Procedure file

Basic information

CNS - Consultation procedure Directive	2016/0011(CNS)	Procedure completed
Rules against tax avoidance practices that directly affect the functioning of the internal market Amended by 2016/0339(CNS) Subject 3.45.04 Company taxation		

Key players

European Parliament	Committee responsible	Rapporteur	Appointed
	ECON Economic and Monetary Affairs		21/01/2016
		S&D BAYET Hugues	
		Shadow rapporteur	
		NIEDERMAYER Luděk	
		LOONES Sander	
		CALVET CHAMBON Enrique	
		DE MASI Fabio	
		JOLY Eva	
		ZANNI Marco	
		KAPPEL Barbara	
	Committee for opinion	Rapporteur for opinion	Appointed
	AFET Foreign Affairs	The committee decided not to give an opinion.	
	IMCO Internal Market and Consumer Protection	The committee decided not to give an opinion.	
	LIBE Civil Liberties, Justice and Home Affairs	The committee decided not to give an opinion.	
Council of the European Union	Council configuration	Meeting	Date
	Economic and Financial Affairs ECOFIN	3468	12/07/2016
	Economic and Financial Affairs ECOFIN	3454	08/03/2016
	Economic and Financial Affairs ECOFIN	3445	12/02/2016
European Commission	Commission DG	Commissioner	
	Taxation and Customs Union	MOSCOVICI Pierre	

Key events

28/01/2016	Legislative proposal published	COM(2016)0026	Summary
12/02/2016	Debate in Council	3445	
25/02/2016	Committee referral announced in Parliament, 1st reading/single reading		
08/03/2016	Debate in Council	3454	
24/05/2016	Vote in committee, 1st reading/single reading		
27/05/2016	Committee report tabled for plenary, 1st reading/single reading	A8-0189/2016	Summary
07/06/2016	Debate in Parliament		
08/06/2016	Results of vote in Parliament		
08/06/2016	Decision by Parliament, 1st reading/single reading	T8-0265/2016	Summary
12/07/2016	Act adopted by Council after consultation of Parliament		
12/07/2016	End of procedure in Parliament		
19/07/2016	Final act published in Official Journal		

Technical information

Procedure reference	2016/0011(CNS)
Procedure type	CNS - Consultation procedure
Procedure subtype	Legislation
Legislative instrument	Directive
	Amended by 2016/0339(CNS)
Stage reached in procedure	Procedure completed
Committee dossier	ECON/8/05621

Documentation gateway

Legislative proposal		COM(2016)0026	28/01/2016	EC	Summary
Committee draft report		PE578.569	01/03/2016	EP	
Reasoned opinion	SE_PARLIAMENT	PE580.758	14/04/2016	NP	
Amendments tabled in committee		PE580.763	18/04/2016	EP	
Economic and Social Committee: opinion, report		CES1284/2016	27/04/2016	ESC	
Committee report tabled for plenary, 1st reading/single reading		A8-0189/2016	27/05/2016	EP	Summary
Text adopted by Parliament, 1st reading/single reading		T8-0265/2016	08/06/2016	EP	Summary
Commission response to text		SP(2016)487	14/07/2016	EC	

adopted in plenary					
Reasoned opinion	MT_PARLIAMENT	PE587.797	05/09/2016	NP	
Follow-up document		COM(2020)0383	19/08/2020	EC	

Additional information

Research document	Briefing

Final act

Directive 2016/1164
OJ L 193 19.07.2016, p. 0001 Summary

Rules against tax avoidance practices that directly affect the functioning of the internal market

PURPOSE: to establish rules against tax avoidance practices that directly affect the functioning of the internal market.

PROPOSED ACT: Council Directive.

ROLE OF THE EUROPEAN PARLIAMENT: the Council adopts the act after consulting the European Parliament but without being obliged to follow its opinion.

BACKGROUND: the European Council Conclusions of 18 December 2014 cite "an urgent need to advance efforts in the fight against tax avoidance and aggressive tax planning, both at the global and European Union levels".

The proposed Directive is one of the constituent parts of the Commission's Anti- Tax Avoidance Package. It builds on the Action Plan for Fair and Efficient Corporate Taxation, presented by the Commission on 17 June 2015 and it responds to the finalisation of the project against Base Erosion and Profit Shifting (BEPS) by the G20 and the Organisation for Economic Cooperation and Development (OECD). It also responds to demands from the European Parliament, several Member States, businesses and civil society, and certain international partners for a stronger and more coherent EU approach against corporate tax abuse.

