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Staff working paper

The internal market: factual examples of double non-taxation cases

Consultation document

Commission européenne/Europese Commissie, 1049 Bruxelles/Brussel, BELGIQUE/BELGIË - Tel. +32 22991111
Office: SPA3 08/17 - Tel. direct line +32 229-55762

PUBLIC CONSULTATION PAPER

The Internal Market:
Request for contributions on factual examples and possible ways to tackle double non-taxation cases

Note:

This document is being circulated for consultation to all interested parties. The sole purpose of this consultation is to contribute to the debate, to collect relevant information and to help the Commission develop its thinking in this area.

This document does not necessarily reflect the views of the European Commission and should not be interpreted as a commitment by the Commission to any official initiative in this area.

Each contribution received will be acknowledged.

All contributions received, including anonymous ones, will be taken into account. Your identity (personal data) and the content of your contribution will only be published on the Internet if you give your specific consent to this by indicating "Yes" in the relevant boxes in the questionnaire. For more detailed information on how your personal data and contribution will be treated, we recommend that you read the specific privacy statement on the consultation website[1].

In the interests of transparency, organisations responding to this consultation are invited to provide the public with relevant information about themselves by registering in the Interest Representative Register and by subscribing to its Code of Conduct

(see https://webgate.ec.europa.eu/transparency/regrin/welcome.do?locale=en).

If the organisation is not registered, its submission will be published separately from those of registered organisations.

[1] [link to the website for this specific consultation]

1. IDENTIFICATION OF THE STAKEHOLDER

The Commission services would be interested in receiving contributions from all interested parties on the issues described below. In order to analyse the responses, it will be useful to group the answers by type of responder.

Question -You could be included in one of the following groups[2]:

□ Multinational enterprise □ Large company

□ Medium small micro sized enterprise (SMEs) □ Academic

□ Non-Governmental organisation (NGO) □ Tax advisor or tax practitioner

□ Others. Please specify _____

Name/denomination of your organization/entity/company _____

Country of domicile_____

Contact details, including e-mail address _____

Brief description of your activity or your sector _____

Do you agree to publication of your personal data?

Yes □ No □

Do you agree to have your response to the consultation published along with other responses?

Yes □ No □

2. Introduction

The Commission is launching this fact-finding public consultation in order to establish evidence concerning double non-taxation within the EU and in relation with Third Countries. Members of the public are encouraged to provide factual examples of cases of double non-taxation on cross-border activities that they have encountered or have knowledge of. Double non-taxation cases encompass cases where there is no taxation of the activities as well as cases where the taxation is extremely low. Double non-taxation cases do not encompass cases where a company is not taxed because the activity is effectively taxed elsewhere, e.g. the exemption of dividends paid to parent companies where there is taxation of the activities in

[2] For the purposes of identification, please check whether your company is a medium, small or microenterprise, according to the Commission Recommendation (2003) 361 of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises; in its annex, Title I, Article 2, SMEs are defined as enterprises which employ fewer than 250 persons and which have an annual turnover not exceeding EUR 50 million, and/or an annual balance sheet total not exceeding EUR 43 million.

the subsidiary, or where a company is not taxed in a profitable year because of losses carried forward form previous years.

The scope of this consultation only includes cases of double non-taxation, i.e. cases where the tax rules of two countries combined lead to non-taxation. The decisions in single member states on how to tax certain types of income received by resident and/or non resident are therefore outside the scope of this consultation as direct taxation generally falls within the competence of the member states although legal measures of approximation is issued for the establishment and functioning of the internal market.

The consultation concerns taxes which companies or other entities pay directly to tax authorities (i.e. "direct taxes") such as corporate income taxes, non-resident income taxes, capital gains taxes, withholding taxes, inheritance taxes and gift taxes.

It is undesirable that in the EU Internal Market a taxpayer is subject to double non-taxation on his/her cross-border activity as this gives the taxpayer a competitive advantage compared to other taxpayers who are subject to ordinary taxation. Our aim is to obtain a better picture of the real problem and, if possible, of its financial impact. You are also invited to provide any suggestions you might have for ways in which the different cases of double non-taxation could be tackled, for instance by legislative approaches, increased information measures or good governance rules.

