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BUSINESSEUROPE position on the EU Commission's communication on the application of anti-abuse measures in the area of direct taxation

THE EUROPEAN COMMISSION'S COMMUNICATION ON THE APPLICATION OF ANTI-ABUSE MEASURES IN THE AREA OF DIRECT TAXATION – WITHIN THE EU AND IN RELATION TO THIRD COUNTRIES

On December 10, 2007, the European Commission (the Commission) launched a Communication on the application of anti-abuse measures in the area of direct taxation. The BUSINESSEUROPE Fiscal Affairs Group (FAG) congratulates the Commission to a very constructive Communication which sets a well balanced benchmark for the future work in this important area. We strongly endorse the Commission's general exhortation about the urgent need for Member States to ensure that any measures to combat tax abuse are sound and fair and that they are strictly aligned with the concept of wholly artificial arrangements as carved out by the European Court of Justice (ECJ).

The BUSINESSEUROPE FAG is grateful for this opportunity to comment on the communication and welcomes the Commission's initiative to establish a framework for further discussions in this area.

Key principles

As pointed out by the Commission, cases of tax abuse are exceptional. Whether applied within the EU/EEA or outside, any rules to prevent abusive tax behaviours must be proportional and carefully designed not to impede activities conducted out of sound business reasons.

According to Community law, the notion of tax avoidance within the EU/EEA is strictly limited to wholly artificial arrangements designed to circumvent tax normally due. The ECJ-case law clearly shows that the concept of wholly artificial arrangements shall be interpreted restrictively. As underlined by the Commission, the ECJ has confirmed several factors which do not suffice to constitute artificial arrangements. Most notably, it is legitimate for tax considerations to be a factor in the decision on where to make an establishment or undertake an activity. The view of benefiting from a more favourable tax system is a valid commercial consideration and Member States cannot hinder the exercise of the right of freedom of movement simply because of lower levels of taxation in other Member States.

On this basis, the BUSINESSEUROPE Fiscal Affairs Group strongly support the Commission in its view that any national tax rules aimed at combating tax abuse must be strictly proportionate and only serve the specific purpose of preventing *wholly artificial arrangements*.

The Design and Application of Anti-Abuse Rules

With respect to the design and application of Anti-Abuse Rules, the BUSINESSEUROPE Fiscal Affairs Group:

- Strongly supports the Commission in encouraging Member States to review their anti-avoidance regimes to ensure full compliance with EC-law. The BUSINESSEUROPE Fiscal Affairs Group is happy to provide detailed input in this process to promote the understanding of the practical implications of various tentative solutions.
- Supports the initiative of finding better coordinated anti-abuse measures as many of the current problems arise from the fact that Member States use diverging approaches to tackle the same issues.
- Strongly agrees with the Commission that any adaptation to EC-law must not be conducted by extending measures designed to prevent cross-border tax abuse to include purely domestic situations. Such solutions would be counterproductive to the goal of increased economic efficiency as they would add complexity and increase compliance burdens.
- Recognizes the merits of developing common definitions for abuse and artificial arrangements. In doing so, however, any attempts to define objective factors indicating the perceived existence of a genuine activity must be done with great caution. As a fundamental principle, the taxpayer must be free to decide what resources are necessary to carry out a given business activity. Any rule that (explicitly or implicitly) introduces general assumptions on what resources are required to carry out *bona fide* business activities must be avoided (i.e. no 'form-over-substance').
- Agrees with the Commission that the taxpayer must be given the opportunity, without any undue administrative burden, to provide evidence of any commercial justification for a given establishment. At the same time, anti-abuse rules must clearly not be based on the presumption that an establishment is artificial unless the taxpayer proves otherwise. It must be noted that anti-abuse rules typically are designed to impose a harsher tax treatment on the taxpayer than is normally due. To be proportionate, the primary burden of proof must therefore lie on the tax authority.
- Sees merits of providing sound 'safe harbour'-criteria as a way of promoting simplicity and legal certainty. However, any such 'safe harbour'-rules must not be designed to imply that the lack of certain 'safe harbour'-criteria in the individual case means that an establishment shall be regarded as wholly artificial. As noted above, it must always be up to the taxpayer to decide the resources needed to conduct the relevant business activity and the taxpayer must always be free to provide evidence of commercial justification.

- Regards CFC-rules to be redundant in an EU/EEA context. Short of removing such rules altogether, Member States must act promptly to ensure that they are targeted to wholly artificial arrangements only. As pointed out by the Commission, their scope may also be narrowed by way of exceptions such as acceptable distribution policies, safe harbour activities etc.
- Supports the objective of improving administrative co-operation and sharing best practices that are compatible with EC-law. It is important not only to detect and contain clearly abusive schemes, but also to avoid undue and overlapping administrative burdens.
- Agrees with the Commission that problems related to mismatches should be tackled at source by ensuring a symmetrical tax treatment rather than through complex anti-abuse regimes. The former approach will adhere to the principle of net taxation by preventing not only undue cases of double non-taxation (which is the focus of anti-abuse regimes), but also cases of double taxation. The BUSINESSEUROPE Fiscal Affairs Group would like to underline that mismatches should not be seen as phenomenon primarily referring to abusive tax practices. Most notably, mismatches frequently result in double taxation due to the inability of countries to recognize the tax treatment of each other's entities and legal instruments. Mismatches resulting in temporary or even permanent double taxation are more frequent than mismatches resulting in unintended double non-taxation. Any actions to prevent unintended effects of mismatches should therefore not be conducted with the primary objective of preventing tax abuse, but as a general pursuit to ensure net taxation.
- Strongly supports the view that any assessment by the tax authority must always be made subject to an independent judicial review upon the request of the taxpayer.

Application of anti-abuse rules in relation to third countries

With respect to the application of Anti-Abuse Rules in relation to third countries, the BUSINESSEUROPE Fiscal Affairs Group:

- Believes that the concept of wholly artificial arrangements strikes a sound and proper balance between the objective of combating abuse and the need to avoid undue restrictions to cross-border activities also *vis a vis* third countries.
- Supports the Commission's exhortation that Member States shall seek to improve the coordination of anti-abuse measures in relation to third countries.
- Notes that, although Art. 43 of the EC Treaty does not prevent discriminatory treatment *vis a vis* third countries, most Member States nevertheless have non-discrimination obligations under their Double Tax Treaties which must be adhered to also outside the EU/EEA.
- Agrees with the Commission that where the application of anti-avoidance rules also covers the movement of capital, they would need to comply with Art. 56 of the EC Treaty, and also in relation to third countries, be applied to wholly artificial arrangements only.