

European Commission to launch a public consultation on double non- taxation

December 2011

Contact:

Carmel O'Connor

+353 1 792 6417
carmel.oconnor@ie.pwc.com

Anne Harvey

+353 1 792 8643
anne.harvey@ie.pwc.com

Martin McCoy

+353 1 792 7746
martin.mccoy@ie.pwc.com

Pat Wall

+353 1 792 8602
pat.wall@ie.pwc.com

Feargal O'Rourke

+353 1 792 6480
feargal.orourke@ie.pwc.com

or your usual client service
team contact



What has happened?

In recent weeks, the European Commission announced that it will launch a public consultation on the issue of double non-taxation. Double non-taxation arises where, as a result of cross border tax planning, companies or individuals mitigate tax on profits because of different tax rules in different Member States. It is a cause for concern in the EU due to the loss of public revenue and is receiving increased attention given the current economic pressures across the Member States. The increased focus stems from the attention placed on what are known as “hybrid” instruments and “hybrid” entities by the EU’s Code of Conduct Tax Group. This group views such arrangements as contrary to the proper functioning of the internal market and forms part of their drive against perceived aggressive tax planning.

What is a hybrid instrument or entity?

A hybrid instrument (for example, a profit participating loan¹) is one which, as a result of its characteristics, is treated as debt in one jurisdiction and equity in another. Accordingly, it allows a company to obtain a tax deduction (as interest) in one jurisdiction whereas the associated income is treated as a tax exempt dividend elsewhere. The same principle applies to hybrid entities which can either be treated as corporate or effectively be ignored for tax purposes. It is notable that the Irish tax authorities have already taken steps against double non-taxation. Finance Act 2011 limits the effectiveness of the use of profit participating loans in the context of securitisation vehicles.

¹ A profit participating loan is one where the return is linked to the profits of the borrower.

Aggressive tax planning

The announcement of the public consultation process by the Commission to tackle instances of double non-taxation is closely connected to the current debate on “aggressive tax planning”. EU Tax Commissioner Mr Algirdas Šemeta’s line and that of many MEPs is that “aggressive” tax planning is perhaps not illegal but it is definitely “undesirable” in the current climate. While the influence of the European Parliament and of the individual MEPs of the Economic and Monetary Affairs Committee on EU tax policymaking is indirect, it has increased since the Lisbon Treaty’s coming into force in December 2009.

Way forward...

The Code of Conduct Group has asked the Commission to come forward with a legislative proposal in 2012 to deal with the perceived abuse of hybrid entities and instruments across the EU Member States. At this stage, there are no detailed proposals on the form of such legislation. However, the undoubted aim of such legislation would be consistent treatment across the Member States of entities and instruments to remove the advantages that can be achieved from different treatment. As well as the aim of combating perceived abuse, it is consistent with the European Commission proposal on harmonisation of tax bases across the Member States (CCCTB) which Ireland continues to oppose. Implementation of the legislation would require the approval of the Member States and is unlikely to be effective until 2014. Nonetheless, as effective tax planning plays a crucial role in business, this is a development which should be closely monitored.



How PwC can help you

We have a dedicated EU direct tax specialist team which is part of a PwC network of EU tax experts. The group closely monitors all EU developments of importance to business. We can provide you with more detail on the provisions as they become available and evaluate the potential impact on your tax planning strategy.

We will keep you apprised on any developments in this space which may be of relevance in an Irish context. In the meantime, please do not hesitate to contact us if you would like to discuss the issues raised in this flyer in further detail.

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