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**A7-0243/2014**

24.3.2014

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## **REPORT**

on the proposal for a Council directive amending Directive 2011/96/EU on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States  
(COM(2013)0814 – C7-0464/2013 – 2013/0400(CNS))

Committee on Economic and Monetary Affairs

Rapporteur: Mojca Kleva Kekuš

### ***Symbols for procedures***

- \* Consultation procedure
- \*\*\* Consent procedure
- \*\*\*I Ordinary legislative procedure (first reading)
- \*\*\*II Ordinary legislative procedure (second reading)
- \*\*\*III Ordinary legislative procedure (third reading)

(The type of procedure depends on the legal basis proposed by the draft act.)

### ***Amendments to a draft act***

#### **Amendments by Parliament set out in two columns**

Deletions are indicated in ***bold italics*** in the left-hand column. Replacements are indicated in ***bold italics*** in both columns. New text is indicated in ***bold italics*** in the right-hand column.

The first and second lines of the header of each amendment identify the relevant part of the draft act under consideration. If an amendment pertains to an existing act that the draft act is seeking to amend, the amendment heading includes a third line identifying the existing act and a fourth line identifying the provision in that act that Parliament wishes to amend.

#### **Amendments by Parliament in the form of a consolidated text**

New text is highlighted in ***bold italics***. Deletions are indicated using either the ■ symbol or strikeout. Replacements are indicated by highlighting the new text in ***bold italics*** and by deleting or striking out the text that has been replaced.

By way of exception, purely technical changes made by the drafting departments in preparing the final text are not highlighted.

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## DRAFT EUROPEAN PARLIAMENT LEGISLATIVE RESOLUTION

on the proposal for a Council directive amending Directive 2011/96/EU on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States

(COM(2013)0814 – C7-0464/2013 – 2013/0400(CNS))

(Special legislative procedure – consultation)

*The European Parliament,*

- having regard to the Commission proposal to the Council (COM(2013)0814),
  - having regard to Article 115 of the Treaty on the Functioning of the European Union, pursuant to which the Council consulted Parliament (C7-0464/2013),
  - having regard to Rule 55 of its Rules of Procedure,
  - having regard to the report of the Committee on Economic and Monetary Affairs and the opinion of the Committee on Legal Affairs (A7-0243/2014),
1. Approves the Commission proposal as amended;
  2. Calls on the Commission to alter its proposal accordingly, in accordance with Article 293(2) of the Treaty on the Functioning of the European Union;
  3. Calls on the Council to notify Parliament if it intends to depart from the text approved by Parliament;
  4. Asks the Council to consult Parliament again if it intends to substantially amend the Commission proposal;
  5. Instructs its President to forward its position to the Council, the Commission and the national parliaments.

### Amendment 1

**Proposal for a directive**

**Recital -1 (new)**

*Text proposed by the Commission*

*Amendment*

***(-1) An estimated EUR 1 trillion of potential tax revenue is lost to tax fraud, tax evasion, tax avoidance or aggressive tax planning in the Union every year, representing an approximate cost of EUR***

*2 000 per annum for each Union citizen. It is therefore vital to take appropriate measures against tax fraud and to amend Council Directive 2011/96/EU<sup>1a</sup> in order to ensure that the application of that directive does not prevent effective action against double non-taxation in the area of hybrid loan structures.*

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**<sup>1a</sup> Council Directive 2011/96/EU of 30 November 2011 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States (OJ L 345, 29.12.2011, p. 8).**

## Amendment 2

### Proposal for a directive Recital -1 a (new)

*Text proposed by the Commission*

*Amendment*

*(-1a) The Commission Communication of 6 December 2012 entitled 'An Action Plan to strengthen the fight against tax fraud and tax evasion' identifies tackling mismatches between tax systems as one of the actions to be undertaken in the short term and includes an amendment of Directive 2011/96/EU in order to ensure that the application of the directive does not inadvertently prevent effective action against double non-taxation in the area of hybrid loan structures. The Action Plan also announced a review of anti-abuse provisions in the corporate tax directives, including Directive 2011/96/EU, with a view to implement the principles underlying the Commission Recommendation of 6 December 2012 on aggressive tax-planning. In its resolution of 21 May 2013 on Fight against Tax Fraud, Tax Evasion and Tax Havens, the European Parliament called on the Commission to put forward a proposal in 2013 to amend Directive 2011/96/EU with*

*a view to revising the anti-abuse provision and eliminating double non-taxation, as facilitated by hybrid entities and financial instruments in the Union.*

### **Amendment 3**

#### **Proposal for a directive**

##### **Recital 2**

*Text proposed by the Commission*

(2) The benefits of Directive 2011/96/EU should not lead to situations of double non-taxation and, therefore, generate unintended tax benefits for groups of parent companies and subsidiaries of different Member States in comparison with groups of companies of the same Member State.

