

Luxembourg Tax Alert

Amendments to the Parent-Subsidiaries Directive

The European common system to prevent double taxation of dividends distributed by European subsidiaries to their European parent company (hereafter “Parent-Subsidiaries Directive”) was set up two decades ago.

Since 2009, there have been discussions and recommendations on a European level about the double non taxation situations (i.e. situations where income is not taxed anywhere) resulting from the application of the Parent-Subsidiaries Directive.

In line with its recommendations on Aggressive Tax planning and following the timing of its action plan to strengthen the fight against tax fraud and tax evasion published in December 2012, the European Commission proposed on 25 November 2013 to amend the Parent-Subsidiaries Directive in respect of two aspects:

- A common anti-abuse rule;
- Hybrid loan mismatches between the European parent company and its European subsidiaries (where payments are treated as deductible expense in the source Member State and as a tax exempt dividend in the recipient Member State).

After various discussions between the European Member States, they amended the initially proposed wordings in order to clarify them and reached an agreement on both provisions.

On 20 June 2014, the European Member States reached an agreement to prevent the double non-taxation of corporate groups deriving from hybrid loan arrangements¹.

Following official European Statement²: “This will close a loophole that currently allows corporate groups to exploit mismatches between national tax rules so as to avoid paying taxes on some types of profits distributed within the group. The amendment to the parent-subsidiary directive will prevent double non-taxation by providing that the member state of the parent company would only refrain from taxing profits from the subsidiary to the extent that such profits are not deductible by the latter”.

On 9 December 2014, the European Member States agreed on a common anti-abuse clause provision³.

Following the recitals of this amendment, the inclusion of a common minimum anti-abuse rule would be very helpful to prevent misuses of the Parent-Subsidiaries Directive and to ensure a greater consistency in its application in different Member States. The application of anti-abuse rules should be proportionate and should serve the specific purpose of tackling an arrangement or a series of arrangements that are not genuine, that is which do not reflect economic reality. To this end, when assessing whether an arrangement or a series of arrangements are abusive, Member States’ tax administrations should undertake an objective analysis of all relevant facts and circumstances.

This anti-abuse provision will certainly be used by tax authorities to tackle intermediate companies with no substance that might have been inserted into corporate structures to benefit from the Parent- subsidiaries Directive for the purposes of avoiding withholding tax on dividend distributions or obtaining exemption on dividends received.

It is advisable to carry out a review of the specific facts and circumstances of each transaction to evaluate whether they would comply with this new tax framework.

The European Member States will have to transpose both amendments into their respective national laws. In Luxembourg, both amendments would be applicable as from 1er January 2016.

¹The agreed wording of the hybrid loan mismatches measure is as follows: Article 4(1), point (a): *Where a parent company or its permanent establishment, by virtue of the association of the parent company with its subsidiary, receives distributed profits, the Member State of the parent company and the Member State of its permanent establishment shall, except when the subsidiary is liquidated, either refrain from taxing such profits to the extent that such profits are not deductible by the subsidiary, and tax such profits to the extent that such profits are deductible by the subsidiary*"

²Council of the European Union, Press release, 3324th Council meeting, Economic and Financial Affairs, 20 June 2014, page 8

³The agreed wording of the common anti-abuse measure is as follows. "In Article 1, paragraph 2 is replaced by the following paragraphs:

"2. Member States shall not grant the benefits of this Directive to an arrangement or a series of arrangements that, having been put into place for the main purpose or one of the main purposes of obtaining a tax advantage which defeats the object or purpose of this Directive, are not genuine having regard to all relevant facts and circumstances.

An arrangement may comprise more than one step or part.

3. For the purposes of paragraph 2, an arrangement or a series of arrangements shall be regarded as not genuine to the extent that they are not put into place for valid commercial reasons which reflect economic reality.

4. This Directive shall not preclude the application of domestic or agreement-based provisions required for the prevention of tax evasion, tax fraud or abuse."

Your contacts

Raymond Krawczykowski
Partner | Tax Leader
Tel/Direct: +352 451 452 500
rkrawczykowski@deloitte.lu

François Guilloteau
Partner | Cross-Border Tax
Tel/Direct: +352 451 452 577
fguilloteau@deloitte.lu

Christelle Larcher
Senior Manager | Cross-Border Tax
Tel/Direct: +352 451 452 976
clarcher@deloitte.lu

Deloitte Luxembourg
560, rue de Neudorf
L-2220 Luxembourg

Tel: +352 451 451
Fax: +352 451 452 401
www.deloitte.lu

Deloitte is a multidisciplinary service organisation which is subject to certain regulatory and professional restrictions on the types of services we can provide to our clients, particularly where an audit relationship exists, as independence issues and other conflicts of interest may arise. Any services we commit to deliver to you will comply fully with applicable restrictions.

Due to the constant changes and amendments to Luxembourg legislation, Deloitte cannot assume any liability for the content of this leaflet. It shall only serve as general information and shall not replace the need to consult your Deloitte advisor.

About Deloitte Touche Tohmatsu Limited:

Deloitte refers to one or more of Deloitte Touche Tohmatsu Limited, a UK private company limited by guarantee, and its network of member firms, each of which is a legally separate and independent entity. Please see www.deloitte.com/lu/about for a detailed description of the legal structure of Deloitte Touche Tohmatsu Limited and its member firms.

Deloitte provides audit, tax, consulting and financial advisory services to public and private clients spanning multiple industries. With a globally connected network of member firms in more than 150 countries, Deloitte brings world-class capabilities and deep local expertise to help clients succeed wherever they operate. Deloitte has in the region of 200,000 professionals, all committed to becoming the standard of excellence.

© 2014 Deloitte General Services

Designed and produced by MarCom at Deloitte Luxembourg