European Business Initiative on Taxation - EBIT

Comments on the European Commission's "Consultation on factual examples and possible ways to tackle double non-taxation cases"

EBIT Comments on the European Commission's "Consultation on factual examples and possible ways to tackle double non-taxation cases"

European Commission
Directorate-General for Taxation and Customs Union
Rue de Spa 3, Office 8/007
B-1049 Brussels
BELGIUM

Brussels, 30 May 2012

Dear Sir, Madam,

1. Introduction

This letter sets out the comments and concerns of the European Business Initiative on Taxation (EBIT)[1] on the European Commission's "Consultation on factual examples and possible ways to tackle double non-taxation cases".

EBIT considers this to be a very important topic for the business community and therefore we welcome this opportunity to provide our comments on the Consultation.

Since its establishment in 2001, EBIT's aim has been to help eliminate remaining tax barriers in Europe's Single Market and encourage the implementation of business-friendly solutions. EBIT's technical input to EU and OECD policy-makers is always rooted in the day-to-day practice and experience of its member companies.

EBIT is convinced that modernising and streamlining Europe's direct tax policy framework further will help to create an environment in which businesses can comply more easily with tax regulations and enable them to concentrate on competitiveness, sustainable growth, investing in people and innovation. Companies in Europe are committed to paying all the legally required national taxes due in the Member States. In doing so they need to navigate between different Member State legal systems and national interpretations of EU and/or tax treaty law. According to a recent study, EU multinationals tend to have a higher effective corporate income tax rate than, for instance, their US counterparts.[2]

EBIT welcomes EU initiatives which are aimed at creating consistency in corporate taxation in the Single Market. EBIT is against tax evasion and tax fraud. Nonetheless, with regard to the current consultation, EBIT has a number of comments and serious concerns with regard to the approach now followed by the Commission, which are set out below.

[1] At the time of writing this submission, EBIT Members included: AIRBUS, BP, CATERPILLAR, EADS, GE, DEUTSCHE LUFTHANSA, INFORMA GROUP, MTU AERO ENGINES, NUTRECO, REED ELSEVIER, ROLLS-ROYCE, ROMPETROL GROUP, SAMSUNG ELECTRONICS and TUPPERWARE spanning the following business sectors: aerospace and defence, aircraft engine manufacturers, airlines, conference organisers, earth moving equipment, electronics, food, food containers, healthcare equipment, oil, pharmaceuticals, publishing, retail, software, and train manufacture.

[2] Reuven S. Avi-Yonah and Yaron Lahav, "The Effective Tax Rate of the Largest US and EU Multinationals" (October 2011). University of Michigan Legal Working Paper Series. Program in Law and Economics. Working Paper 41.

2. Executive summary

EBIT is concerned by the fact that the Consultation document does not contain a clear definition of the terms double taxation, "double non-taxation" and "low taxation".

EBIT considers that the issue of double non-taxation should not be addressed separately from that of double taxation.

EBIT also considers that the Commission's initiative will need to take full account of Member States' tax sovereignty or sufficiently acknowledge the concept of subsidiarity, subject to compliance with the TFEU.

EBIT considers that the phenomena of double taxation and non-taxation are inherent consequences of the fact that EU Member States' corporate income tax systems have not been harmonised and that this is not sufficiently reflected in the Consultation document.

EBIT believes the scope of double non-taxation as envisaged in the consultation document is far too broad.

EBIT is concerned that the Commission initiative duplicates other pre-existing initiatives such as those of the Code of Conduct Group.

Any action that might be taken, insofar as this initiative goes ahead, should be based on reciprocity with countries outside the EU, to avoid damaging EU economic competitiveness.

EBIT is concerned that the Commission's initiative is fully co-ordinated with other relevant international initiatives, such as the recent OECD report on "Hybrid Mismatch Arrangements – Tax Policy and Compliance Issues".

3. The present Consultation document on double non-taxation

The present Consultation document is connected to the issues of subsidiarity, transfer pricing, double taxation and administrative burdens, absence of loss relief, the Code of Conduct, OECD initiatives and information exchange discussed in Appendix 1 below. The interaction between them is, however, far from clear. This can be illustrated as follows.

