Brussels, 24 November 2022
(OR. en)

14674/22
ADD 3

LIMITE

FISC 218
ECOFIN 1154

REPORT

From:	General Secretariat of the Council
To:	Delegations
Subject:	Code of Conduct Group (Business Taxation) - Report to the Council

Poland's Holding Tax Regime (PL015)

Assessment - Holding Tax Regime PL015

Criterion		1a	1b	2a	2b	3	4	5	OA
Holding tax regime		X	?	X	?	X	X	X	X

General description of the amendment

The regime provides for a CIT exemption for 95% of the dividends received by the Polish holding company from its subsidiaries (both Polish[1] and foreign[2]). The remaining 5% of the dividends is

[1] A Polish subsidiary status is available to a company that meets all following conditions:
- At least 10% of its shares are held directly, for at least 1 year(uninterrupted), by the Polish holding company;
- The subsidiary does not hold more than 5% of the shares of other companies (both Polish and foreign), does not hold participation titles in an investment fund or common investment institution, does not own a company lacking legal personality or other property rights connected with the right to receive a benefit as a founder or beneficiary of a foundation, trust or other entity of a similar nature;
- The subsidiary does not belong to a tax capital group and does not enjoy special economic zone tax exemption.

subject to 19% CIT. In addition, the regime grants a full exemption for profits from the sale of the subsidiaries' shares, sold to non-related entities.

The Code of Conduct guidance[3] for holding companies has determined the particular features that the Group needs to take into account when assessing a holding company regime. These features are:

"*(iii) Exemption of foreign source dividends in circumstances in which the profits giving rise to the dividends:*

(a) have been taxed at a significantly lower level in the source country than they would have been if they had arisen in the Member State; and

(b) have not been subject to effective anti-abuse or countermeasures which in paragraph L of the code the Council notes play a fundamental role in counteracting tax avoidance and evasion.

(iv) Asymmetrical measures where capital gains are exempt but capital losses are tax deductible."

The Polish Holding regime excludes the dividend exemption in case the foreign distributing company is taxed 25% lower than the CIT that would have to be paid if this subsidiary were a Polish tax resident subject to 19% CIT. Hence the regime excludes that the profits giving rise to the dividend are significantly lower taxed and consequently fulfills the above mentioned condition of (iii) (a) of the guidance.

Furthermore, the regime contains different anti-abuse measures, hence fulfilling the above mentioned condition of (iii) (b). It consists among other things of:

- Excluding the exemption, based on the CFC legislation, when the source of the revenue is at least 33% of passive nature;
- Excluding the exemption in case the dividend paid leads to a reduction of the tax base or the tax due in the source state;
- The Polish holding may not directly or indirectly be owned by a shareholder seated or managed or registered, nor may the (foreign) subsidiary be situated in jurisdictions that:

---

[2] A foreign subsidiary status requires all of the above conditions for a Polish subsidiary and needs to:
- be subject to tax on its worldwide income in its residency state and not does not enjoy tax exemption there;
- have legal personality and may not have its seat, management or registration in jurisdictions:
    - that apply harmful tax competition or
    - are included in the EU list of non-cooperative jurisdictions for tax purposes or
    - have a legal basis for exchange of information in tax matters.

[3] Doc. 5814/6/18 REV 6, p.10

- apply harmful tax competition or
- are indicated in the EU list of non-cooperative jurisdictions for tax purposes or
- have no legal basis for exchange of information in tax matters.

With regards to the capital gains exemption on the sale of shares, the Commission notes that capital losses on these sales, cannot be deducted.

It is the Commission services' view that the Polish measure complies with the abovementioned conditions from the Guidance. However, the Guidance itself foresees that the final evaluation of whether or not the rollback and standstill conditions are satisfied must be made against the criteria in the Code itself.[4]

A. Affects Business Location:
As the measure is only recently introduced, it is not yet clear whether the measure is significantly affecting the location of business. However, given the lower level of taxation provided, it cannot be excluded that this measure could affect the location of business. Therefore, the measure can be considered as in scope of the Code of Conduct.

B. Significantly lower level of taxation: "Within the scope specified in paragraph A, tax measures which provide for a significantly lower effective level of taxation, including zero taxation, than those levels which generally apply in the Member State in question are to be regarded as potentially harmful and therefore covered by this code"
The general Corporate income tax rate in Poland is 19%. Dividends distributed by a subsidiary received by a holding are for 95% tax exempt. The remaining 5% is taxed at 19%. Furthermore, capital gains from the sale of shares are fully exempt. By exempting 95% of the dividends received, the overall taxation of these dividends amounts to 0,95% compared to the statutory tax rate of 19%. For capital gains on shares, there is even no taxation. Consequently, the level of taxation is significantly lower than the levels that generally apply and this measure is therefore potentially harmful within the meaning of paragraph A of the Code.