The current political priorities in international taxation highlight the need for ensuring that tax is paid where profits and value are generated. The schemes targeted by this proposed Directive involve situations where taxpayers act against the actual purpose of the law, taking advantage of disparities between national tax systems, to reduce their tax bill.

Taxpayers may benefit from low tax rates or double deductions or ensure that their income remains untaxed by making it deductible in one jurisdiction whilst this is not included in the tax base across the border either. The outcome of such situations distorts business decisions in the internal market and unless it is effectively tackled, could create an environment of unfair tax competition.

IMPACT ASSESSMENT: no impact assessment was carried out for this proposal given that the proposed Directive is complementary to other initiatives aimed to implement the output of the OECD BEPS reports in the EU and contribute towards a common minimum level of protection against tax avoidance.

To provide up-to-date analysis and evidence, a separate Staff Working Document accompanying the draft Directive gives an extensive overview of existing academic work and economic evidence in the field of base erosion and profit shifting.

CONTENT: the draft Directive is broadly inclusive and aims to capture all taxpayers which are subject to corporate tax in a Member State. Its scope also embraces permanent establishments, situated in the Union, of corporate taxpayers which are not themselves subject to the Directive.

Having the aim of combating tax avoidance practices which directly affect the functioning of the internal market, the proposal lays down anti-tax avoidance rules in six specific fields:

1. The deductibility of interest: multinational groups often finance group entities in high-tax jurisdictions through debt and arrange that these companies pay back 'inflated' interest to subsidiaries resident in low-tax jurisdictions. The aim of the proposed rule is to discourage the above practice by limiting the amount of interest that the taxpayer is entitled to deduct in a tax year. Given that this Directive fixes a minimum level of protection for the internal market, it is envisaged setting the rate for deductibility at the top of the scale (10 to 30%) recommended by the OECD. Member States may then introduce stricter rules.
2. Exit taxation: taxpayers may try to reduce their tax bill by moving their tax residence and/or assets to a low-tax jurisdiction. Exit taxation serves the purpose of preventing tax base erosion in the State of origin when assets which incorporate unrealised underlying gains are transferred, without a change of ownership, out of the taxing jurisdiction of that State. The proposal also addresses the EU law angle of exit taxation by giving taxpayers the option for deferring the payment of the amount of tax over a certain number of years and settling through staggered payments.
3. A switch-over clause: given the inherent difficulties in giving credit relief for taxes paid abroad, States tend to increasingly exempt foreign income from taxation. Switch-over clauses are commonly used against such practices. Namely, the taxpayer is subjected to taxation (instead of being exempt) and given a credit for tax paid abroad. In this way, companies are discouraged from shifting profits out of high-tax jurisdictions towards low-tax territories, unless there is sufficient business justification for these transfers.
4. A general anti-abuse rule: such a rule is designed to cover gaps that may exist in a country's specific anti-abuse rules against tax avoidance. It would allow authorities the power to deny taxpayers the benefit of abusive tax arrangements. Within the Union, the application of anti-abuse rules should be limited to arrangements that are wholly artificial (non-genuine); otherwise, the taxpayer should have the right to choose the most tax efficient structure for its commercial affairs.

5. Controlled foreign company (CFC) rules: taxpayers with controlled subsidiaries in low-tax jurisdictions may engage in tax planning practices whereby they shift large amounts of profits out of the (highly-taxed) parent company towards subsidiaries which are subject to low taxation. The effect is to reduce the overall tax liability of the group. CFC rules re-attribute the income of a low-taxed controlled foreign subsidiary to its parent company. As a result of this, the parent company is charged to tax on this income in its State of residence usually, this is a high-tax State.
6. A framework to tackle hybrid mismatches: these mismatches are the consequence of differences in the legal characterisation of payments (financial instruments) or entities when two legal systems interact. Such mismatches may often lead to double deductions (i.e. deduction on both sides of the border) or a deduction of the income on one side of the border without its inclusion on the other side. In order to ensure that Member States introduce rules to effectively combat against these mismatches, this Directive prescribes that the legal characterisation given to a hybrid instrument or entity by the Member State where a payment, expense or loss, as the case may be, originates shall be followed by the other Member State which is involved in the mismatch.

Rules against tax avoidance practices that directly affect the functioning of the internal market

The Committee on Economic and Monetary Affairs adopted, in the framework of a special legislative procedure (Parliaments consultation), the report by Hugues BAYET (ALDE, BE) on the proposal for a Council directive laying down rules against tax avoidance practices that directly affect the functioning of the internal market.

