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MEETING DOCUMENT

From:	General Secretariat of the Council
To:	Code of Conduct Group (Business Taxation)
N° prev. doc.:	WK 9430/2018
Subject:	Member States responses to the questionnaire on monitoring of Guidance on rollback and standstill

Delegations will find attached addendum (Romania) to Member States responses to the questionnaire on monitoring Guidance on rollback and standstill.



MINISTRY OF PUBLIC FINANCE

General Directorate of Legislation for the Fiscal Code and Customs Regulations



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No. 750557/October 29, 2018

With regard to the request of the General Secretariat of the Council, as sent by email on July 27, 2018, with the topic "Final Questionnaire regarding the Monitoring Guide on Standstill and Rollback Guidelines" approved in the session of the Work group regarding the Code of Conduct of July 24, 2018", asking for a response to the questionnaires in annexes 1-3 on the monitoring of fiscal regimes, in the framework of the activities of the Code of Conduct group organized in the EU Council, please be informed on the following:

Annex 1 Questionnaire on Financial branches:

Law no. 227/2015 on the Fiscal Code, as subsequently amended and supplemented, which sets: the legal framework on taxes, charges, and mandatory social contributions, does not include provisions regulating the tax regime for Financial Branches.

Annex 2 Questionnaire regarding holding companies, asymmetrical measures

The answers to this questionnaire are attached hereto.

Annex 3 Questionnaire on Headquarters

Law no. 227/2015 on the Fiscal Code, as subsequently amended and supplemented, which sets: the legal framework on taxes, charges, and mandatory social contributions, does not include provisions regulating the tax regime for Headquarters.

Yours sincerely,

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Director General

Annex II

Questionnaire on holding companies, Asymmetrical Measures

Q1: Does your country have a regime for Holding Companies?

NO: Romania doesn't currently have a law regulating the legal and fiscal regime of holding or holding companies.

Q2: How does the regime treat capital earnings?

Q3: How does the regime treat capital losses?

Q4: Are there general rules, not directly related to the regime, which apply to capital earnings and/or losses, in addition to or in lieu of specific rules?

Law no. 227/2015 on the Fiscal Code, as subsequently amended and supplemented, includes under Title II „Corporate income tax” and VI „Tax on incomes obtained in Romania by non-residents and tax on representative offices of foreign companies incorporated in Romania” provisions which regulate the fiscal regime of dividends received by Romanian legal entities or paid to non-resident legal entities, as well as the fiscal regime of revenues from equity securities, capital earnings, as follows:

I. Regarding dividends

The following are non-taxable revenues when calculating the fiscal result: “b) dividends received from a foreign legal entity payer of corporate tax or of a tax similar to corporate tax, located in a third country (which is not a Member State of the European Union) that concluded a convention of avoidance of double taxation with Romania, if the Romanian legal entity receiving the dividends holds on the date of registration of the dividends in accordance with applicable accounting regulations at least 10% of the share capital of the legal entity that distributes dividends for an interrupted term of one year;”(art.23 letter b))

The following shall be non-taxable when calculating the fiscal result:

a) the dividends distributed to a Romanian legal entity, the mother-company, by a subsidiary thereof located in a Member State, including those distributed to its permanent seat located in another Member State than that of the subsidiary, if the Romanian legal entity fulfills the following cumulative conditions:

1. has one of the following forms of organization: general partnership, limited partnership, joint-stock company, limited partnership by shares, limited liability company;
2. pays corporate income tax, in accordance with the provisions of title II of the Fiscal Code, with no possibility of an option or exemption;
3. holds at least 10% in the share capital of the subsidiary located in another Member State, which is the one distributing the dividends;

4. on the date of registration of the revenue from dividends, it has been holding the minimum percentage of shares provided under point 3, for an uninterrupted term of at least one year;

The subsidiary from a Member State is a foreign legal entity which fulfills the following cumulative conditions:

1. has one of the forms of organization provided in annex no. 1, which is an integral part of title II;

2. in accordance with the fiscal legislation of that Member State, it is considered to be a resident of that Member State and pursuant to a convention on the avoidance of double taxation concluded with a third country, it is not considered to have its fiscal residence outside of the European Union;