Definition of 'double taxation, 'double non-taxation' and 'low taxation'

EBIT is concerned by the fact that the Consultation document does not contain a clear definition of the terms double taxation, 'double non-taxation' and 'low taxation'. This leads to terminological confusion and misunderstandings.

Double non-taxation

For instance, take Issue 7 of the Consultation document which amongst other things concerns special regimes for the taxation of income from intellectual property. In combination with the tax regime in another State, double non-taxation might occur, according to the Consultation document. EBIT considers, however, that this is not a situation of double non-taxation, but the result of legitimate policy choices of the Member State concerned, i.e. the promotion of research and development. Some of these tax regimes have been notified in

advance to the Commission which decided that they do not amount to State aid within the meaning of Article 107(1) TFEU.[3]

Another example can be found in Issue 6 of the Consultation document on 'Debt financing of tax exempt income'. This issue targets borrowing via a local acquisition company to acquire and tax group/tax consolidate with a local target company, where a sale of the shares of the resulting acquired sub-group by the investors would be tax free. This is a consequence of tax policy choices made by the countries concerned rather than double non taxation. Moreover, in the scenario used in the Consultation document, the acquisition is financed through a third party loan, that is to say through an economic operator which will itself be subject to tax. In other words, this is not a double non-taxation situation: the profits of a company are matched with the losses of its parent: at group level no profit is realised, so why would it be taxed, and the lending bank is taxable on the interest it receives.

EBIT concludes therefore that the definitions of key concepts and aims of the Consultation document such as double non-taxation do not appear to be fully thought through.

Moreover, the impact of double non-taxation is in EBIT's view not being evaluated correctly. Even where a situation of double non-taxation would be identified and even where the amount at stake could be considered as being material, one has to understand that the impact on competition cannot be established by that material situation of double non-taxation alone. Double non-taxation impacts the effective tax rate of a company. The effective tax rate is a combination of tax rate and tax base and both differ from one State to another. Double non-taxation may well reduce the effective tax rate of a company. However such a company may still suffer a higher effective tax burden than a company that would be established in a country having a low nominal tax rate. From an economic point of view, competition is not distorted. Such a conclusion would only be possible if all economic actors would be subject to the same tax system and one or more would enjoy a double non-taxation arrangement. In this light, double non-taxation could be considered as not being different than a difference of tax base. As the OECD has stated:

> "there are no particular reasons why any two countries should have the same level and structure of taxation. Although differences in tax levels and structures may have implications for other countries, these are essentially political decisions for national governments. Depending on the decisions taken, levels of tax may be high or low relative to other states and the composition of the tax burden may vary. The fact that a country has modernised its fiscal infrastructure earlier than other countries, for example by lowering the rates and broadening the base to promote greater neutrality, is principally a matter of domestic policy. Countries should remain free to design their own tax systems as long as they abide by internationally accepted standards in doing so".[4]

Double non-taxation is an inevitable consequence of this freedom, as is double taxation. Does double non-taxation always affect competition? Probably not. Would a countermeasure from another State restore competition? In EBIT's view, the answer is no, because the level of taxation would in turn depend on that State's tax system. Defining the terms 'double non-taxation', 'double taxation' and "low taxation" and assessing the impact of multiple countries' tax regimes on competition is even more difficult when one analyses these phenomena not only within the EU but in a global context. In EBIT's view, the OECD Hybrid Mismatch

[3] See Commission Notice on the application of the State aid rules to measures relating to direct business taxation, OJ 98/C 384/03, par 13; Commission Decision of 11 December 2007, C(2007) 6042 def. (State Aid N 507/2007; Italy – R&D Tax credit), with further references to case practice; Commission Decision of 13 February 2008, No. C2008) 467 final (State Aid N 480/2007, Spain – Reduction of tax from intangible assets).

4 Harmful Tax Competition: An Emerging Global Issue (1998), para 26 eee

Arrangements report identifies double non-taxation situations, whereas issues 4-8 in the Commission Consultation document are largely low tax situations.

EBIT notes that the Consultation document unfortunately addresses none of the above issues.

