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REPORT

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

Amendments to the Holding regime PL015 (PL017) – Assessment

A. Summary description of the measure PL017

1. The original measure PL015 Holding regime was assessed in 2022¹ as Not Harmful.
2. The amendments² to the PL015 Holding regime, notified early 2023 under reference PL017, cover several distinct elements³ (see agreed description⁴ approved by the Group on 2 June 2023). The elements relevant to the Code of Conduct – which would lead to a significantly lower level of effective taxation than normal – are the extension of the tax exemption from 95%

¹ 14674/22

² Act of 7 October 2022 amending the Act on Corporate Income Tax and certain other acts, published in the Journal of Laws on 25 October 2022

- ³ Amendments to PL015: “*Extension of the catalogue of legal forms in which a holding company can operate to include a simple joint stock company;*
- *Removal of the prohibition on the enjoying of Parent-Subsidiary Directive exemptions by the holding company;*
- *Removal of the prohibition on ownership by a Polish/foreign subsidiary:*
 - *more than 5% of shares in another company and*
 - *of all rights and obligations in a company that is not a legal entity.*
- *Having exempted income by subsidiary under the special economic zone (SEZ) or Polish Investment Zone (PIZ) will not exclude this company from holding regime;*
- *Granting 100% dividend exemption of the amount of dividends received by the Polish holding company from its subsidiaries (currently it is 95%);*
- *Exclusion of a domestic subsidiary from acting as WHT tax remitter when dividends are paid to a holding company (with respect to the full dividend exemption mentioned in the paragraph above);*
- *Stipulation of the period (two (un)interrupted years) during which exemption’ conditions must be fulfilled jointly*

⁴ Agreed Description – PL017 Amendments to the Holding regime PL015. Document: WK 06546/2023 INIT.

to 100% and the possibility to benefit from the holding regime where the underlying income is composed of tax exempt income of a subsidiary under the Special Economic Zone (SEZ) regulation or Polish Investment Zone (PIZ)⁵ regime.

B. Assessment of the measure PL017

3. The Code of Conduct Group has agreed guidance on holding companies in the past (Guidance on Standstill and Rollback⁶), which interprets the substance and the profit determination criterion. The assessment of the **PL017 measure** is therefore carried out, under:
- paragraph B.1, criteria 1 to 4, of the Code of Conduct; and
 - the agreed guidance⁷ for holding companies.

⁵ Preferential regime PL013 already assessed Harmful in respect of two of its elements (ring-fencing); the harmful features have been adequately rolled back.

⁶ Endorsed by the Council in its conclusions on the tax package (doc. 13898/00 FISC 207)

⁷ Doc. 5814/6/18 REV 6, p.10

I. Assessment under the Code criteria

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%.

After the amendment, the PL Holding regime provides for a **CIT exemption of 100%** (previously 95%) of the dividends received by the Polish holding company from its subsidiaries (both Polish⁸ and foreign⁹).

The regime maintains the **full tax exemption** for profits from the sale of the shares of the subsidiaries, sold to non-related entities.

Finally, the amendment extends the benefits of the regime also to dividends from companies where the underlying profits were tax exempt under the Polish SEZ or PIZ regime.

Therefore, the PL017 measure provides for a full tax exemption of eligible dividends and capital gains from the sale of shares and thus leads to a significantly lower effective level of taxation which is potentially harmful within the meaning of paragraph B.1 of the Code.

Criterion 1:

“whether advantages are ring-fenced de facto or de jure from the domestic market, e.g., they are accorded only to non-residents or in respect of transactions carried out with non-residents, or they do not affect the national tax base”

Criterion 1 contains two elements.

⁸ A Polish subsidiary status is available to a company that meets all following conditions:

- The subsidiary has a certain legal form (a limited liability company or a joint-stock company) and is a Polish tax resident;
- At least 10% of its shares are held directly, for at least 2+ years (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.~~

⁹ A foreign subsidiary status is available to a company that meets all of the above conditions for a subsidiary and:

- is subject to tax on its worldwide income in its residency state and does not enjoy tax exemption there;
- has 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
 - do not have a legal basis for exchange of information in tax matters.

