Council Directive (EU) 2015/121 of 27 January 2015 amending Directive 2011/96/EU on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States

COUNCIL DIRECTIVE (EU) 2015/121

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

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 115 thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national parliaments,

Having regard to the opinion of the European Parliament[(1)],

Having regard to the opinion of the European Economic and Social Committee[(2)],

Acting in accordance with a special legislative procedure,

Whereas:

(1) Council Directive 2011/96/EU[(3)] exempts dividends and other profit distributions paid by subsidiary companies to their parent companies from withholding taxes and eliminates double taxation of such income at the level of the parent company.

(2) It is necessary to ensure that Directive 2011/96/EU is not abused by taxpayers who fall within the scope of its application.

(3) Some Member States apply domestic or agreement-based provisions aimed at tackling tax evasion, tax fraud or abusive practices in a general or in a specific way.

(4) However, those provisions may have different levels of severity and, in any case, they are designed to reflect the specificities of each Member State's tax system. Moreover, some Member States do not have any domestic or agreement-based provisions for the prevention of abuse.

(5) Therefore, the inclusion of a common minimum anti-abuse rule in Directive 2011/96/EU would be very helpful to prevent misuse of that Directive and to ensure greater consistency in its application in different Member States.

(6) The application of anti-abuse rules should be proportionate and should serve the specific purpose of tackling an arrangement or a series of arrangements which are not genuine, that is, which do not reflect economic reality.

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(7) To that 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.

(8) While Member States should use the anti-abuse clause to tackle arrangements which are, in their entirety, not genuine, there may also be cases where single steps or parts of an arrangement are, on a stand-alone basis, not genuine. Member States should be able to use the anti-abuse clause also to tackle those specific steps or parts, without prejudice to the remaining genuine steps or parts of the arrangement. That would maximise the effectiveness of the anti-abuse clause while guaranteeing its proportionality. The 'to the extent approach' can be effective in cases where the entities concerned, as such, are genuine but where, for example, shares from which the profit distribution arises are not genuinely attributed to a taxpayer that is established in a Member State, that is, if the arrangement based on its legal form transfers the ownership of the shares but its features do not reflect economic reality.

(9) This Directive should not affect in any way Member States' ability to apply their domestic or agreement-based provisions aimed at preventing tax evasion, tax fraud or abuse.

(10) Directive 2011/96/EU should therefore be amended accordingly,

HAS ADOPTED THIS DIRECTIVE:

Article 1

In Directive 2011/96/EU, Article 1(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 which, having been put into place for the main purpose or one of the main purposes of obtaining a tax advantage that 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.

Article 2

1 Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 31 December 2015 at the latest. They shall forthwith communicate to the Commission the text of those provisions.

When Member States adopt those provisions, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. Member States shall determine how such reference is to be made.

2 Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this Directive.