid instruments and entities) to question differences in taxation between member states in general (such as differences in tax rates). This regrettably implies that the Commission is questioning the fundamental subsidiarity principle, which holds that fiscal flexibility does not contravene the four fundamental EU freedoms or state aid rules. The European Court of Justice's (ECJ) *Cadbury* decision[1] expressly endorses the right of a company in one Member State to set up a subsidiary in another Member State to access a more favourable tax regime, as long as the subsidiary is a genuine economic establishment and not "wholly artificial." Because tax competition has been expressly approved by the ECJ, rejecting it would create substantial uncertainty.

Second, TEI wholly supports focused action dealing with abusive structuring that takes advantage of double non-taxation. TEI welcomes the opportunity to discuss the conditions and consequences of such abuse with the Commission. We regret, however, that developing various instruments and requirements for Member States to include in their local legislation to deal with the consequences of tax competition (such as the examples given under points 5 through 8 of the Consultation) would create tax uncertainty and limit competitiveness and growth within the EU. The recent ECJ decision in favour of 3M Italia SpA[2] held that there is no EU law obligation for a Member State to enact anti-avoidance provisions where there is no abuse of EU law.

More fundamentally, EU Member States have sovereignty in tax matters. Because of its broad reach, the Consultation, which addresses not only double non-taxation but also differences in tax rate, may undermine that sovereignty. Thus, differences across Member States in policies and tax rates (for example, where a participation exemption is given to very low or nil taxed dividends), should be left to each EU Member State to address on its own.

We note that the ECJ has gone to great lengths to confirm Member State tax sovereignty and defend the integrity of a country's tax system. Indeed, in *Kerckhaert-Morres*[3] it accepted the potential for double taxation to safeguard these principles. Regrettably, the Consultation paints double non-taxation as an obstacle to the internal market. TEI submits that if double non-taxation is viewed as an obstacle, double taxation is equally – indeed, even more – problematic. In the Institute's view, a balanced approach that addresses instances of both double non-taxation and double taxation would better advance sound tax policy across EU Member States and promote the internal market in an evenhanded manner.

TEI supports the EU Commission's commitment to public consultation. We trust our comments provide a helpful perspective on the Commission's efforts, allow for a more focused approach on abuse, and promote a fair and balanced fiscal environment within the EU. If you

[1] *Cadbury Schweppes* (Case C-196/04, 12 September 2006).

[2] *3M Italia SpA* (Case C-417/10, 29 March 2012).

[3] *Kerckhaert-Morres* (Case C-513/04 , 14 November 2006).

have any questions about this letter please do not hesitate to contact Anna Theeuwes, Chair, TEI European Direct Tax Committee, on 31 70 377 3199 or an.m.l.theeuwes@shell.com or Benjamin R. Shreck, TEI Tax Counsel on 202.638.5601 or bshreck@tei.org.

Respectfully submitted,

Tax Executives Institute, Inc.

David M. Penney
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