[4] Doc. 5814/6/18 REV 6, p. 7, §12.

Criterion 1: "Whether advantages are accorded only to non-residents or in respect of transactions carried out with non-residents"
Criterion 1 contains two elements. The first element is whether the measure is exclusively available to non-residents or transactions with non-residents (criterion 1a). The second element is whether it is only or mainly used by non-residents or for transactions with non-residents (criterion 1b). 1a) Criterion 1a concerns the de jure application of the measure. The measure applies and is available to all legal entities based in Poland without any restrictions in terms of shareholding (resident or non-resident shareholders) or in terms of business sector. The only limitation in terms of shareholding is that holdings may not be directly or indirectly owned by a shareholder seated or managed or registered in jurisdictions that apply harmful tax competition, that are indicated in the EU list of non-cooperative jurisdictions for tax purposes, or that have no legal basis for exchange of information in tax matters. This concerns however an anti-abuse measure and does not constitute ring-fencing. Given the above, we propose a cross (X) for this criterion 1b) Criterion 1b is used to complement the assessment under criterion 1a which only looks at the literal interpretation of the measure. It assesses the de facto effect of the measure. Where the majority of taxpayers (or counterparties to transactions) benefitting from the measure are in fact non-residents the measure will fall foul of criterion 1b. As the measure has only been implemented recently, no figures are available yet. Therefore, as we do not have comprehensive information to determine whether this measure would be predominantly used by non-residents in the future, we have proposed a question mark ("?") for this criterion 1b).
Criterion 2: "Whether advantages are ring-fenced from the domestic market, so they do not affect the national tax base"
As regards criterion 2 the division between criteria 2a and 2b is done in the same way as in the case of criterion 1 (i.e. de jure interpretation and de facto analysis). In general, a measure is caught by criterion 2 if the advantages are ring-fenced from the domestic market so that they do not affect the national tax base. In most cases, the evaluation against criterion 2 follows closely that of criterion 1. 2a) What has been written under criterion 1a analogously applies to criterion 2a. Therefore, we suggest a cross ('X') as well for this criterion.

2b) On the basis of the explanations provided above and the marking under criterion 1b, the evaluation of criterion 2b follows the same reasoning. As there are no figures available yet, we suggest a question mark ('?') as well for this criterion.

Criterion 3: "Whether advantages are granted even without any real economic activity and substantial economic presence within the Member State offering such tax advantages"
According to the standard practice for the evaluation of a measure against criterion 3, a measure is found harmful under this criterion if there are no specific requirements with regard to real economic activities or employment obligations. In the case at hand, it concerns a tax regime for holdings, which may not in fact require much substance in order to exercise their activity of holding and managing participations. The guidance on criterion 3 demands, that in case it does not concern a pure equity holding, an analysis of the requirements for substantial economic presence is performed by the Code of Conduct Group.[5] The requirements for this analysis are an adequate number of employees with necessary qualifications and an adequate amount of operating expenditure with regard to the core income generating activities. The measure foresees explicitly a substance requirement and requires that the holding company conducts a genuine business activity by performing independently its essential functions using own resources, including local managers. It will be up to the Polish tax authorities to perform regular tax audits on the substance requirement, taking into account, among other things, the elements listed in the Guidance. It is the Commission Services' view that hence substance is required and that the measure meets Criterion 3. We therefore propose a cross ('X').

Criterion 4: "Whether the rules for profit determination in respect of activities within a multinational group of companies departs from internationally accepted principles, notably the rules agreed upon within the OECD"
The measure does not contain such elements that would be relevant from the point of view of internationally accepted principles as referred to in criterion 4 of paragraph B of the Code, and we have therefore proposed a cross ("X").

[5] Doc. 5814/6/18 REV 6, p.128-129.

Criterion 5: "whether the tax measures lack transparency, including where legal provisions are relaxed at administrative level in a non-transparent way"
All preconditions necessary for the granting of a tax benefit should be clearly laid down in publicly available laws, decrees, regulations etc. before a measure can be considered transparent. Since this is the case with respect to this measure, we have proposed a cross ("X") for criterion 5.

Overall assessment:

With respect to the overall evaluation of the Polish Holding Tax Regime, a cross ("X") have been suggested indicating that the regime is overall not harmful.