*Amendment*

(2) The benefits of Directive 2011/96/EU should not lead to situations of double non-taxation **or extreme forms of undertaxation** and, therefore, generate unintended tax benefits for groups of parent companies and subsidiaries of different Member States in comparison with groups of companies of the same Member State.

### **Amendment 4**

#### **Proposal for a directive**

##### **Recital 4**

*Text proposed by the Commission*

(4) In order to prevent tax avoidance and abuse through artificial arrangements, a common anti-abuse provision tailored to the purpose and objectives of Directive 2011/96/EU should be inserted.

*Amendment*

(4) In order to prevent tax avoidance and abuse through artificial arrangements, a common, **compulsory** anti-abuse provision tailored to the purpose and objectives of Directive 2011/96/EU should be inserted.

### **Amendment 5**

#### **Proposal for a directive**

##### **Recital 5**

*Text proposed by the Commission*

(5) It is necessary to ensure that this Directive does not preclude the application of domestic or agreement-based provisions required for the prevention of tax evasion.

*Amendment*

(5) It is necessary to ensure that this Directive does not preclude the application of domestic or agreement-based provisions required for the prevention of tax evasion,

*in so far as they are compatible with this Directive.*

## **Amendment 6**

### **Proposal for a directive**

#### **Article 1 – point 1**

Directive 2011/96/EU

Article 1 – paragraph 2

*Text proposed by the Commission*

2. This Directive shall not preclude the application of domestic or agreement-based provisions required *for the prevention* of tax evasion.

*Amendment*

2. This Directive shall not preclude the application of domestic or agreement-based provisions required *in order to prevent tax evasion or to permit the taxation of activities at the place of production or consumption, in so far as they are compatible with this Directive.*

## **Amendment 7**

### **Proposal for a directive**

#### **Article 1 – point 2**

Directive 2011/96/EU

Article 1a – paragraph 1

*Text proposed by the Commission*

1. Member States shall withdraw the benefit of this directive in the case of an artificial arrangement or an artificial series of arrangements which has been put into place for the *essential* purpose of obtaining an improper tax advantage under this directive and which defeats the object, spirit and purpose of the tax provisions invoked.

*Amendment*

1. Member States shall withdraw the benefit of this directive in the case of an artificial arrangement or an artificial series of arrangements which has been put into place for the purpose of obtaining an improper tax advantage under this directive and which defeats the object, spirit and purpose of the tax provisions invoked.

## **Amendment 8**

### **Proposal for a directive**

#### **Article 1 – point 2**

Directive 2011/96/EU

Article 1 a – paragraph 2 – subparagraph 2

*Text proposed by the Commission*

In determining whether an arrangement or series of arrangements is artificial, Member States shall ascertain, in particular, whether they involve one or more of the following situations:

**Amendment 9**

**Proposal for a directive**

**Article 1 – point 2 a (new)**

Directive 2011/96/EU

Article 3 – paragraph 2 – point a

*Present text*

(a) **replacing**, by means of bilateral agreement, the criterion of a holding in the capital by that of a holding of voting rights;

**Amendment 10**

**Proposal for a directive**

**Article 1 – point 2 b (new)**

Directive 2011/96/EU

Article 3 – paragraph 2 – point b

*Text proposed by the Commission*

**Amendment 11**

**Proposal for a directive**

**Article 1 a (new)**

*Text proposed by the Commission*

*Amendment*

In determining whether an arrangement or series of arrangements is artificial, Member States shall ascertain, in particular, **but not exclusively**, whether they involve one or more of the following situations:

*Amendment*

**2a. In Article 3(2), point (a) is replaced by the following:**

"(a) **adding**, by means of bilateral agreement, the criterion of a holding in the capital by that of a holding of voting rights;"

*Amendment*

**2b. In Article 3(2), point (b) is deleted.**

*Amendment*

**Article 1a**

**Review**

**By 31 December 2016, the Commission**

*shall report to the European Parliament and the Council reviewing the operation of this Directive and in particular its effectiveness in preventing tax avoidance and abuse.*

*The report shall be submitted together with a legislative proposal, if appropriate.*

## **Amendment 12**

### **Proposal for a directive**

#### **Article 3 – paragraph 1**

*Text proposed by the Commission*

This Directive shall enter into force on the twentieth day following that of its publication in the Official Journal of the European Union.

