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(Resolutions, recommendations and opinions)

RESOLUTIONS

COUNCIL

COUNCIL RESOLUTION

of 8 June 2010

on coordination of the Controlled Foreign Corporation (CFC) and thin capitalisation rules within the European Union

(2010/C 156/01)

THE COUNCIL OF THE EUROPEAN UNION,

RECALLING the communications from the Commission to the Council, the European Parliament and the Economic and Social Committee of 19 December 2006 on coordinating Member States' direct tax systems in the internal market [1] and of 10 December 2007 on the application of anti-abuse measures in the area of direct taxation — within the EU and in relation to third countries [2], and the Council Conclusions on coordinating Member States' direct tax systems in the internal market of 27 March 2007,

ACKNOWLEDGING the need to strike a proper balance between the public interest of combating abuse and protecting the tax bases of Member States and the need to avoid disproportionate restrictions on cross-border activity within the EU,

NOTING that anti-abuse rules may take a variety of forms, such as a general concept of abuse based on legislation or developed in case law or more specific anti-abuse provisions, such as Controlled Foreign Corporation (CFC); noting furthermore that a number of Member States consider that thin capitalisation rules can play a role in preventing abuse; recalling also that anti-abuse rules are envisaged in the EU directives on corporate taxation,

NOTING that the term 'thin capitalisation rules' in this resolution refers to thin capitalisation rules aimed at the prevention of abuse and not to all thin capitalisation rules in general, and considering that thin capitalisation rules which observe the arm's-length principle are capable of preventing tax avoidance, or maintaining the balanced allocation of taxing powers, or both,

CONSIDERING that CFC or thin capitalisation rules may constitute restrictions on the exercise of the Treaty freedoms when they entail a difference in the treatment between objectively comparable domestic and cross-border situations,

RECALLING that it follows from the case law of the Court of Justice of the EU that restrictions on the Treaty freedoms within the EU are capable of being justified by overriding reasons in the public interest, such as the need to prevent tax avoidance and/or the need to preserve a balanced allocation of taxing powers between the Member States, provided that they are proportionate in relation to such objectives, and that preventing tax avoidance in relation to 'wholly artificial arrangements' is generally justified,

CONSIDERING that national CFC and thin capitalisation rules can usefully comprise 'safe harbour' criteria beyond which the possibility of abuse is highest so long as the taxpayer is allowed to produce evidence of the contrary,

(1) COM(2006) 823 final.
(2) COM(2007) 785 final.

EMPHASISING, furthermore, that the guiding principles are a political commitment, whose implementation is left to the decision of each Member State, and therefore affect neither the rights or the obligations of the Member States nor the respective competencies of the Member States and of the Union under the Treaty and, in particular, do not require Member States who do not have the types of rules referred to in this Resolution to introduce such rules,

RECOMMENDS that Member States, when applying cross-border CFC and thin capitalisation rules within the EU not applicable in similar domestic situations, adopt the following guiding principles:

A. For the application of CFC rules, a non-exhaustive list of indicators suggesting that profits may have been artificially diverted to a CFC includes in particular the following:

(a) there are insufficiently valid economic or commercial reasons for the profit attribution, which therefore does not reflect economic reality;

(b) incorporation does not essentially correspond with an actual establishment intended to carry on genuine economic activities;

(c) there is no proportionate correlation between the activities apparently carried on by the CFC and the extent to which it physically exists in terms of premises, staff and equipment;

(d) the non-resident company is overcapitalised, it has significantly more capital than it needs to carry on its activity;

(e) the taxpayer has entered into arrangements which are devoid of economic reality, serve little or no business purpose or which might be contrary to general business interests, if not entered into for the purpose of avoiding tax.

B. With respect to thin capitalisation rules, which will respect the arm's-length principle, the assessment will be on a case-by-case basis. A non-exhaustive list of indicators suggesting an artificial transfer of profits includes in particular the following:

(a) the level of debt to equity is excessive;

(b) the amount of net interest paid by the company goes beyond a certain threshold of the earnings before interest and taxes (EBIT) or of the earnings before interest, taxes, depreciation and amortisation (EBITDA);

(c) a comparison between the equity percentage of the company to that of the group worldwide appears to prove that the debt is excessive.

STRESSES the fact that administrative cooperation can be of key importance in ensuring the effectiveness of anti-abuse measures and underlines therefore the importance of Member States' assistance to each other for the purposes of detecting and combating abusive schemes.