Legislative approaches (i.e. closing loopholes and stopping mismatches) could be done at different levels. The different levels would be unilateral legislation in the individual Member States, bilaterally between the Member States or on EU level through directives.

Increased information measures could include rules on disclosure to the tax authorities (e.g. early mandatory disclosure of certain tax planning schemes).

Good governance rules could be e.g. soft law agreements between Member States or exchange of good practices.

3. Background

International double taxation is usually defined as the imposition of comparable taxes in two or more States on the same taxpayer in respect of the same subject matter and for identical periods. Its harmful effects have been widely recognized and in particular are mentioned in the first paragraph of the OECD Model Tax Convention.

But also the opposite situation, double non-taxation, has potential harmful effects in terms of fairness of the tax systems and potential distortion of the Internal Market.

In the Annex IV to the Annual Growth Survey 2012, the Commission acknowledged that Member States have to consider revenue-raising measures. Better tax coordination at the EU-level has a role to play in this context.

Therefore, the avoidance of double non-taxation has an enhanced importance in the present Economic Crisis context.

The European Council conclusions of 24 June 2011[3] asked the Commission to ensure the avoidance of harmful practices and proposals to fight tax fraud and tax evasion.

The Commission, in the Communication on Double Taxation in the Single Market[4] stated that in a period when MS are looking for secure and additional tax revenues, it is important for their credibility towards their taxpayers that they take the necessary measures to remove double taxation and double non-taxation.

Moreover, in the Communication, the Commission announced that as regards double non-taxation, it would launch a fact-finding consultation procedure.

The Commission is presenting this consultation to the public in order to gather evidence of double non-taxation within the EU and in relation with Third Countries and of its potential impact on the Internal Market in order to identify and develop the appropriate policy response to double non-taxation.

4. Questions submitted to the public and to interested parties

We have, based on various sources including international tax literature, articles and lectures, identified a number of issues where double non-taxation could occur. These issues are briefly presented below in order to facilitate the consultation. It should however be stressed that we also invite you to describe any other double non-taxation issues (see issue 10 – Other issues?). The list of issues shall not be seen as exhaustive.

Issue 1 – Mismatches of entities

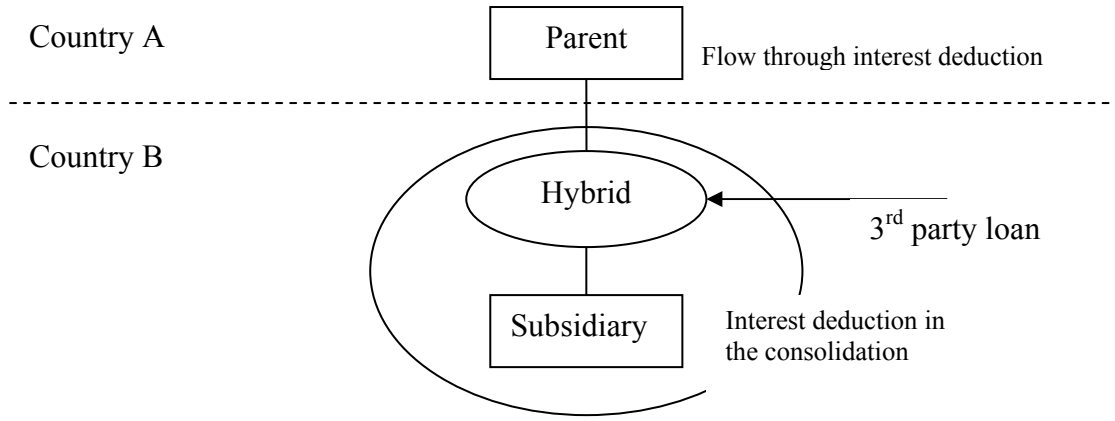
Mismatches of entities occur when entities ('hybrid entities') are treated differently for tax purposes in two jurisdictions (i.e. transparent entity in one jurisdiction and non-transparent in the other).

