Council of the
European Union

Brussels, 2 June 2022
(OR. en)

9295/22
ADD 3

LIMITE

FISC 114
ECOFIN 452

REPORT

From:	General Secretariat of the Council
To:	Permanent Representatives Committee
Subject:	Code of Conduct Group (Business Taxation) - Report to the Council = Approval

Poland's holding tax regime (PL015) – Agreed Description

I. Background

Poland has notified a new Holding tax regime in the framework of the annual standstill exercise 2021.

II. Relevant legal framework

The new regime has been introduced by the Act of 29 October 2021 amending the Act on Personal Income Tax, the Act on Corporate Income Tax and certain other acts in the so called Polish Deal, published in the Journal of Laws on 23rd November 2021[1]. This resulted in a new chapter 5b (articles from 24m to 24p) of the CIT act which determines the Holding tax regime. The new Holding tax regime is applicable as from 1 January 2022.[2].

[1] Journal of Laws of 2021, item 2105
[2] It should be noticed that although CIT provisions came into force as of 1st January 2022, in practice first tax-free dividends / gains from sale of shares may be obtained in 2023.

III. Purpose of the measure

Poland has already a participation exemption based on the Parent-Subsidiary Directive. The purpose of the new measure is to exempt dividends received by holding companies not covered by the existing legislation.

IV. Design of the measure

The regime provides a CIT exemption for 95% of the dividends received by the Polish holding company from its subsidiaries (both Polish[3] and foreign[4]). The remaining 5% of the dividend is subject to 19% CIT. In addition, it grants a full exemption for profits from the sale of the shares of the subsidiaries, sold to non-related entities.

A Polish holding company status is available to a company that meets all following criteria:

- has limited liability or is a joint stock company and is subject to Polish tax on its worldwide income,
- holds directly, for an uninterrupted period of at least 1 year, at least 10% of shares of its Polish or foreign subsidiary,
- does not belong to a tax capital group and does not enjoy special economic zone tax exemption,
- does not enjoy CIT exemptions arising from the Parent Subsidiary Directive,

[3] 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 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.

[4] A foreign subsidiary status is available to a company that meets 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 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
  - do not have a legal basis for exchange of information in tax matters.

- conducts genuine business activity (substance requirement)[5]; and
- is not directly or indirectly owned by a shareholder seated or managed or registered in jurisdictions that:
    - o apply harmful tax competition[6]; or
    - o are indicated in the EU list of non-cooperative jurisdictions for tax purposes; or
    - o have no legal basis for exchange of information in tax matters.

Limitation of dividend exemption

There is no exemption of the dividends if certain criteria linked to CFC legislation are met in the tax year in which the dividend is paid or during the preceding five tax years. In this context, no exemption is granted in the following cases:

- at least 33% of the income distributed is of passive nature (e.g. dividends, gains from disposal of shares, gains from disposal of financial instruments, interest income, intellectual property income, income from certain intangible services, from leases and similar arrangements, sale of goods or products from or to related parties); and
- when the level of actual taxation of the subsidiary is at least 25% lower than the CIT that would be due if the subsidiary were a Polish tax resident subject to 19% CIT.

[5] Reference is made to art. 24a, §18 of the Act on Corporate Income Tax. This paragraph lists the elements in particular taken into account when assessing whether a foreign controlled entity carries out genuine economic activities. It should be noted here that substance requirement should be understood specifically, i.e. as referring to substance appropriate for holding activities. According to art. 24a, §18 of the Act on Corporate Income Tax, it is assessed whether:
(1) the registration of a foreign controlled entity involves the existence of an enterprise in which that entity actually carries out activities which constitute an economic activity, including, in particular, whether the foreign controlled entity has premises, qualified personnel and equipment used in its business activity;
(2) the foreign controlled entity does not create a structure that does not function economically;
(3) there is a commensurate relationship between the scope of business of the foreign controlled entity and its actual premises, personnel or equipment;
(4) the agreements entered into are in accordance with economic reality, are economically justified and do not manifestly run counter to the general economic interests of that entity;
(5) a foreign controlled entity independently performs its essential economic functions using its own resources, including local managers.
[6] Jurisdictions that apply harmful tax competition are listed by the minister responsible for public finances in accordance with article 11j Act on Corporate Income Tax.

The exemption does not apply if the dividend payment allows a reduction of the tax base or the tax liability in the source state.

Capital gains exemption

In order to benefit from the tax exemption on the capital gains on shares, a notification (declaration of the intention to enjoy the exemption) by the Polish holding company to the tax office is required.

The exemption does not apply to sales of shares in a so-called real estate company, i.e. a Polish/foreign subsidiary with at least 50% of its value derived directly or indirectly from Polish real estate or rights concerning such estate.

A Polish holding company cannot deduct its capital losses.

V. Follow-up

The COCG agreed with the description of PL015 measure.