Double taxation versus double non-taxation

The phenomena of double taxation and non-taxation are inherent consequences of the fact that EU Member States' corporate income tax systems have not been harmonised. Sometimes this works to the advantage of companies, and sometimes this works to the disadvantage of companies. Since it is settled ECJ case law that double taxation is simply a disparity and not against EU law, it should logically follow that double non-taxation does not go against EU law principles either. In other words, as a matter of logic, the issue of double non-taxation cannot and should not be seen as separate from the issue of double taxation. They are two sides of the same coin and should be addressed together as also appeared to be envisaged in the Commission's original Communication on Double Taxation in the Single Market COM(2011) 712 final published on 11 November 2011. The Commission may consider that it has done so in its Communication on double taxation. However, EBIT notes that no concrete results or at least binding principles appear to have emerged to date.

As regards double non-taxation issues arising from bilateral tax treaties, it should be pointed out that within the EU as noted in the Consultation document, different interpretations of a similar provision may sometimes lead to double non-taxation. Obviously this is also true – and based on our practical experience more and more frequently so – for double taxation. Accordingly, those provisions may subsequently create new barriers within the EU. The solution has been known for years: adopt an EU Model tax treaty or multilateral convention or at least adopt guidelines and / or common definitions of "international tax law" concepts and terms.

Between the EU and non-EU Third Countries, double non-taxation may well be based on a combination of EU Directives and bilateral tax treaties. This issue has also been known for years and should be addressed by means of coordination of tax treaty policy and / or the conclusion of tax treaties by the EU.

Double non-taxation versus disparities in tax rates of EU Member States and Third Countries

As a matter of EU law, a company of any Member State is entitled under the EU's freedom of establishment to set up a subsidiary or branch in another Member State even if the purpose of doing so is to benefit from a more favourable tax regime, provided that subsidiary or branch is genuinely economically established in the second Member State and is not a wholly artificial arrangement (Case C-196/04 *Cadbury Schweppes*, paragraphs 36-38 and 76). Accordingly, the EU's free movement provisions legally support the right of companies to genuinely establish themselves in a tax-friendly Member State. EBIT questions how the Consultation document relates to this settled body of ECJ case law?

The Consultation document's geographical scope is however not limited to the European Union. It also targets situations of double non taxation / low taxation arising from investments made in Third Countries. EBIT, again, regrets the lack of a clear definition of the term 'low taxation' in the Consultation document. The concept used seems inappropriate when one is looking for a relevant definition in a global context. As the OECD stated in its 1998 report:

> "countries with specific structural disadvantages, such as poor geographical location, lack of natural resources, etc., frequently consider that special tax incentives or tax regimes are necessary to offset non-tax disadvantages, including any additional cost

> from locating in such areas."[5] ; and:
>
> "within countries, peripheral regions often experience difficulties in promoting their development and may, at certain stages in this development, benefit from more attractive tax regimes or tax incentives for certain activities."[6]

The OECD concludes that:

> "these decisions may be justifiable from the point of view of the country in question."[7]

Under EU law, those differences are explicitly addressed. Indeed, some regions of Member States which are facing economic difficulties may use tax incentives to attract investment. Although the EU does not seem to be bound by any legal obligation to treat establishment within and outside the EU equally – as far as this does not restrict the free movement of capital – such a policy decision may well produce unfair results.[8] It should be borne in mind that a measure that would cancel the benefit of a voluntary tax exemption (e.g. tax holidays in a Third Country) would mean that a Third Country's tax incentive aiming at favouring investment would be counterbalanced by taxation within the EU. Such a Third Country's sacrifice would then benefit an EU Member State. It would seem more appropriate to EBIT, at least at a first stage, to focus on harmful tax competition, i.e. practices that "do not reflect different judgments about the appropriate level of taxes and public outlays or the appropriate mix of taxes in a particular economy, which are aspects of every country's sovereignty in fiscal matters, but are, in effect, tailored to attract investment or savings originating elsewhere or to facilitate the avoidance of other countries' taxes."[9]

EBIT considers that the EU should take the above into account by recognising that Third Countries are free to design their own tax systems including the provision of tax incentives and that the EU should target only those Third Countries which maintain or introduce harmful tax practices. In practice this should lead the EU to at least exclude from the scope of the Consultation's outcome any genuine economic activities which are taxed at a low effective tax rate.