The Committee recommended the European Parliament to approve the Commission proposal as amended:

Permanent establishment: in order to ensure consistency with regard to the treatment of permanent establishments, it is essential that Member States apply, both in relevant legislation and bilateral tax treaties, a common definition of permanent establishments. According to the text, it shall mean a fixed place of business situated in a Member State through which the business of a company of another Member State is wholly or partly carried on; this definition should also address situations in which companies which engage in fully dematerialised digital activities are considered to have a permanent establishment in a Member State if they maintain a significant presence in the economy of that country.

Secrecy or low tax jurisdictions: a recital stipulated that profit shifting into secrecy or low tax jurisdictions poses a particular risk to Member States' tax proceeds as well as to fair and equal treatment between tax avoiding and tax compliant firms, large and small. In addition to the generally applicable measures proposed in this Directive for all jurisdictions, it is essential to deter Specific measures are therefore proposed to use this directive as a tool to ensure compliance by current secrecy and low tax jurisdictions with the international push for tax transparency and fairness.

In particular, the proposed text specified that Member States may impose a withholding tax on payments from an entity in that Member State to an entity in a secrecy or low tax jurisdiction. Member States shall update any Double Tax Agreements which currently preclude such a level of withholding tax with a view to removing any legal barriers to this collective defence measure.

Transfer pricing: the definition of 'transfer prices' shall mean the prices at which an undertaking transfers tangible goods or intangible assets or provides services to associated undertakings.

In a recital, it is stated that the term 'transfer pricing' refers to the conditions and arrangements surrounding transactions effected within a multinational company, including subsidiaries and shell companies whose profits are divested to a parent multinational. The Union must satisfy itself that the taxable profits generated by multinational undertakings are not being transferred outside the jurisdiction of the Member State concerned and that the tax base declared by multinational undertakings in their country reflects the economic activity undertaken there.

Letterbox companies: the amended text proposed that the use of letterbox companies by taxpayers operating in the Union should be prohibited. Taxpayers should communicate to tax authorities evidence demonstrating the economic substance of each of the entities in their group, as part of their annual country-by-country reporting obligations.

Double tax agreements: in order to improve the current mechanisms to resolve cross-border taxation disputes in the Union, focusing not only on cases of double taxation but also on double non-taxation, a dispute resolution mechanism with clearer rules and more stringent timelines should be introduced by January 2017.

Hybrid mismatches related to third countries: the amended text stated that where a hybrid mismatch between a Member State and a third country results in a double deduction, the Member State shall deny the deduction of such a payment, unless the third country has already done so. Where a hybrid mismatch between a Member State and a third country results in a deduction without inclusion, the Member State shall deny the deduction or non-inclusion of such a payment, as appropriate, unless the third country has already done so.

Effective tax rate: the Commission is called upon to develop a common method of calculation of the effective tax rate in each Member State, so as to make it possible to draw up a comparative table of the effective tax rates across the Member States.

European tax identification number: proper identification of taxpayers is essential to effective exchange of information between tax administrations. It is proposed that the Commission should present a legislative proposal for a harmonised, common European taxpayer identification number by 31 December 2016, in order to make automatic exchange of tax information more efficient and reliable within the Union.

Patents: until now, multinationals have used patent incentives to artificially reduce their profits. This has an adverse impact on genuinely innovative countries. Members are proposing that these multinationals should be subject to an exit tax where they repatriate proceeds from patents to countries with lower tax rates.

Legislative proposal on CCCTB: Members noted that a fully-fledged Common Consolidated Corporate Tax Base (CCCTB), with an appropriate and fair distribution key, would be the genuine "game changer" in the fight against artificial BEPS strategies. In light of this, the Commission should publish an ambitious proposal for a CCCTB as soon as possible, and the legislative branch to conclude negotiations on that crucial proposal as soon as possible.

Penalties: Member States should have in place a system of penalties as provided for in national law and should inform the Commission thereof.

Review and monitoring: the Commission should put in place a specific monitoring mechanism to ensure the proper implementation of this

Directive and the homogeneous interpretation of its measures by Member States. It should evaluate the implementation of this Directive three years after its entry into force and report to the European Parliament and the Council thereon. Member States should communicate to the European Parliament and the Commission all information necessary for this evaluation.