Assume an enterprise with a parent company in country A and a subsidiary in country B intends to finance an investment by the subsidiary in e.g. machinery or the market introduction of a product. The parent does not have sufficient funds itself so that third-party debt will be used to finance the operation. This debt financing would usually lead to one net financing cost in either country A or country B.

Use of an inserted entity that is treated as transparent in Country A, but is treated as a company in Country B (assuming such an entity can be arranged) could lead to double deduction. If the inserted entity takes up the third-party loan; Country A would give deduction against the parent company' income if Country A applies word-wide income taxation, and Country B would give deduction against the income of the subsidiary if it has some form of consolidation or group loss offset possible.

[3] http://register.consilium.europa.eu/pdf/en/11/st00/st00023.en11.pdf

[4] COM(2011)712 final



The outcome of this mismatch in entity qualification is that tax deductible expenses (in this example interest expense) can be deducted in both countries when the 'real' expense is only incurred once.

Double non-taxation can also occur if the mismatch of the hybrid entity is the reverse (i.e. the hybrid entity is seen as an entity in the country of the owners (country A), but seen as transparent by the country where the hybrid entity is located (country B)). In these cases income of the hybrid entity can be excluded from taxation in both countries. If Country A exempt income like dividends and capital gains from shares; it will not tax the income as the income is seen as income of an entity resident in country B. Country B will not tax either unless the activities in the country B qualify as a permanent establishment for the owners in country B.

Question A – Do you find such mismatches of entities relevant in the future discussions on double non-taxation?

Yes □ No □ Do not know □

Questions B – Are you aware of mismatches of entities between member states or towards third countries?

Yes □ No □ Do not know □

Question C - Please give relevant details about these mismatches of entities *(max 500 words)?*

Question D – Please provide any suggestions you might have for ways in which these mismatches of entities could be tackled *(max 500 words)*.

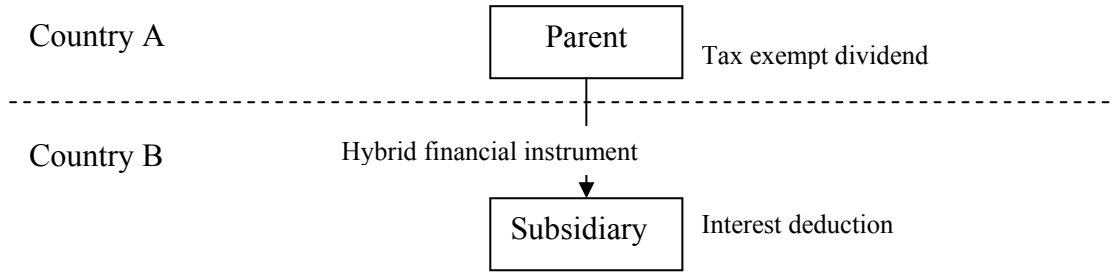
Issue 2 - Mismatches of financial instruments

There are financial instruments that include characteristics of both debt and equity (or seen from the creditor/shareholder: loan and shares). These financial instruments are usually known as hybrid financial instruments and include instruments such as preferred shares and profit participating loans.

Member states will not necessarily qualify these hybrid instruments in the same way. If there is a mismatch in the qualifications of such financial instruments between member states (i.e. as debt in one jurisdiction and as equity in the other), double non-taxation might occur.

Assume an enterprise with a parent company in country A and a subsidiary in country B intends to finance an investment of the subsidiary in e.g. machinery or the market introduction of a product (i.e. the same factual situation as under issue 1) but this time, the parent does have sufficient funds itself and intends to use them for the investment.

The parent company may choose to use of a hybrid financial instrument that is treated as equity in country A, but as debt in country B. When the subsidiary is funded with such an instrument, the subsidiary will have interest deductions in country B while the corresponding income for the parent company in country A will be dividends which in many member states are tax exempt income for parent companies.



The outcome of this mismatch of financial instrument qualification is an interest deduction in one member state without taxation of the corresponding income in another member state.

Question A – Do you find such mismatches of financial instruments relevant in the future discussions on double non-taxation?

Yes □ No □ Do not know □

Questions B – Are you aware of mismatches of financial instruments between member states or towards third countries?