*Amendment*

This Directive shall enter into force on the twentieth day following that of its publication in the Official Journal of the European Union. ***It shall be published in consolidated form with the Directive which it amends within three months of its publication.***

## EXPLANATORY STATEMENT

It is not only a moral imperative to ensure fairness in taxation among all income classes; it is also of utmost economic sense to ensure that imposed taxes are collected and used to their full capacity. Additional revenues for the Member States – without any new taxes – would allow for new investment in job creation, growth programmes and infrastructure. At the time when Europe is still dealing with the consequences of the crisis, we cannot afford not to act.

In the on-going effort of the EU to close the existing tax loopholes generated by exploiting the differences in the national tax systems of the Member States, double non-taxation as well as extreme forms of under-taxation, deprive Member States of significant revenues and foster unfair competition between businesses operating in the Single Market. It is for reasons of fairness and transparency as well as competition and economic efficiency that the EU must do its utmost to ensure its tax gap to be closed promptly.

The European Parliament has been very vocal in the debate on tax fairness and the fight against tax fraud, tax evasion, tax avoidance, aggressive tax planning and tax havens. In the EP motion for resolution from 21 May 2013 (201372060(INI)), we have specifically called on the Commission to address the problem of hybrid mismatches between the different tax systems used in Member States as well as to present a proposal for the revision of the PSD with a view to revise the anti-abuse clause and to eliminate double non-taxation in the EU as facilitated by hybrid arrangements.

The proposed changes introduced by the Commission are therefore welcomed and supported by your Rapporteur. The current proposal seeks to tackle hybrid financial mismatches within the scope of application of the PSD and introduces a general anti-abuse rule to strengthen the functioning of the PSD.

### **1. Hybrid mismatches**

Hybrid loan arrangements are financial instruments with characteristics of both debt and equity. Currently Member States apply different tax qualifications to hybrid loans (either debt or equity), which causes payments under a cross border hybrid loan to be treated as a tax deductible expense in one Member State (where the loan was paid) and as a tax exempt distribution of profits in the other Member States (where payment was received). This leads to a harmful situation of double non-taxation. The solution proposed by the Code of Conduct Group in 2010, guiding Member States to follow tax qualifications given to hybrid loan payments by the source Member State (with no tax exemption granted to hybrid loan payments that are deductible in the source Member State), has been the right way forward. However, for this solution to be fully implemented the provision in the PSD, obliging Member States to exempt from taxation profit distributions received by parent companies from subsidiaries of another Member States, needs to be amended and eliminated.

## **2. General anti-abuse rule (GAAR)**

Following up the non-obligatory nature of Commission's Recommendation on aggressive tax planning (COM(2012)8806), your Rapporteur warmly welcomes the newly introduced, obligatory element of a general anti-abuse rule to be added to the PSD. The inclusion of such a comprehensive and compulsory GAAR would remove any legal uncertainties and improve the efficiency of measures taken to counter international tax avoidance and aggressive tax planning while enhancing coordinated actions by Member States. The Parliament has long been advocating to put a stop to "directive-shopping", where companies seek to invest through intermediaries in Member States where the anti-abuse provisions are less stringent or where there is no rule; therefore your Rapporteur strongly supports the introduction of an obligatory rule under which all Member States will have to ignore any tax benefits arising from artificial arrangements or those lacking commercial substance and not reflecting economic reality.

## **3. Status of parent company and harmonization of statutory corporate tax rate**

Your Rapporteur, additionally to amending Articles 1 and 4 of PSD, further proposes the strengthening of the definition of a parent company, where an extra extension of time and the share of minimal capital to be held in another Member State by a parent company will prohibit multinational companies from benefitting illicitly and distorting competition. For similar reasons of putting a stop to tax dumping and rather contributing to the creation of a tax harmonization in the Single Market, your Rapporteur introduces proposals, already supported by this Parliament in 2011, for the statutory corporate tax rate of a Member State not being lower than 75% of the average statutory corporate tax rate applicable in all Member States.

