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The Hundred Group
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Tax Committee

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Mr Algirdas Šemeta
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Dear Me Šemeta

Consultation on Double Non-Taxation: "The internal market – Factual examples of double non-taxation cases

We welcome the opportunity to comment on the European Commission's consultation on "The internal market: factual examples of double non-taxation cases", published on 29 February 2012, to gather evidence of double non-taxation within the EU and with Third Countries.

Who we are

The Hundred Group represents the views of the Finance Directors of FTSE 100 and several large UK private companies. Our member companies collectively employ over 7% of the UK workforce and in 2011, paid, or generated, taxes equivalent to 13% of total UK Government receipts. Our overall aim is to promote the competitiveness of the UK for UK businesses, particularly in the areas of tax, reporting, pensions, regulation, capital markets and corporate governance.

Scope of consultation

We understand that the consultation is an information gathering exercise and includes a questionnaire. However, the questionnaire takes a very broad view of double non-taxation i.e. including examples of relatively low taxation in one member state as compared to another, and does not seek the view on the likely impact on EU centric business. There needs to be engagement with all stakeholders (e.g. governments, NGOs, business) to align on a suitable definition of double non taxation as currently it is too broad and the current scope goes beyond the geographical boundaries of the EU.

As such, we do not believe we can usefully respond to the specific questions, and therefore have provided a more generic response to the consultation.

Our Views

Member States have intentionally reserved the right to set their own corporate tax policies and have recognised their economic and geographic differences by setting the 'attractiveness' of their respective tax regimes. The ability of national governments to set

their own internal policies awards them the sovereign right and power to control domestic budgets.

The consultation does not recognise that EU multi national companies (MNCs) embrace tax competition by considering the extant tax regime as a factor in determining in which member state to locate their operations and people. This has been demonstrated and supported in both the FII GLO and the Thin Cap GLO, where it has been generally accepted that tax competition is fair and it is up to the individual Member States to formulate legislation to counter schemes they perceive to be aggressive.

How should double non taxation be dealt with?

The OECD published a document on 5 March 2012 summarising the tax policy issues raised by hybrid arrangements and describes the policy options to address them. The paper focuses on domestic rules which deny benefits in the case of hybrid mismatch arrangements and countries' experiences regarding their application. It makes a number of recommendations focusing on targeted rules denying benefits in the case of certain hybrid mismatch arrangements; continued sharing of relevant intelligence on such arrangements; and introducing or revising disclosure initiatives.

The OECD acknowledges the drawbacks of national implementation of supra-national legislation. It recognises that each country is responsible for taxing its own income/loss and it is entirely their decision if they decide not to assert taxing rights. Further, it does not recommend that a second country collects the tax on income that the first county has decided not to tax. We consider the OECD report to be a balanced assessment of double non taxation and consider that the most pragmatic way to counter such arrangements is through specific domestic rules.

Taking this view, we believe a number of examples included in the consultation are already addressed through existing domestic legislation, double tax treaties, OECD guidelines and through bodies such as JITSIC, for example:

1. Domestic legislation

    - Specific domestic legislation already exists in some countries to deal with hybridity (e.g. the UK).
    - The consultation seems to attack the participation exemption for holding companies which most EU Member States have implemented to remain competitive and to ease administration. Many countries already limit the exemption for dividends derived from passive income along with limitations on interest deductions on the acquisition of subsidiaries which generate exempt dividends.

2. Bi-national and/or Super-national legislation

    - The EU Interest & Royalty Directive and Double Tax Conventions already contain anti avoidance which applies to Member States.
    - The EU Code of Conduct (Business Taxation).
    - The Transfer Pricing regulations and the OECD Transfer Pricing Guidelines sufficiently deal with intercompany transactions conducted on a non-arm's length basis.

3. Whilst greater transparency may be achieved, double tax agreements and JITSIC offer extensive opportunities for territories to be transparent with one another.

Conclusion and Next Steps

In summary, we do not consider that there is a requirement for cross-territory anti avoidance as we believe the infrastructure already exists within most Member States to deal with double non taxation. Where domestic legislation does not exist, it should be left to the individual Member States to consider additional rules with reference to its economic environment.

We are concerned that in an already challenging economic environment, the proposals will create further uncertainty, additional complexity and at worse make it difficult for EU Headquartered MNCs to sustain global competitiveness.

Please feel free to contact me if you wish to discuss the views expressed in this letter.

Yours sincerely

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