3. it pays, in accordance with the fiscal legislation of a Member State and with no possibility of an option or exemption, one of the taxes provided in annex no. 2, which is an integral part of this title, or a tax similar to the corporate income tax regulated by this title.

b) the dividends distributed to a mother-company, which is a foreign legal entity from a Member State, by the subsidiaries thereof located in other Member States, through their permanent seats in Romania, if the foreign legal entity meets the following cumulative conditions:

1. it has one of the forms of organization provided in annex no. 1, which is an integral part of title II;

2. in accordance with the fiscal legislation of the Member State, it is considered to be a resident of that Member State and, pursuant to a convention on avoidance of double taxation concluded with a third country, it is not considered to have its fiscal residence outside of the European Union;

3. it pays, in accordance with the fiscal legislation of a Member State and with no possibility of any option or exemption, one of the taxes provided in annex no. 2, which is an integral part of title II, or a tax similar to the corporate income tax regulated by title II;

4. it holds at least 10% of the share capital of the subsidiary located in another Member State, which is the one distributing the dividends;

5. on the date of registration of the revenue from dividends by the permanent seat from Romania, the foreign legal entity has been holding the minimum number of shares provided under point 4 for an uninterrupted term of at least one year.

The provisions shall not apply to an action or series of actions taken with the main purpose or one of the main purposes of obtaining a fiscal advantage which goes against the object or purpose of this article, which are dishonest, given all relevant facts and circumstances. Such an action might include several stages or parties. For the purposes of this paragraph, an action or series of actions shall be considered dishonest if they are not taken for valid commercial reasons which reflect economic reality. The provisions of this paragraph shall be supplemented by other existing provisions in the internal legislation or agreements related to fighting tax evasion, fiscal fraud, or abuses.

(art. 24 para. (1) item a) and letter b)- transposition of the provisions of Directive 2011/96/EU))

Exemptions from the tax owed by non-residents:

„c) the dividends paid by a Romanian legal entity or a legal entity seated in Romania and incorporated in accordance with European legislation, to a legal entity residing in another Member State of the European Union or to a permanent seat of an enterprise from a Member State of the European Union located in another Member State of the European Union, if:

1. the foreign legal entity that benefits of the dividends fulfills the following cumulative conditions:

(i) it is residing in a Member State of the European Union and has one of the forms of organization provided in annex no. 1 to title II;

(ii) it is considered to be a resident of the Member State of the European Union, in accordance with the fiscal legislation of the state in question and, pursuant to a convention of avoidance of double taxation concluded with a third country, it is not considered a resident for taxation purposes outside of the European Union;

(iii) it pays, in accordance with the fiscal legislation of a Member State, with no possibility of any option or exemption, one of the taxes provided in annex no. 2 of title II or a tax similar to corporate income tax regulated under title II;

~~(iv) it holds at least 10% of the share capital of the Romanian legal entity for an uninterrupted term of at least one year, ending on the date of payment of the dividend.~~

2. the beneficiary of the dividends is a permanent seat of a legal entity residing in a Member State of the European Union located in another Member State of the European Union, and the foreign legal entity for which the permanent seat operates must fulfill the cumulative conditions provided by point 1, sub-points (i) - (iv) and the profits recorded by the permanent seat must be taxable in the Member State where it is established, on the basis of a convention for avoidance of double taxation or of the internal legislation of that Member State;

3. the Romanian legal entity paying the dividends fulfills the following cumulative conditions:

(i) it is a company incorporated on the basis of Romanian laws and has one of the following forms of organization: joint-stock company, limited partnership by shares, limited liability company, general partnership, limited partnership;

(ii) it pays corporate income tax in accordance with the provisions of title II, with no possibility of any option or exemption. In order to be awarded this exemption, the legal entity seated in Romania and incorporated in accordance with European legislation which pays the dividend must pay corporate income tax in accordance with the provisions of title II with no possibility of any option or exemption;

The provisions shall not apply to an action or series of actions taken with the main purpose or one of the main purposes of obtaining a fiscal advantage which goes against the object or purpose of this article, which are dishonest, given all relevant facts and circumstances. Such an action might include several stages or parties. For the purposes of this paragraph, an action or series of actions shall be considered dishonest if they are not taken for valid commercial reasons which reflect economic reality. The provisions of this paragraph shall be supplemented by other existing provisions in the internal legislation or agreements related to fighting tax evasion, fiscal fraud, or abuses.” (art. 229 para. (1) letter c) and para. (2)).