It also frequently happens that companies establish themselves in Member States with an effective corporate income tax rate which is higher than the EU-average. Should other Member States in these situations pay out the difference to the company concerned? Obviously, this cannot be the case. Similarly, and as a matter of logic, Member States should also not be under the obligation to impose additional taxes if a company has established itself in a Member State with an effective corporate income tax rate below the EU-average, irrespective of the practical difficulties in determining which effective tax rates in the Member States are 'right' and which are 'wrong'.

Issue 5 of the Consultation document ('Transactions with associated enterprises in countries with no or extremely low taxation') moves from targeting dividend exemptions applied to untaxed profits to saying that: "The exemption should ... only apply when the profits of the subsidiary have been (effectively) taxed." The exemption method for relief from double taxation of foreign profits and dividends in particular is by far the most common method adopted by OECD countries. Moreover, as discussed above, this issue as brought forward by the Commission has already been identified by the Code of Conduct Group which has

[5] OECD,1998 report, para 27 i
[6] Ibidem
[7] Ibidem
[8] This could even lead Third States to adopt retaliatory measures (of a fiscal nature or not) which could affect EU competitiveness and hinder the concerned region's economic growths
[9] OECD report, para 292

adopted specific guidance for EU Member States regarding CFCs or switch-over provisions. What would be the consequences of CFC / switch-over clauses? When would they be triggered? When is income subject to tax at a low rate? The key question here is: what is a low (effective) rate? In view of the tax sovereignty retained by the Member States, it seems to be an impossible task to answer this question.

Double non-taxation and double administrative burdens

The Consultation document does not explain how the issue of double non-taxation relates to the issue of double or more administrative burdens in EU Member States in relation to the same income. In EBIT's view, these issues cannot be viewed separately and should be dealt with together.

APAs – interaction with instruments for the exchange of information

In our day-to-day business experience there have been very few instances where, as suggested in Issue 4 of the Consultation document, unilateral APAs have resulted in a tax advantage due to a different transfer pricing method being applied in the country of the counterparty company to the method adopted by the company which has negotiated the unilateral APA. In any event, to the extent that this is an issue, it should wherever possible be addressed via the relevant tax treaty mutual agreement procedure, rather than being categorised as double non-taxation. Within the framework of the Code of Conduct Group, a solution to combat unilateral APAs has been found by relying upon the spontaneous exchange of information, which is now compulsory under the new EU Directive on the exchange of information (see Appendix 1). It is not clear to EBIT, however, how these solutions relate to the present Consultation document.

Interaction with Code of Conduct Group

Appendix 1 of the present letter shows a lot of activity of the Code of Conduct Group in the area which is the subject of the Consultation. EBIT suggests the Commission await the conclusions of the Code of Conduct Group before embarking on any new initiatives and policy approaches, in line with the following agreed EU institutional procedure:

> "the Group should maintain to aim at a (broad) consensus to reflect the MSs positions in the Code of Conduct Group in future reports to ECOFIN, to avoid losing the effectiveness of the Code Group, while respecting the principle of unanimity as laid down in paragraph 14 of the Council conclusions concerning the establishment of the Code of Conduct Group (9 March 1998, 98/C99/01)."[10]

If the Code of Conduct Group is unable to reach consensus on this basis, EBIT suggests amending the mandate of the Code of Conduct Group rather than launching another initiative among all the other existing initiatives as discussed in Appendix 1 to this letter.

[10] Document of 26 November 2008, 16410/08 FISC 174, from the General Secretariat to the ECOFIN Council p 5.

Interaction with OECD initiatives

EBIT was concerned that the Consultation document has apparently not been coordinated with the OECD's report on Hybrid Mismatch Arrangements, and vice versa. This is a very worrying development as the phenomena of double taxation and double non-taxation are global issues which should be addressed globally in a coordinated way.

4. European competitiveness at stake

EBIT considers that care should be taken that the current initiative will not adversely impact the European economy's competitiveness which would be the case if measures were unilaterally introduced in Europe whilst -ideally- still building on an international consensus within the OECD regarding their parallel initiative in respect of hybrid mismatch arrangements and the fight against harmful tax competition.