*With corporate base erosion being high on the international political agenda, it is of utmost importance that the EU takes the lead in ensuring that multinational corporate businesses start proportionally contributing to the tax systems and puts a stop to complicated, unfair and unprincipled aggressive tax avoidance schemes of multinationals that serve no other purpose but to avoid paying a fair share of taxes in times when taxpayers throughout Europe have been pressed to contribute their share.*

12.2.2014

## **OPINION OF THE COMMITTEE ON LEGAL AFFAIRS**

for the Committee on Economic and Monetary Affairs

on the proposal for a Council directive amending Directive 2011/96/EU on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States  
(COM(2013)0814 – C7-0464/2013 – 2013/0400(CNS))

Rapporteur: Lidia Joanna Geringer de Oedenberg

### **SHORT JUSTIFICATION**

Your rapporteur for opinion welcomes the Commission proposal for amending the Parent-Subsidiary Directive as it is crucial to close existing loopholes in this Directive.

Your rapporteur recalls that an estimated EUR 1 trillion in public money is lost due to tax fraud and tax avoidance every year in the EU<sup>1</sup>. This alarming size of the tax gap represents a rough yearly cost of EUR 2000 for every European citizen. The average of the tax lost in Europe today exceeds the total amount that Member States spend on healthcare, and it amounts to more than four times the amount spent on education in the EU.

The current tax gap in Europe represents not only an alarming loss of public revenue but also a danger for the safeguarding of the EU social model based on quality public services available to all. It is a threat to the proper functioning of the Single Market and a dent to the efficiency and fairness of tax systems within the EU. The loss of revenues continues to increase the deficit and debt levels in the Member States right at the most crucial time of fighting the crisis. Due to tax fraud and tax avoidance, funds available to foster public investment, growth and employment are waning.

Against this background, it is most timely and welcome that the Commission takes the initiative to tackle certain cases of double non-taxation concerning certain financial hybrid mismatches.

Your rapporteur has proposed, in her draft opinion, a number of amendments with a view to better illustrating, reinforcing and clarifying the text proposed by the Commission.

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<sup>1</sup> European Parliament resolution of 21 May 2013 on Fight against Tax Fraud, Tax Evasion and Tax Havens, P7\_TA(2013)0205.

## AMENDMENTS

The Committee on Legal Affairs calls on the Committee on Economic and Monetary Affairs, as the committee responsible, to take into account the following amendments:

### Amendment 1

#### Proposal for a directive

##### Recital -1 (new)

*Text proposed by the Commission*

*Amendment*

***(-1) An estimated EUR 1 trillion of potential tax revenue is lost to tax fraud, tax evasion, tax avoidance and aggressive tax planning every year in the EU, representing an approximate cost of EUR 2000 for European citizen each year. It is therefore vital to take appropriate measures against tax fraud and to introduce a legislative amendment to Council Directive 2011/96/EU to ensure that the application of the directive does not prevent effective action against double non-taxation in the area of hybrid loan structures.***

### Amendment 2

#### Proposal for a directive

##### Recital -1 a (new)

*Text proposed by the Commission*

*Amendment*

***(-1a) The Action Plan to strengthen the fight against tax fraud and tax evasion adopted by the Commission on 6 December 2012<sup>1a</sup> identifies tackling mismatches between tax systems as one of the actions to be undertaken in the short term and includes a legislative amendment of Council Directive 2011/96/EU in order to ensure that the application of the directive does not inadvertently prevent effective action against double non-taxation in the area***

*of hybrid loan structures. The Action Plan also announced a review of anti-abuse provisions in the corporate tax directives, including Directive 2011/96/EU, with a view to implement the principles underlying the Commission Recommendation on aggressive tax-planning<sup>1b</sup>. In its resolution of 21 May 2013 on Fight against Tax Fraud, Tax Evasion and Tax Havens<sup>1c</sup>, the European Parliament called on the Commission to present in 2013 a proposal for the revision of the Parent-Subsidiary Directive with a view to revise the anti-abuse clause and to eliminate double non-taxation as facilitated by hybrid entities and financial instruments in the EU.*

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<sup>1a</sup> COM(2012)0722.

<sup>1b</sup> C(2012)8806.

<sup>1c</sup> P7\_TA(2013)0205.

### Amendment 3

#### Proposal for a directive Recital 3

##### *Text proposed by the Commission*

(3) For the purpose of avoiding situations of double non-taxation deriving from mismatches in the tax treatment of profit distributions between Member States, the Member State of the parent company and the Member State of its permanent establishment should not allow those companies to benefit from the tax exemption applied to received distributed profits, to the extent that such profits are deductible by the subsidiary of the parent company.