The first element (criterion 1a) is two folded and verifies whether:

- advantages are ring-fenced *de jure* from the domestic market (e.g. they are accorded only to non-residents or in respect of transactions carried out with non-residents), or
- advantages do not affect the national tax base.

The second element (criterion 1b) is whether such advantages are *de facto* ring fenced from the domestic market, or de facto do not affect the national tax base.

1a) Criterion 1a concerns the de jure application of the measure.

The findings put forward in the previous assessment concerning PL015 remain valid.

The measure applies 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.

Moreover, with regard to the specific amendment under scrutiny, the extension of the benefit to dividends from PL subsidiaries with exempt income under the SEZ or PIZ regimes concerns a purely domestic situation, and not a structure with a cross-border element.

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 fail 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 or in respect of transactions with non-residents in the future, we have proposed a question mark ("?") for this criterion 1b).

Criterion 2:

“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 2, a measure is found harmful under this criterion if there are no specific requirements with regard to real economic activities or employment obligations.

The findings put forward in the previous assessment concerning PL015 remain valid.

The tax regime concerns holding companies, which may not require much substance in order

to exercise their activity of holding and managing participations.

The guidance on criterion 2 prescribes 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.¹⁰ 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 requires a minimum substance whereby 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 2. We therefore propose a cross ('X').

Criterion 3:

“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 findings put forward in the previous assessment concerning PL015 remain valid.

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 3 of paragraph B of the Code, and we have therefore proposed a cross (“X”).

Criterion 4:

“whether the tax measures lack transparency, including where legal provisions are relaxed at administrative level in a non-transparent way”

The findings put forward in the previous assessment concerning PL015 remain valid.

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 4.

¹⁰ Doc. 5814/6/18 REV 6, p.128-129.

II. Assessment under the Guidance for holding companies¹¹

The measure concerns a particular type of regime, in respect of which the Code of Conduct Group has agreed the following guidance, which interprets the substance and the profit determination criterion.

The features that the Group took into account when evaluating whether the measures it assessed in the areas of finance branches, holding companies and headquarter companies were harmful 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 extension of the holding regime to dividends from subsidiaries with exempt income under the SEZ or PIZ regimes leads to double non-taxation in Poland (exemption of business income at the level of the Polish subsidiary under the SEZ / PIZ regime, and subsequent full tax exemption of the dividends at the level of the Polish holding company).

However, the *Guidance on Holding regimes* specifically targets foreign source dividends. It is therefore not applicable in the context of domestic dividends.

In addition, the PIZ has been assessed by the Group and two elements have adequately been rolled back (PL013). The tax exemption of the PIZ has therefore been accepted by the Group.

Excluding dividends benefiting from the exemption under the SEZ/PIZ regime from the participation exemption at the level of the holding company would result in canceling the tax advantage granted to the subsidiary as part of its SEZ/PIZ status. The (double) non-taxation thus remains consistent – within the purely domestic situation – with the aim pursued by the preferential SEZ regimes.

The findings put forward in the assessment of PL015 remain valid for foreign-source dividends, in respect of features (iii) and (iv) of the Guidance.

“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 feature of (iii) (a) of the guidance.

¹¹ Doc. 5814/6/18 REV 6, p.10

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

- Disallowing the tax exemption where based on the CFC legislation, the source of the revenue is at least 33% of passive nature;
- Disallowing the tax 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:
 - operate tax systems with features that allow harmful tax competition or
 - feature on the EU list of non-cooperative jurisdictions for tax purposes; or
 - have no legal base for the exchange of information in tax matters.

With regard to the capital gains tax exemption on the sale of shares, the Commission Services note that capital losses on these sales cannot be deducted. (condition iv)”

The last anti-abuse provision aims to prevent that an untaxed domestic dividend can be passed through to a low tax jurisdiction. It is important to mention that not only direct ownership but also indirect ownership of shareholders in these jurisdictions is covered.

III. Overall assessment:

With respect to the overall evaluation of the amendments to the Polish Holding Tax Regime (PL0117), and in particular, its extension to dividends paid out from PL subsidiaries with tax exempt income in SEZ or PIZ, we have suggested a cross (“X”) indicating that the regime is overall not harmful.

	1a	1b	2	3	4	OA
PL017 amendments to Holding regime PL015	X	?	X	X	X	X