Should the EU adopt any new rule targeting double non-taxation, especially as regards transactions with non-EU Third Countries, this should in EBIT's view be applicable only to the extent that those countries would apply the same principles (as done in the EU Savings Directive approach). The key word is reciprocity here, and the application of the same principles in non-EU Third Countries should not be simply aspirational as it currently is (see the Commission's strategy to promote "good governance" with Third Countries), otherwise EU-based companies will be subject to stricter rules than companies located in most non-EU countries and therefore disadvantaged competitively. So, any action should be undertaken in cooperation with relevant Third Countries.

5. Conclusion

Ahead of any adoption of a common corporate tax base, which should be optional, consolidated and deliver administrative simplification, EBIT does not consider that any issue as regards double non-taxation should be addressed separately from that of double taxation. The phenomena of double taxation and non-taxation are inherent consequences of the fact that EU Member States' corporate income tax systems have not been harmonised and Member States retain tax sovereignty subject to compliance with the TFEU. Sometimes this works to the advantage of companies, and sometimes this works to the disadvantage of companies. EBIT believes that the scope of the so-called double non-taxation reflected in the Consultation document is far too broad in the light of all the other existing and overlapping initiatives discussed in this letter. It is crucial that the interaction with these other initiatives be clarified first. EBIT is concerned by the fact that the Consultation document does not contain any clear definitions of the terms double taxation, 'double non-taxation' and 'low taxation'. This leads to terminological confusion and misunderstandings. The impact of double non-taxation is in EBIT's view not being evaluated correctly. Should the EU adopt any new rule on double non-taxation with regard to transactions with non-EU Third Countries then this should be based on reciprocity. The phenomena of double taxation and double non-taxation are global issues which should be addressed globally in a coordinated way. There is a real danger that a lack of coordination between the EU and non-EU Third Countries with respect to the current issue may lead to a significant deterioration of European economic competitiveness: the stakes are high.

EBIT will be happy to discuss its collective views with the Commission and remains committed to a constructive dialogue with the Commission and any other stakeholders.

EBIT Comments on the European Commission's "Consultation on factual examples and possible ways to tackle double non-taxation cases"

Yours sincerely,

European Business Initiative on Taxation – May 2012

For further information on EBIT, please contact its Secretariat via Bob van der Made, Tel: + 31 (0) 6 130 96 296; Email: bob.van.der.made@nl.pwc.com)

Disclaimer / Copyright: This document contains the collective views of the EBIT business working group and is provided to you courtesy of EBIT. PricewaterhouseCoopers acts as EBIT's secretariat but PricewaterhouseCoopers is not a Member of EBIT. Nothing in this document can be construed as an opinion or point of view of any individual member of EBIT or of PricewaterhouseCoopers. Any reproduction, in part or in total, of this document, in any form whatsoever, is subject to prior written authorisation of EBIT. Such authorisation can be obtained by sending an email to: bob.van.der.made@nl.pwc.com

Appendix 1: Background

As EU law stands at present, direct taxation does not fall within the purview of the Union. The Member States as a matter of principle retain extensive competences in tax matters. They remain free to determine the organisation and conception of their tax system and to determine the scope of their tax jurisdiction, either unilaterally or bilaterally.[11] The Member States are also at liberty to pursue 'external' objectives through tax measures such as the protection of the environment or stimulation of research and development.

In its current state, EU law does not lay down any general criteria for the allocation of taxing powers between the Member States.[12] It is, therefore, up to the Member States to conclude international instruments for the avoidance of international juridical double taxation. In this allocation of fiscal jurisdiction, it is not unreasonable for the Member States to base their bilateral tax treaties on international practice and the OECD Model Tax Convention on Income and on Capital.[13] Whilst the Member States are free to conclude – or not to conclude – bilateral tax treaties with each other, any remaining international juridical double taxation does not amount to a prohibited restriction on the freedom to provide services, the free movement of workers, the freedom of establishment or the free movement of capital.[14]

The lack of direct tax harmonisation and the absence of an obligation to avoid double taxation lead to a number of consequences which will now be discussed.

Transfer pricing, double taxation and administrative burdens

Multinational companies face an increasing number of international transfer pricing disputes, resulting in potential double taxation of profits. It is true that EU Member States have entered into mechanisms to solve this issue, but in practice these mechanisms are not always able to eliminate double taxation within a reasonable time.[15] This renders these mechanisms less attractive for companies and not always fit for purpose. In addition, companies are faced with double administrative burdens because of different administration and language requirements in the Member States.

