

Opinion of the European Economic and Social Committee 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) 814 final — 2013/0400 (CNS)

(2014/C 226/07)

Rapporteur: **Mr DANDEA**

On 16 December 2013, the Council of the European Union decided to consult the European Economic and Social Committee, under Article 115 of the Treaty on the Functioning of the European Union, 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) 814 final — 2013/0400 (CNS).

The Section for Economic and Monetary Union and Economic and Social Cohesion, which was responsible for preparing the Committee’s work on the subject, adopted its opinion on 13 March 2014 (rapporteur: Mr Dandea).

At its 497th plenary session, held on 25 and 26 March 2014 (meeting of 25 March), the European Economic and Social Committee adopted the following opinion by 145 votes to 3, with 10 abstentions.

1. Conclusions and recommendations

1.1 The Committee welcomes the proposal for a directive ⁽¹⁾ amending Directive 2011/96/EU on the common system of taxation applicable in the case of parent companies and subsidiaries (Parent-Subsidiary Directive), and considers that it is a major step forward in implementing the action plan to strengthen the fight against tax fraud and tax evasion ⁽²⁾.

1.2 Considering that every year the Member States lose billions of euros as a result of tax fraud and tax evasion, as well as aggressive tax planning which generally involves speculation on gaps and inconsistencies between national legislation, the Committee can only endorse the Commission proposal aiming to implement the general anti-abuse rule (GAAR) provided for in its recommendation ⁽³⁾.

1.3 The Committee supports the equal treatment of cross-border groups with regard to taxation of profits, as it is known that in some circumstances the provisions of the current directive give these groups scope to use hybrid financial instruments enabling them to obtain tax advantages which undermine competition within the single market.

1.4 As the GAAR is very broad, the Committee recommends that when implementing this directive, Member States take account of the Commission’s recommendation on aggressive tax planning as well as the interpretation of the European Court of Justice establishing the principle whereby when combating abusive commercial practices the general principle of EU law must not be exceeded. The Committee recommends that the Commission draw up a recommendation which will help the Member States ensure that the transposition of the directive is legally correct.

1.5 The Committee asks that during the transposition process, the Member States should adhere to a very clear legal definition of the concepts set out in Article 1a(2) in order to ensure that the directive is implemented correctly, without creating complicated situations for businesses and tax administrations. Phrases such as ‘artificial transaction’, ‘reasonable business conduct’ or transactions which are ‘circular in nature’ therefore need to be transposed into clear legal language in order to avoid creating implementation problems for businesses, tax administrations or the legal system.

⁽¹⁾ COM(2013) 814 final.

⁽²⁾ COM(2012) 722 final.

⁽³⁾ C(2012) 8806 final.

2. The Commission proposal

2.1 The Commission proposal aims to tackle the inconsistencies between national legislation as regards hybrid financial instruments within the remit of the Parent-Subsidiary Directive and to introduce a general anti-abuse rule in order to safeguard the functioning of the directive.

2.2 The proposal for a directive is based on Article 115 of the Treaty on the Functioning of the European Union, whereby the Council may issue directives for the approximation of the laws, regulations or administrative provisions of the Member States which directly affect the functioning of the internal market, as the Commission considers that this is the only means of implementing the GAAR.

2.3 The proposal is needed as individual action on the part of Member States in response to inconsistencies between hybrid financial instruments would not solve the problem which is largely the result of interaction between national legislation.

2.4 Although the Parent-Subsidiary Directive contains an anti-abuse clause, it is not sufficiently clear and could give rise to confusion. The inclusion of a GAAR, in accordance with the Commission recommendation, will do away with this lack of clarity and provide Member States with a more effective instrument.

3. General and specific comments

3.1 The Committee has endorsed ⁽⁴⁾ this amendment to the Parent-Subsidiary Directive and called on the Member States to ensure that the implementation process takes place within a reasonable timeframe.

3.2 The Committee has said that, as part of this review, it is important to introduce an obligation for multinational companies to draw up separate accounts for each country in which they operate, specifying production volumes and profits made. If accounts were presented in this way, it would be easier to identify companies misusing transfer pricing or pursuing aggressive tax planning. Moreover, the Committee has recommended introducing legislation on the taxation of corporate profits, based on a set of common rules. The Committee regrets that these aspects were not given sufficient weight when this proposal for a directive was drawn up.

3.3 The Committee recommends that the Commission provide the Member States with support when they implement this directive. To this end, the Commission should present a recommendation clarifying issues related to the transposition into legal terms of the concepts set out in the GAAR.

3.4 The Committee points out that implementing the directive using very broad definitions could create extremely difficult situations for businesses and tax administrations.

3.5 With regard to the implementation of Article 1a(2), a clear definition of the concept of 'artificial transaction' is needed. The Committee accordingly recommends that Member States make use of the OECD Guide ⁽⁵⁾, particularly the provisions on corporate restructuring. The Committee also recommends drawing on European Court of Justice case-law with regard to 'wholly artificial arrangements'. A transaction may be carried out in the most advantageous way possible for tax purposes without automatically constituting an artificial transaction.

3.6 With regard to the implementation of Article 1a(2)(b), the Committee considers that there is a need for a clear definition of the concept of 'reasonable business conduct'. Incorporating this expression into national legislation without any clear definition thereof will create complicated legal situations, with disputes centring on business conduct.

3.7 The Committee considers that with a view to implementation, it is necessary to clarify aspects relating to transactions which are 'circular in nature'. Circular transactions which have economic substance and comply with legal requirements are part of normal commercial practices. Such transactions should not come under the tax measures used to transpose this directive.

⁽⁴⁾ OJ C 67, 6.3.2014, p. 68.

⁽⁵⁾ OECD Model Tax Convention, Chapter C5, Articles 9181 and 9182.

3.8 The Committee recommends that the Member States should grasp the opportunity inherent in the transposition of this directive to simplify their national legislation on taxation of profits. This could be the first step towards EU-wide harmonisation of legislation in this area.

Brussels, 25 March 2014.

The President
of the European Economic and Social Committee
Henri MALOSSE