Yes □ No □ Do not know □

Question C - Please give relevant details about these mismatches of financial instruments *(max 500 words)?*

Question D – Please provide any suggestions you might have for ways in which these mismatches of financial instruments could be tackled *(max 500 words)*.

Issue 3 – Application of Double Tax Conventions leading to double non-taxation

Member States have over the years concluded bilateral or multilateral double tax conventions (DTCs) with each other that help to allocate taxing rights between the signatory states and provide relief if double taxation arises.

The application of DTCs (in connection with national legislation in the signatory states) could in some cases lead to double non-taxation.

The commentary to Article 23A of the OECD Model Tax Convention already tackles with one situation of double non-taxation that would arise from a conflict of qualifications of income. In such cases the state of residence is according to the OECD commentary not required to exempt the income when the source state based on its domestic law considers that the provisions of the treaty precludes it from taxing.

This does however not solve all cases of double non-taxation that comes from the application of DTCs. It does for instance not solve cases where the double non-taxation is based on different interpretations of the facts or of the provisions of the treaty. This could for example be cases where the two countries have different interpretations of when electronic commerce will constitute a permanent establishment. This would result in double non-taxation if the state of residence believes there is a permanent establishment (and exempt the income) and the source state believes there isn't a permanent establishment (and therefore does not tax the income).

Question A – Do you find such cases relevant in the future discussions on double non-taxation?

Yes □ No □ Do not know □

Questions B – Are you aware of cases where member states application of double tax conventions lead to double non-taxation?

Yes □ No □ Do not know □

Question C - Please give relevant details about these cases *(max 500 words)?*

Question D – Please provide any suggestions you might have for ways in which this problem could be tackled *(max 500 words)*.

Issue 4 - Transfer pricing and unilateral Advance Pricing Arrangements

An advance pricing arrangement (APA) is an arrangement that determines, in advance of controlled transactions, an appropriate set of criteria for the determination of the transfer pricing for those transactions over a fixed period of time. An APA may be unilateral involving only one tax administration.

In transfer pricing there can be good reasons for issuing unilateral APAs or similar advance agreements concerning transfer pricing although bilateral APAs should be preferred over unilateral APAs. Unilateral arrangements give the taxpayers certainty of the taxation of intra-group transactions in the issuing member state.

APAs may however create double non-taxation. This could e.g. be the case if the member state (Country A) where the associated enterprise is situated is not aware of the APA issued in the other Member State (Country B). If the APA determines that the group may use one transfer pricing method (e.g. the cost plus method) for a controlled transaction, there could be a risk for double non-taxation if Country A believes that the arm's length price should be determined on the basis of another method (e.g. the comparable uncontrolled price method).

The outcome of using different transfer pricing methods could be double non-taxation as well as double taxation. The risk of double taxation can be tackled by using the EU Arbitration Convention[5].

It could be noted that member states with the "Code of Conduct" (Business Taxation) have committed themselves to spontaneously exchange details of concluded unilateral APAs. The Exchange of Information should be made to any other tax administration directly concerned by the unilateral APA and should be done as swiftly as possible after the conclusion of the APA.[6]

Question A – Do you find unilateral advance pricing arrangement relevant in the future discussions on double non-taxation?

Yes □ No □ Do not know □

Questions B – Are you aware of unilateral advance pricing arrangements that could lead to double non-taxation?

Yes □ No □ Do not know □

Question C - Please give relevant details about these unilateral advance pricing arrangements *(max 500 words)?*

Question D – Please provide any suggestions you might have for ways to tackle unilateral advance pricing arrangements leading to double non-taxation *(max 500 words)*.

Issue 5 – Transactions with associated enterprises in countries with no or extremely low taxation

There could be a risk of double non-taxation if member states do not have appropriate rules in place to deal with transactions with associated enterprises in countries with no or low taxation.

These appropriate rules would include transfer pricing rules to ensure arms length conditions between the associated enterprises.

There could also be a risk of double non-taxation if dividend exemption applies to untaxed profits. The aim of the profit distribution exemption between groups of companies is to prevent double taxation of parent companies on the profits of their subsidiaries. The exemption should therefore only apply when the profits of the subsidiary has been (effectively) taxed.