No loss relief

The fragmentation of the EU tax base of a multinational company leads to a situation where

---

[11] Opinion of AG Poiares Maduro in Case C-446/03 *Marks & Spencer*, § 23-24. See for a similar statement in the context of Article 107 TFEU (State aid) Joined Cases T-211/04 and T-215/04 *Government of Gibraltar v. Commission*, § 46, and the Opinion of AG Jääskinen in Joined Cases C‑106/09 P and C‑107/09 P *Commission and Spain v. Gibraltar and UK*, § 137 *et seq*.

[12] Apart from Council Directive 90/435/EEC of 23 July 1990 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States (OJ 1990 L 225, p. 6), the Convention of 23 July 1990 on the elimination of double taxation in connection with the adjustment of profits of associated enterprises (OJ 1990 L 225, p. 10), and Council Directive 2003/48/EC of 3 June 2003 on taxation of savings income in the form of interest payments (OJ 2003 L 157, p. 38), and Council Directive 2003/49/EC of 3 June 2003 on a common system of taxation applicable to interest and royalty payments made between associated companies of different Member States (OJ 2003 L 157, p. 49), no uniform or harmonisation measure designed to eliminate double taxation has as yet been adopted at Community law level.

[13] Case C-336/96 *Gilly*, § 31.

[14] Case C-513/04 *Kerckhaert and Morres.*

[15] See Convention 90/436/EEC on the elimination of double taxation in connection with the adjustment of profits of associated enterprises (the Arbitration Convention) and the good work of the EU Joint Transfer Pricing Forum (JTPF) which assists and advises the Commission on transfer pricing tax matters.

losses suffered in one EU Member State cannot be offset against profits in another.[16]
Code of Conduct Group (Business Taxation) and Notice on Fiscal State Aid

The issue of double non-taxation is already being addressed in the Code of Conduct Group. The lack of direct tax harmonisation has made it possible for EU Member States to engage in a certain form of tax competition with each other. In 1997, the ECOFIN Council held a wide-ranging debate in the light of a Commission Communication entitled "A package to tackle harmful tax competition in the European Union'. Following that debate, the Council and the Representatives of the Governments of the Member States, meeting within the Council, agreed to the Resolution on a code of conduct for business taxation.[17] In the beginning, the work of the Code of Conduct Group focussed on unilateral measures of EU Member States aimed at harmful tax competition. Recently, however, the Code of Conduct Group has been focussing more on the alleged harmful effect of the interaction of tax measures of more than one Member State. The report of a Subgroup of the Code of Conduct Group of 12 May 2010, 9779/10 FISC 43, contains, for instance, the following paragraph:

> "11. Concerning profit participating loans the problem arises when the State of the corporate taxpayer paying interest allows its deduction from the tax base, whereas the Member State of the corporate taxpayer which receives the income considers it as a tax exempted dividend income; therefore, such income would remain untaxed in both Member States. It was acknowledged that there can be some other issues concerning mismatches, such as double taxation, hybrid companies or mismatches in national CFC rules.
>
> 12. Two possible solutions were put forward:
> - The Member State receiving the loan and paying the interest, the source State, aligns with the tax treatment of the Member State of receipt, which would imply the denial of deduction of interest expenses,
> - The Member State of receipt aligns with the tax treatment of the source Member State, which would imply to disallow the exemption of the payment received.
> The second solution requires fewer Member States to modify their internal legislation."