Rules against tax avoidance practices that directly affect the functioning of the internal market

The European Parliament adopted by 486 votes to 88, with 103 abstentions, in the framework of a special legislative procedure (Parliaments consultation), a legislative resolution on the proposal for a Council directive laying down rules against tax avoidance practices that directly affect the functioning of the internal market.

Parliament approved the Commission proposal subject to the following amendments:

A political priority: according to Members, the Union should consider that combatting fraud, tax evasion and tax avoidance are overriding political priorities, as aggressive tax planning practices are unacceptable from the point of view of the integrity of the internal market and social justice.

The resolution stated that it is essential to give tax authorities the appropriate means to fight effectively against BEPS, and, in so doing, improve transparency in respect of the activities of large multinationals, in particular with regard to profits, tax paid on profits, subsidies received, tax rebates, numbers of employees and assets held.

Permanent establishment: Parliament stated that the concept of permanent establishment will provide a precise, binding definition of the criteria which must be met if a multinational company is to prove that it is situated in a given country. This will compel multinational companies to pay their taxes fairly.

In order to ensure consistency with regard to the treatment of permanent establishments, it is essential that Member States apply, both in relevant legislation and bilateral tax treaties, a common definition of permanent establishments. According to the text, it shall mean a fixed place of business situated in a Member State through which the business of a company of another Member State is wholly or partly carried on; this definition should also address situations in which companies which engage in fully dematerialised digital activities are considered to have a permanent establishment in a Member State if they maintain a significant presence in the economy of that country.

Secrecy or low tax jurisdictions: Members recalled that profit shifting into secrecy or low tax jurisdictions poses a particular risk to Member States' tax proceeds as well as to fair and equal treatment between tax avoiding and tax compliant firms, large and small.

In addition to the generally applicable measures proposed in this Directive for all jurisdictions, it is essential to deter secrecy and low tax jurisdictions from basing their corporate tax and legal environment on sheltering profits from tax avoidance while at the same time not adequately implementing global standards as regards tax good governance, such as the automatic exchange of tax information, or engaging in tacit non-compliance by not properly enforcing tax laws and international agreements, despite political commitments to implementation. Specific measures are therefore proposed to use this Directive as a tool to ensure compliance by current secrecy or low tax jurisdictions with the international push for tax transparency and fairness.

In particular, the amended text specified that Member States may impose a withholding tax on payments from an entity in that Member State to an entity in a secrecy or low tax jurisdiction. Member States shall update any Double Tax Agreements which currently preclude such a level of withholding tax with a view to removing any legal barriers to this collective defence measure.

Transfer pricing: the definition of 'transfer prices' shall mean the prices at which an undertaking transfers tangible goods or intangible assets or provides services to associated undertakings.

In a recital, it is stated that the term 'transfer pricing' refers to the conditions and arrangements surrounding transactions effected within a multinational company, including subsidiaries and shell companies whose profits are divested to a parent multinational. The Union must satisfy itself that the taxable profits generated by multinational undertakings are not being transferred outside the jurisdiction of the Member State concerned and that the tax base declared by multinational undertakings in their country reflects the economic activity undertaken there.

Switch-over clause: Member States shall not exempt a taxpayer from tax on foreign income, that does not arise from active business, which the taxpayer received as a profit distribution from an entity in a third country or as proceeds from the disposal of shares held in an entity in a third country or as income from a permanent establishment situated in a third country where the entity or the permanent establishment is subject, in the entity's country of residence or the country in which the permanent establishment is situated, to a tax on profits at a statutory corporate tax rate lower than 15 %.

Letterbox companies: the amended text stipulates that the use of letterbox companies by taxpayers operating in the Union should be prohibited. Taxpayers should communicate to tax authorities evidence demonstrating the economic substance of each of the entities in their group, as part of their annual country-by-country reporting obligations.

Black list: Members considered that a Union-wide definition and an exhaustive 'black list' should be drawn up of the tax havens and countries, including those in the Union, which distort competition by granting favourable tax arrangements. The black list should be complemented with a list of sanctions for non-cooperative jurisdictions and for financial institutions that operate within tax havens.

Dispute resolution mechanism: in order to improve the current mechanisms to resolve cross-border taxation disputes in the Union, focusing not only on cases of double taxation but also on double non-taxation, a dispute resolution mechanism with clearer rules and more stringent timelines should be introduced by January 2017.