##### *Amendment*

(3) For the purpose of avoiding situations of double non-taxation deriving from mismatches in the tax treatment of profit distributions between Member States, the Member State of the parent company and the Member State of its permanent establishment should not allow those companies to benefit from the tax exemption applied to received distributed profits, to the extent that such profits are deductible by the subsidiary of the parent company. ***The Member State of the parent company and the Member States of its permanent establishment should tax the portion of profits that is deductible by the***

*subsidiary of the parent company.*

#### **Amendment 4**

##### **Proposal for a directive**

##### **Article 1 – point 3**

Directive 2011/96/EU

Article 4 – paragraph 1 – point a

*Text proposed by the Commission*

"(a) refrain from taxing such profits to the extent that such profits are not deductible by the subsidiary of the parent company; or"

*Amendment*

"(a) refrain from taxing such profits, **but only** to the extent that such profits are not deductible by the subsidiary of the parent company; or"

#### **Amendment 5**

##### **Proposal for a directive**

##### **Article 1a (new)**

*Text proposed by the Commission*

*Amendment*

##### **Article 1a**

##### **Review**

***Two years after the transposition date of this Directive, the Commission shall report to the European Parliament and the Council reviewing the operation of this Directive and in particular its effectiveness in preventing tax avoidance and abuse.***

***The report shall be submitted together with a legislative proposal, if appropriate.***

## PROCEDURE

<b>Title</b>	Common system of taxation applicable in the case of parent companies and subsidiaries of different Member States
<b>References</b>	COM(2013)0814 – C7-0464/2013 – 2013/0400(CNS)
<b>Committee responsible</b> Date announced in plenary	ECON 13.1.2014
<b>Opinion by</b> Date announced in plenary	JURI 13.1.2014
<b>Rapporteur</b> Date appointed	Lidia Joanna Geringer de Oedenberg 16.12.2013
<b>Discussed in committee</b>	21.1.2014
<b>Date adopted</b>	11.2.2014
<b>Result of final vote</b>	+: 22 -: 1 0: 0
<b>Members present for the final vote</b>	Raffaele Baldassarre, Sebastian Valentin Bodu, Françoise Castex, Christian Engström, Marielle Gallo, Giuseppe Gargani, Lidia Joanna Geringer de Oedenberg, Sajjad Karim, Klaus-Heiner Lehne, Antonio López-Istúriz White, Antonio Masip Hidalgo, Alajos Mészáros, Bernhard Rapkay, Evelyn Regner, Francesco Enrico Speroni, Alexandra Thein, Cecilia Wikström, Tadeusz Zwiefka
<b>Substitute(s) present for the final vote</b>	Eva Lichtenberger, Angelika Niebler, József Szájer, Axel Voss
Substitute(s) under Rule 187(2) present for the final vote	Sylvie Guillaume, Jan Mulder, Jaroslav Paška

## PROCEDURE

<b>Title</b>	Common system of taxation applicable in the case of parent companies and subsidiaries of different Member States	
<b>References</b>	COM(2013)0814 – C7-0464/2013 – 2013/0400(CNS)	
<b>Date of consulting Parliament</b>	16.12.2013	
<b>Committee responsible</b> Date announced in plenary	ECON 13.1.2014	
<b>Committee(s) asked for opinion(s)</b> Date announced in plenary	JURI 13.1.2014	
<b>Rapporteur(s)</b> Date appointed	Mojca Kleva Kekuš 10.12.2013	
<b>Discussed in committee</b>	17.2.2014	18.3.2014
<b>Date adopted</b>	18.3.2014	
<b>Result of final vote</b>	+: 35	-: 1
	0: 5	
<b>Members present for the final vote</b>	Marino Baldini, Burkhard Balz, Jean-Paul Basset, George Sabin Cutaş, Rachida Dati, Leonardo Domenici, Derk Jan Eppink, Elisa Ferreira, Ildikó Gáll-Pelcz, Jean-Paul Gauzès, Sven Giegold, Sylvie Goulard, Liem Hoang Ngoc, Gunnar Hökmark, Syed Kamall, Wolf Klinz, Jürgen Klute, Philippe Lamberts, Werner Langen, Ivana Maletić, Arlene McCarthy, Marlene Mizzi, Sławomir Nitrás, Ivari Padar, Anni Podimata, Antolín Sánchez Presedo, Peter Simon, Theodor Dumitru Stolojan, Sampo Terho, Marianne Thyssen, Ramon Tremosa i Balcells, Corien Wortmann-Kool, Pablo Zalba Bidegain	
<b>Substitute(s) present for the final vote</b>	Lajos Bokros, Sari Essayah, Ashley Fox, Robert Goebbels, Anne E. Jensen, Olle Ludvigsson, Petru Constantin Luhan, Nils Torvalds	
<b>Date tabled</b>	24.3.2014	