[5] Convention 90/436/EEC on the elimination of double taxation in connection with the adjustment of profits of associated enterprises

[6] Communication 2007/71 on the work of the EU Joint Transfer Pricing Forum in the field of dispute avoidance and resolution procedures and on Guidelines for Advance Pricing Agreements within the EU, paragraph 68.

Similarly there could be a risk of double non-taxation if interest and royalty payments are exempted from withholding tax in cases where the company which is the beneficial owner is not (effectively) taxed. This would create double non-taxation as the payment will be deductible in the EU member state and not (effectively) taxed in the other country.

Question A – Do you find transactions with associated enterprises in no/low tax countries relevant for the future discussions on double non-taxation?

Yes □ No □ Do not know □

Questions B – Are you aware of transactions with associated enterprises in no/low tax countries that could lead to double non-taxation?

Yes □ No □ Do not know □

Question C - Please give relevant details about these kinds of transactions *(max 500 words)?*

Question D – Please provide any suggestions you might have for ways in which these kinds of double non-taxation could be tackled *(max 500 words)*.

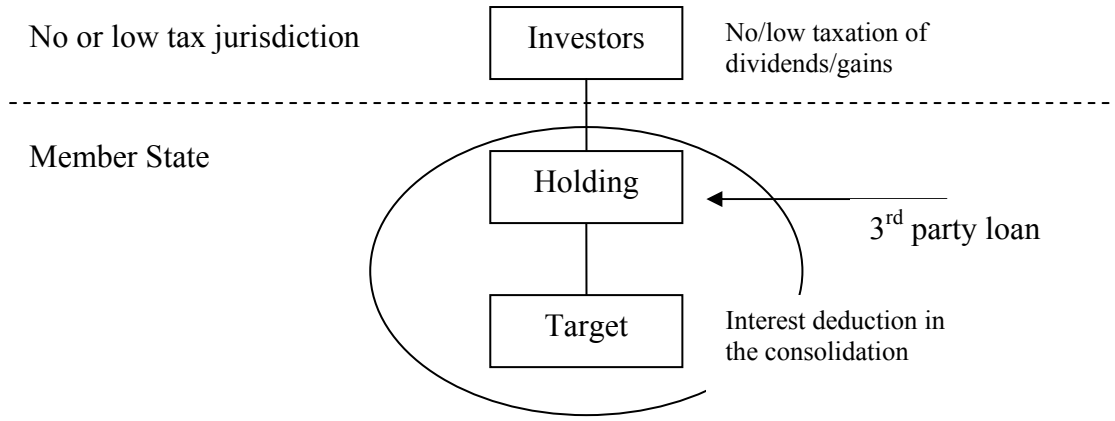
Issue 6 – Debt financing of tax exempt income

Double non-taxation might occur if interest deductions are allowed on debt that finances income that is not (effectively) taxed in any country.

One example of this could be the financing of foreign subsidiaries or permanent establishments in countries with no or low taxation. Many member states apply the principle of territoriality for corporate taxation. This means that income not related to activities in the member state is kept outside the tax base. Dividends and capital gains on shares in subsidiaries are tax exempt and income from permanent establishments in other countries is also tax exempt.

Double non-taxation could incur if full interest deductions are allowed for debt financing of activities in foreign subsidiaries and permanent establishments that are not subject to (effective) taxation. The corresponding income from the shares will be tax free and the underlying activities in the subsidiary or the permanent establishment will only be taxable outside the member state, where it's not (effectively) taxed.

Another example could be cases where foreign investors are allowed to allocate their debt financing in relation to acquisition of target companies through consolidation between the acquiring holding company and the target company (see illustration).



Dividends could flow out of the member state without tax. Furthermore gains on the (direct or indirect) sale of shares in the target company will in most cases not be taxable. The outcome will therefore be double non-taxation as there will be interest deductions inside the member state and no taxation of the corresponding income (the dividend or capital gain) outside the member state.

Question A – Do you find these cases relevant for the future discussions on double non-taxation?

Yes □ No □ Do not know □

Questions B – Are you aware of cases where debt financing of tax exempt income is deductible?