In 1997, the ECOFIN Council noted that some of the tax measures covered by the Code of Conduct Group may also fall within the scope of the provisions on State aid in the Treaty. Subsequently, in 1998, the Commission published a Notice on State aid and direct business taxation. In this Notice, the Commission has set further limits to the exercise of the powers retained by the Member States in the area of direct taxation. In 2009, the Commission decided that any advantages arising from disparities in the tax systems of the Member States do not amount to State aid within the meaning of Article 107(1) of the TFEU.[18]

According to the Commission, this does not mean that the Code of Conduct Group cannot play a role here:

> "the work of the Code of Conduct Group should be expanded, in particular to ensure that mismatches between tax systems do not lead to harmful results for tax administrations or business. In particular mismatches can create situations of double non-taxation which can be exploited to reduce Member States tax revenues and to

[16] It has been decided in Case C-446/03 *Marks & Spencer* and Case C-414/06 *Lidl Belgium* that only 'final losses' need to be offset in cross-border situations if the Member State at issue operates a system of group loss relief domestically.
[17] Conclusions of ECOFIN Council meeting of 1 December 1997 concerning taxation policy (98/C 2/01).
[18] Commission Decision of 8 July 2009 on the groepsrentebox scheme which The Netherlands is planning to implement (C 4/07 (ex N 465/06)) (notified under document C(2009) 4511) (2009/809/EC).

> provide unjustified advantages to certain businesses. In the current difficult times such loopholes, which also undermine the spirit of the Single Market, must be tackled. If results cannot be achieved by the end of 2012, the Commission will look to its right of initiative as a means of addressing these important matters."[19]

This cannot be seen apart from the following statement in the Report of 13 November 2011, 17081/1/11 REV 1 FISC 144, from the Code of Conduct Group to the ECOFIN Council:

> "Regarding the Profit Participating Loans the Group agreed that the legal implications of different ways for implementation of the solution contained in the Code Group's Report to the Council (ECOFIN) on 7 December 2010 (doc. 16766/10 FISC 139, par. 17) should be subject to further technical analysis in a Commission's Working Group. The Commission will keep the Code Group informed of the progress of this analysis."

On 22 November 2010, the Code of Conduct Group agreed the following in the context of inbound dividend taxation:

> "Regarding Inbound Profit Transfers, the Group agreed that a risk of abuse arises regarding profits entering the EU from non EU countries, whether directly to the Member State of receipt (being the Member State in which the ultimate parent company is resident) or through several Member States up to the Member State of receipt, when such income has not been taxed or it has been subject to tax at source at a low tax rate. There is a risk of abuse in this case, since the subsidiary resident in a third country will be able to avoid inbound taxation by using the most convenient Double Taxation Agreement (DTA). That income will afterwards freely flow within the EU with no withholding tax (subject to the rules of the Parent-Subsidiary Directive), arriving untaxed at final destination.
>
> On this issue the Group, noting the guidance on Rollback and Standstill contained in the Code Group's Report to ECOFIN Council on 26-27 November 2000, was able to agree the following guidance:
>
> *Member States may opt to tax inbound profit transfers or to operate a participation exemption. Member States which operate a participation exemption should either ensure that the profits which give rise to foreign source dividends are subject to effective anti-abuse or countermeasures, or apply switch-over provisions targeted at ensuring effective taxation. The first could be achieved through a Member State having CFC-legislation or other anti-abuse provisions which ensure that profits artificially diverted from that Member State which may give rise to foreign source dividends are appropriately taxed.*"[20]

OECD initiatives

It should be noted that the OECD is also active in the area of 'harmful tax competition'. Following a report in 1998 ("Harmful Tax Competition: An Emerging Global Issue") the OECD created the Global Forum on Harmful Tax Practices. OECD and non-OECD economies are working together through the Global Forum to address harmful tax practices by improving transparency and establishing effective exchange of information. In March 2012, the OECD published the report on 'Hybrid Mismatch Arrangements – Tax Policy and Compliance

[19] European Commission 23 November 2011, Annex IV to Annual Growth Survey 2012, COM(2011) 815 final, p 10-11.

[20] Report of 22 November 2010 from the Code of Conduct Group (Business taxation) to the Council (ECOFIN) on 7 December 2010, 16766/10 FISC 139, p. 6.

Issues'. Based on the conclusions reached in this report (on p. 25) the OECD's Committee on Fiscal Affairs recommends countries to:

> "a) Consider introducing or revising specific and targeted rules denying benefits in the case of certain hybrid mismatch arrangements;
> b) Continue sharing relevant intelligence on hybrid mismatch arrangements, the deterrence, detection and response strategies used, and monitor their effectiveness;
> c) Consider introducing or the revising disclosure initiatives targeted at certain hybrid mismatch arrangements."

