VNO NCW

MKB Nederland

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

TAXUD/D-1	
29 MAI 2012	
CDF	JV
ASS	PMP
INFO	VJ
ANN	
CLASS	

Briefnummer
12/10.793/Jla

Den Haag
25 mei 2012

Onderwerp
VNO-NCW comments to the consultation document TAXUD D1 D(2012) The internal market: factual examples of double non-taxation cases

Telefoonnummer
070-3490423
E-mail
lammers@vno-ncw.nl

Dear Sirs,

The European Commission has launched a public consultation in order to establish evidence concerning double non-taxation within the EU and in relation to third countries. The consultation runs from February 29 until May 30, 2012.

VNO-NCW welcomes the opportunity to provide comments on this consultation document. VNO-NCW, the confederation of Netherlands industry and employers, is the largest employers' organisation in the Netherlands and represents the common interests of Dutch business, both at home and abroad.

The increasing economic integration of markets driven by technological change and policy liberalisation – known as globalisation – is providing great opportunities for the world, the EU and its individual Member States. The 2009 Communication by the European Commission *Promoting good governance in the tax area*[1] mentions that there are however also downsides to globalisation. For example, the fact that money can also move more freely to tax jurisdictions that refuse to accept the principles of transparency and the automatic exchange of information can facilitate tax avoidance or even tax evasion. For that reason the Commission elaborated in the 2009 Communication on the importance of good governance in the tax area and how this could be implemented in the EU, on the particular tools that the EU and Member States have at their disposal, and lastly the scope for more coordinated action on this subject with third countries and specifically the OECD and the UN.

[1] COM(2009) 201

The Commission concluded in this document that the promotion of good governance in the tax area on as broad a geographical basis is the appropriate way to address these concerns. An important notion in this conclusion is that this approach preserves the delicate balance between tax sovereignty of the individual countries on the one side and the legitimate protection of tax revenues on the other.

Considering the political momentum generated around this topic, we understand that the Commission, in holding the consultation, is aiming at establishing whether or not there is a need for further action in this area in addition to following the proposed series of steps to promote good governance in the tax area in the 2009 Communication, and if so to identify and develop the appropriate policy response to double non-taxation.

VNO-NCW concedes there is a risk of a variety of national non-coordinated initiatives in this area. Therefore, in order to avoid double taxation as well as double non-taxation it is important that countries can agree on a common set of principles and apply them consistently, as was incidentally also the objective of the 2009 Communication.

However, the questions in the consultation paper go far beyond what VNO-NCW would consider to be double non-taxation. We believe it is crucial to make a clear distinction between actual double non-taxation cases (e.g. due to mismatches of hybrid entities and hybrid instruments) and tax competition (low taxation). And in failing to doing so, the European Commission seems inadvertently – given their position in the 2009 Communication – to warrant limiting the tax sovereignty in individual countries and thus disturbing the aforementioned delicate balance.

The right of individual countries to implement their own tax policies is paramount in the view of VNO-NCW. This implies that non-taxation is not always a result of aggressive tax planning. On the contrary, non-taxation is often intentional, based upon national tax policy objectives. A general prohibition of double non-taxation would depart from such national objectives. It is imperative that it is made clear that this is not the intended objective of this consultation, nor that it would be an acceptable policy response on this issue. Just as the ECJ accepted the potential of double taxation to safeguard state sovereignty in tax matters and the integrity of a country's internal tax system, double non-taxation from the same cause should be accepted.

VNO-NCW appreciates the earlier work the European Commission has done on preventing cases of double taxation and fully agrees that wholly artificial constructs that lead to double non-taxation can lead to undesirable

competitive advantages for companies as well as individuals[2]. VNO-NCW would therefore support an approach that focuses on abusive and "wholly artificial structures" as the ECJ put in the Cadbury Schweppes case and consider coordinated actions that would consider the risk of double taxation as well as double non-taxation. However, in the view of VNO-NCW it should be prevented that companies and individuals would be forced in the future to judge themselves whether a measure in the national tax legislation is part of the – carefully considered – national tax policy or not. That would principally question national sovereignty in tax matters. From a practical point of view, it would create significant legal uncertainty and make it impossible for companies and especially companies in the EU to operate their business efficiently, putting these companies at an unacceptable competitive disadvantage compared to companies the world over.

VNO-NCW would in closing like to point out that the principle that tax policy is a national matter can be at odds with attempting to address the problem of double non-taxation through European legislation, since EU legislation on tax issues requires unanimity of the Member States. However, upholding this principle is essential. This means that it would be more effective for national governments to liaise bilaterally to converge their tax policies in order to prevent mismatches that could lead to double non-taxation rather than try to formulate a more targeted EU policy response or good governance rules in the tax area in addition to the series of steps that have already been laid out in the 2009 Communication.

Yours sincerely,

Drs. C. Oudshoorn
Director

[2] Although individuals seem to take a back seat in this consultation paper, we would like to stress that both should be considered equally.