II Regarding revenues from equity securities, capital earnings:

Foreign legal entities are required to pay corporate income tax for the fiscal results corresponding to operations of sale – assignment of equity securities held in a

Romanian legal entity, if the conditions of exemption are not met, in the following cases:

1. they do not prove to be residents of a state that concluded a convention for avoidance of double taxation with Romania;
2. Romania and the state of residence of the foreign legal entity which sells the equity securities have not concluded a convention for avoidance of double taxation;
3. the right of taxation belongs to Romania, if the convention of avoidance of double taxation is applied;

The foreign legal entity is required to declare and pay corporate income tax, according to law. The 16% tax rate shall apply on the fiscal result which is calculated as difference between the revenues and expenses registered in accordance with applicable accounting regulations, from which shall be subtracted the non-taxable revenues and the fiscal deductions and to which shall be added non-deductible expenses. The fiscal result shall also take into account elements similar to revenues and expenses, in accordance with methodological norms, as well as fiscal losses which shall be recovered in accordance with the provisions of title II. The positive ~~fiscal result shall be taxable profit, and the negative fiscal result shall be fiscal loss.~~

(art. 19, art.38 para. (1) letter. b), para. (2)).

The following shall be non-taxable revenues when calculating the fiscal result:

„the value of new equity securities or the amounts representing the increase of the nominal value of existing equity securities registered as a result of incorporation of reserves, benefits, or issuance premiums of the legal entities where equity securities are held. They shall be taxable on the date of assignment, transmission for free, ~~withdrawal of the share capital or liquidation of the legal entity where the equity securities are held,~~ with the exception of those that correspond to equity securities for which the conditions of non-taxation (holding of 10% for an uninterrupted term of 1 year) are met.

„revenues from assessment/reassessment/sale/assignment of equity securities held in a Romanian legal entity or a foreign legal entity located in a country that concluded a convention for avoidance of double taxation with Romania, if the taxpayer holds for an uninterrupted term of one year, including the date of assessment/reassessment/sale/assignment, at least 10% of the share capital of the legal entity where it holds the equity securities. *The revenues from the sale/assignment of equity securities held in a Romanian legal entity by a legal entity residing in a country that has not concluded a convention for avoidance of double taxation with Romania shall not be subject to these provisions;*” **(art.23 letter c), letter i)).**

The following shall not be deductible when calculating the fiscal result:

- the expenses that correspond to non-taxable revenues;
- the expenses from assessment/reassessment of equity securities, if the taxpayer has been holding for an uninterrupted term of one year, including the date of assessment/reassessment, at least 10% of the share capital of the legal entity where the equity securities are held. **(art. 25 para. (4) letter e) and letter ș).**

Considering the mechanism of determination of the fiscal result presented above, the regime of fiscal losses in the case of the operation of sale/assignment of equity securities is the following:

- in the case of taxable revenues, fiscal losses shall be recovered in accordance with the provisions of title II.
- in the case of non-taxable revenues, the expenses shall not be deductible and the loss shall not be considered either.

Also, when establishing the amount of a tax, of a charge or of a mandatory social contribution, fiscal authorities can disregard a transaction which does not have an economic purpose, adjusting the fiscal effects thereof, or they may reclassify the form of a transaction/activity to reflect the economic content of the transaction/activity.

The fiscal body shall be required to motivate in fact the taxation decision issued after disregarding a transaction or, as applicable, as a result of the reclassification of the form of a transaction, by indicating the relevant elements related to the purpose and content of the transaction which is subject to disregard/reclassification, as well as of all the means of evidence considered for that purpose.

~~Cross-border transactions or a series of cross-border transactions which are qualified as artificial by the competent fiscal bodies shall not be part of the scope of double taxation avoidance conventions.~~

Artificial cross-border transactions are cross-border transactions or series of cross-border transactions which don't have an economic content and cannot be normally used in regular economic practices, the fundamental purpose thereof being that of avoiding taxation or obtaining fiscal advantages that could not be otherwise awarded. Cross-border transactions or series of cross-border transactions are those transactions carried out between two or several persons of which at least one is located outside Romania. (art.11)

Q5: Are there anti-abuse provisions which are relevant for preventing abuses of regime?