Information exchange

The fact that EU Member States have adhered to their national direct tax sovereignty, makes a well-designed system of information exchange and tax collection between the Member States necessary. The ECOFIN Council of 15 February 2011 formally adopted a new Council Directive 2011/16/EU on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC. This new Directive contains *inter alia* the following provisions:

> "Article 9 [Scope and conditions of spontaneous exchange of information]
>
> 1. The competent authority of each Member State shall communicate the information referred to in Article 1(1) to the competent authority of any other Member State concerned, in any of the following circumstances:
>
> a) the competent authority of one Member State has grounds for supposing that there may be a loss of tax in the other Member State;
> b) a person liable to tax obtains a reduction in, or an exemption from, tax in one Member State which would give rise to an increase in tax or to liability to tax in the other Member State;
> c) business dealings between a person liable to tax in one Member State and a person liable to tax in the other Member State are conducted through one or more countries in such a way that a saving in tax may result in one or the other Member State or in both;
> d) the competent authority of a Member State has grounds for supposing that a saving of tax may result from artificial transfers of profits within groups of enterprises;
> e) information forwarded to one Member State by the competent authority of the other Member State has enabled information to be obtained which may be relevant in assessing liability to tax in the latter Member State.
>
> 2. The competent authorities of each Member State may communicate, by spontaneous exchange, to the competent authorities of the other Member States any information of which they are aware and which may be useful to the competent authorities of the other Member States.
>
> Article 10 [Time limits]
>
> 1. The competent authority to which information referred to in Article 9(1) becomes available, shall forward that information to the competent authority of any other Member State concerned as quickly as possible, and no later than one month after it becomes available.
>
> 2. The competent authority to which information is communicated pursuant to Article 9 shall confirm, if possible by electronic means, the receipt of the information to the competent authority which provided the information immediately and in any event no later than seven working days."

These provisions cannot be viewed separately from the following paragraphs in the report of the Code of Conduct Group of 22 November 2010, 16766/10 FISC 139, p. 9:

> "With respect to improving exchange of information for cross border rulings, the Group agreed the following:
>
> - If a Member State provides advance interpretation or application of a legal provision for a cross border situation or transaction of an individual taxpayer (hereafter: cross border ruling), which is likely to be relevant for the tax authorities of another Member State, the tax authorities of the first Member State will spontaneously exchange the relevant information regarding this cross border ruling in accordance with the provisions of the Directive on Mutual Assistance with the latter Member State in order to assure coherent overall taxation.
> - By means of a non-exhaustive list, this would specifically concern the following types of cross border rulings:
>
> - MS 1 gives clearance on the absence of a PE in MS 1 to a company resident in MS 2. Such a ruling could be relevant for the tax authorities of MS 2 (same applies in reverse situation).
> - MS 1 gives clearance on specific items related to the tax base of a PE in MS 1 to a company resident in MS 2. Such a ruling could be relevant for the tax authorities of MS 2 (same applies in reverse situation).
> - MS 1 gives clearance on the tax status of a hybrid entity resident in MS 1 which is controlled by residents of MS 2. Such a ruling could be relevant for the tax authorities of MS 2 (same applies in reverse situation).
> - MS 1 gives clearance to a company resident in MS 1 regarding the tax value for depreciation for an asset that is acquired from a group company in MS 2. Such a ruling could be relevant for the tax authorities of MS 2 (same applies in reverse situation)."

In addition to these developments in the EU, the OECD has also achieved significant progress in the area of information exchange. Reference is made to the joint Council of Europe/OECD Convention on Mutual Administrative Assistance in Tax Matters and to the numerous Tax Information Exchange Agreements (TIEAs) which have been concluded in recent years.

Disclaimer / Copyright: This document contains the collective views of the EBIT business working group and is provided to you courtesy of EBIT. PricewaterhouseCoopers acts as EBIT's secretariat but PricewaterhouseCoopers is not a Member of EBIT. Nothing in this document can be construed as an opinion or point of view of any individual member of EBIT or of PricewaterhouseCoopers. Any reproduction, in part or in total, of this document, in any form whatsoever, is subject to prior written authorisation of EBIT. Such authorisation can be obtained from EBIT by sending an email to its Secretariat: bob.van.der.made@nl.pwc.com