Hybrid mismatches related to third countries: Members stated that where a hybrid mismatch between a Member State and a third country results in a double deduction, the Member State shall deny the deduction of such a payment, unless the third country has already done so. Where a hybrid mismatch between a Member State and a third country results in a deduction without inclusion, the Member State shall deny the deduction or non-inclusion of such a payment, as appropriate, unless the third country has already done so.

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Legislative proposal on CCCTB: Parliament noted that a fully-fledged Common Consolidated Corporate Tax Base (CCCTB), with an appropriate and fair distribution key, would be the genuine "game changer" in the fight against artificial BEPS strategies. In light of this, the Commission should publish an ambitious proposal for a CCCTB as soon as possible, and the legislative branch to conclude negotiations on that crucial proposal as soon as possible.

Penalties: Member States should have in place a system of penalties as provided for in national law and should inform the Commission thereof.

Review and monitoring: the Commission should put in place a specific monitoring mechanism to ensure the proper implementation of this Directive and the homogeneous interpretation of its measures by Member States. It should evaluate the implementation of this Directive three years after its entry into force and report to the European Parliament and the Council thereon. Member States should communicate to the European Parliament and the Commission all information necessary for this evaluation.

Rules against tax avoidance practices that directly affect the functioning of the internal market

PURPOSE: to establish rules against tax avoidance practices that directly affect the functioning of the internal market.

LEGISLATIVE ACT: Council Directive (EU) 2016/1164 laying down rules against tax avoidance practices that directly affect the functioning of the internal market.

CONTENT: the Directive aims to lay down rules in order to strengthen the average level of protection against aggressive tax planning in the internal market.

In a market of highly integrated economies, there is a need for common strategic approaches and coordinated action, to maximise the positive effects of the Organisation for Economic Cooperation and Development (OECD) initiative against base erosion and profit shifting (BEPS).

The Directive applies to all taxpayers that are subject to corporate tax in one or more Member States, including permanent establishments in one or more Member States of entities resident for tax purposes in a third country. It lays down anti-tax-avoidance rules in five specific anti-BEPS fields:

- Interest limitation rules: multinational companies may artificially shift profits to jurisdictions with more generous rules with regard to deductibility. The Directive aims to dissuade companies from recourse to this practice by limiting the amount of interest that the taxpayer has the right to deduct in a tax period. The Directive sets the rate of deductibility at a maximum of 30% of the taxpayer's earnings before interest, tax, depreciation and amortization.
- Exit taxation rules: taxpayers may try to reduce their tax liability by transferring its tax residence and/or its assets to a low-tax jurisdiction, solely for the purposes for aggressive tax planning. Exit taxation rules aims to prevent the erosion of the tax base in the Member State of origin when high-value assets are transferred with ownership unchanged, outside the tax jurisdiction of that Member State. The Directive also addresses the EU law angle of exit taxation by giving taxpayers the option of deferring the payment of the amount of tax over five years and settling through staggered payments.
- General anti-abuse rule: this rule is designed to cover gaps that may exist in a country's specific anti-abuse rules against tax avoidance, and allows authorities the power to deny taxpayers the benefit of abusive tax arrangements. The directive provides that the general anti-abuse clause will be applied to arrangements that are not genuine to the extent that they are not put into place for valid commercial reasons that reflect economic reality.
- Controlled foreign company (CFC) rules: in order to reduce their overall tax liability, corporate groups can shift large amounts of profits towards controlled subsidiaries in low-tax jurisdictions. CFC rules reattribute the income of a low-taxed controlled foreign subsidiary to its - usually more highly taxed - parent company. As a result of this, the parent company is charged to tax on this income in its State of residence.
- Rules on hybrid mismatches: corporate taxpayers may take advantage of disparities between national tax systems in order to reduce their overall tax liability, for instance through double deduction (i.e. deduction on both sides of the border) or a deduction of the income on one side of the border without its inclusion on the other side. To neutralise the effects of hybrid mismatch arrangements, the Directive lays down rules whereby one of the two jurisdictions in a mismatch should deny the deduction of a payment leading to such an outcome.

ENTRY INTO FORCE: 8.8.2016.

TRANSPOSITION: by 31.12.2018.

APPLICATION: from 1.1.2019.

By way of derogation, Member States have until 1 January 2020 to apply the exit taxation rules.

Member States which have at 8 August 2016, national targeted rules for preventing BEPS risks, which are equally effective to the interest limitation rule set out in the Directive, may apply these targeted rules until the end of the first full fiscal year following the date of publication of the agreement between the OECD members on the official website on a minimum standard with regard to BEPS Action 4, but at the latest until 1 January 2024.