Yes □ No □ Do not know □

Question C - Please give relevant details about these case(s) *(max 500 words)?*

Question D – Please provide any suggestions you might have for ways in which these kinds of double non-taxation could be tackled *(max 500 words)*.

Issue 7 - Different treatment of passive and active income

Some member states apply special tax regimes for passive income such as interests and royalties.

Some of these regimes are justified by technical reasons (i.e. to compensate the inflation depreciation effect) or just by a tax policy choice of a Member State.

Sometimes, however, these regimes may potentially lead to situations of effective double non-taxation.

Double non-taxation might incur in these cases through a combination of the exemption (or extremely low taxation) in the member state with the special regime and the tax rules in another member state. This could for instance be the case if the other member state allow deductions for interest and royalty payments and do not have a withholding tax on the payments. The outcome here would be deductions in one member state and no (effective) taxation in the member state with the special regime.

There could also be a risk of double non-taxation if the other member state apply the principle of territoriality for corporate taxation and therefore exempt income from activities abroad (whether its dividends from subsidiaries, gains on subsidiary shares or income from foreign permanent establishments). The outcome here would (effectively) be a double exemption.

These tax special regimes only apply to passive income and therefore active business activities would be excluded from these double non-taxation schemes.

Question A – Do you find these special regimes relevant for the future discussions on double non-taxation?

Yes □ No □ Do not know □

Questions B – Are you aware of such special regimes leading to double non-taxation?

Yes □ No □ Do not know □

Question C - Please give relevant details about these case(s) *(max 500 words)?*

Question D – Please provide any suggestions you might have for ways in which these kinds of double non-taxation could be tackled *(max 500 words)*.

Issue 8 – Double Tax Conventions with third countries

EU businesses operate in a Global Economic Scenario and therefore situations of potential risk of double non-taxations are not limited to the Internal Market. Schemes of double non-taxation frequently imply the use (or abuse) of Double Tax Conventions (DTCs) with Third Countries.

Some DTC between member states and developing countries contain sparing tax clauses[7] and matching tax clauses[8] that intend to promote genuine economic activities in the developing countries. These clauses can however be misused in some circumstances to achieve double non-taxation beyond the initial intentions.

Most member states also have DTCs with countries that (partly or fully) have no or extremely low taxation. These DTCs can also be used to achieve double non-taxation especially if the member state according to the DTC shall apply the exemption method for elimination of double taxation or if the member state according to the DTC cannot apply any (or only low) withholding tax on dividends, interest and/or royalties.

Other schemes include the combination of two DTCs or one DTC combined with EU legislation to achieve double non-taxation.

[7] The State of residence grants a tax credit taking into account the tax that would have been paid at the State of source in absence of a certain tax incentive.

[8] The State of resident grants a notional tax credit, independently of the effective taxation at the State of source.

On 28th April 2009 the Commission issued a Communication on Promoting Good Governance in Tax Matters[9] to present concrete actions that could be taken to better promote the principles of good governance in the tax area (transparency, exchange of information and fair tax competition)

Having full regard to the principle of subsidiarity, the Communication concluded "there is a need to ensure more coherence between Member States individual positions in the international tax arena, and the good governance principles such as in bilateral tax treaties with third countries".

Future discussions on double non-taxation could take into account the principles of good governance in the tax area.

Question A – Do you find double tax conventions with third countries to be relevant for the future discussions on double non-taxation?

Yes ☐ No ☐ Do not know ☐

Questions B – Are you aware of double tax conventions with third countries that can be used to achieve double non-taxation?

Yes ☐ No ☐ Do not know ☐

Question C - Please give relevant details about these double tax conventions with third countries *(max 500 words)?*

Question D – Please provide any suggestions you might have for ways in which these kinds of double non-taxation could be tackled *(max 500 words)*.

Issue 9 –Disclosure

Double non-taxation can be very difficult to detect in an ordinary tax audit. The availability of the relevant information is crucial for detection of double non-taxation and for policy responses to them.

The OECD published in February 2011 a report on disclosure initiatives to tackle aggressive tax planning[10]. In the report it was concluded (in paragraph 29) that:

> "Disclosure initiatives can help fill the gap between the creation/promotion of aggressive tax planning schemes and their identification by the tax authorities. Mandatory early disclosure rules, for example, have proven to be very effective in providing governments with timely, targeted and comprehensive information on aggressive tax planning schemes, thus allowing timely policy and compliance responses."

[9] COM(2009) 201.

[10] "Tackling aggressive tax planning through improved transparency and disclosure (Report on disclosure initiatives". The report can be found on http://www.oecd.org/dataoecd/13/55/48322860.pdf.

The mandatory early disclosure rules are rules created by some member states which require certain promoters of tax planning schemes to disclose these schemes to the tax administration. Promoters could be e.g. accountants, solicitors, banks and financial institutions. The rules require the promoters to provide the tax administration with information about schemes falling within certain descriptions. The promoter must explain how the scheme is intended to work and must normally do so before making the scheme available to clients.

Other types of disclosure initiatives could be e.g. additional tax reporting obligations, questionnaires, co-operative compliance programmes and rulings.

Question A – Do you agree that targeted disclosure initiatives could be a way to tackle double non-taxation?

Yes □ No □ Do not know □

Question B – Do you have knowledge of the experiences with disclosure rules in member states?

Yes □ No □ Do not know □

Question C – If your answer is yes to A, please specify which disclosure initiatives you believe could be a way to tackle double non-taxation *(max 500 words)*?

Question B - If your answer is yes to B, please specify what the experiences in member states are *(max 500 words)*?

Issue 10 – Other issues?

As written above the list of issues (issues 1-8) shall not be seen as exhaustive. We would therefore also invite you to describe any other double non-taxation issues that you have encountered or that you are aware of.

We would also be interested in suggestions of increased information measures – not being disclosure (issue 9) - you might have for ways to tackle double non-taxation.

It should be recalled that the consultation only concerns taxes which companies and other entities pay directly to the tax authorities (i.e. "direct corporation taxes"). You should therefore only include double non-taxation issues concerning direct corporation taxes.

It should also be recalled that the cases should be cases with double non-taxation of the activities. This does not include cases where there is low taxation in one tax year because of losses carried forward from previous years nor does it include cases where the "non- taxation" in one jurisdiction is matched by a corresponding (effective) taxation in another jurisdiction. The former is a question on the timing while the later is a question of allocation of taxing right – neither of them is a question of double non-taxation.

Question A– Are you aware of double non-taxation not described above?

Yes □ No □ Do not know □

Question B - Please give relevant details about these kinds of double non-taxation case(s) *(max 500 words)?*

Question C – Please provide any suggestions you might have for ways in which these kinds of double non-taxation could be tackled *(max 500 words)*.

Question D - Please provide any other suggestions of increased information measures – not being disclosure - you might have for ways to tackle double non-taxation *(max 500 words)*.

5. Who is consulted?
All interest parties including tax professionals in practice, in business and in academia.

6. How can I contribute?
You are invited to reply to this consultation by completing the questionnaire by sending a response by letter, fax or email within 3 months of the date of publication.

Email: TAXUD-D1-Consultation-DNT@ec.europa.eu
Postal address: European Commission
Directorate-General for Taxation and Customs Union
Rue de Spa 3, Office 8/007
B-1049 Brussels
Belgium
Fax: +32-2-29 56377

7. What will happen next?
At the end of the consultation process the Commission will publish a report summarising the outcome of the consultation on the website of the Taxation and Customs Directorate General (http://ec.europa.eu/taxation_customs/common/consultations/tax/index_en.htm).

In addition, the Commission will analyse carefully analyse the information provided in order to identify and develop the appropriate policy response. The results will be used as input to the Communication on strengthening good governance in the tax area ("tax havens, uncooperative jurisdictions and aggressive tax planning") planned for the 4th quarter of 2012.

8. Any questions?
Please contact: TAXUD-D1-CONSULTATION-DNT@ec.europa.eu or tel. +32 2 29 64846 or +32 2 29 55136 or fax: +32-2-2956377

We hope you will take this opportunity to contribute your views!