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## The New Common Anti-Abuse Rule in the EU Parent-Subsidiary Directive is a ‘De Minimis Rule’, But Not a Carte Blanche for the National Legislature

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Due to an amendment of the EU Parent-Subsidiary Directive, the EU Member States must include a common minimum anti-abuse provision in their legislation by 31 December 2015 at the latest.

The common minimum anti-abuse provision is contained in Art. 1(2) and (3) of the Parent-Subsidiary Directive (which grants exemptions on payments of dividend in the EU):

*‘2. Member States shall not grant the benefits of this Directive to an arrangement or a series of arrangements which, having been put into place for the main purpose or one of the main purposes of obtaining a tax advantage that defeats the object or purpose of this Directive, are not genuine having regard to all relevant facts and circumstances. An arrangement may comprise more than one step or part.*

*3. For the purposes of paragraph 2, an arrangement or a series of arrangements shall be regarded as not genuine to the extent that they are not put into place for valid commercial reasons which reflect economic reality’.*

Implementation of the general anti-abuse provision in the national law of a Member State is mandatory. This is shown clearly from the text of Art. 1, para. 2, ‘Member States shall not grant the benefits of this Directive’. The purpose of the general anti-abuse provision is to prevent abuse of the Parent-Subsidiary Directive. The reason to include a mandatory provision is worded clearly in the preamble: first, it is pointed out that, ‘Some Member States apply domestic or agreement-based provisions aimed at tackling tax evasion, tax fraud or abusive practices in a general or in a specific way’. In addition, it is noted in the preamble of the directive that the various anti-abuse provisions of the Member States are not identical: ‘However, those provisions may have different levels of severity and, in any case, they are designed to reflect the specificities of each Member State’s tax system’; that anti-abuse provisions are sometimes lacking is also addressed: ‘Moreover, some Member States do not have any domestic or agreement-based provisions for the prevention of abuse’.

In the preamble to the directive, the following is also observed: ‘Therefore, the inclusion of a

common minimum anti-abuse rule in Directive 2011/96/EU would be very helpful to prevent misuse of that Directive and to ensure greater consistency in its application in different Member States’.

The Council High Level Working Party on Tax issues (HLWP) summarised this as follows: ‘The proposed anti-abuse rule, by filling the gaps arising from the misalignments in Member States’ rules aimed at tackling abusive practices, would provide a common minimum level of protection of the PSD against abuses. Such a rule would only come into play if and to the extent that the Member State concerned does not have a domestic anti-abuse rule or has a domestic anti-abuse rule which is less strict than the proposed ‘minimum standard’.

The reason for a mandatory general anti-abuse provision, therefore, is to see to it that all Member States combat abuse under the same conditions in order to achieve consistency. This is thus described in the preamble as a ‘common *minimum* anti-abuse rule’ (italics DW).

In the conclusions of the ECOFIN of 9 December 2014, in which a political agreement was reached on the adoption of the amending directive, it is observed that the new general anti-abuse provision is a ‘de minimis rule’, which is ‘allowing countries to apply *stricter* national rules, as long as they meet minimum EU requirements’. (Italics DW).

The Netherlands State Secretary of Finance made the same observation: ‘The current proposal for a general anti-abuse rule is a *de minimis* rule which means that if Member States have *more stringent* national anti-abuse provisions, these continue to apply in full. The background regarding this anti-abuse rule is to create an EU-wide equal lower limit to anti-abuse when applying the PSD’. (Italics DW).

The question is whether the observation that the Member States can still apply *stricter* national anti-abuse rules is in fact correct. It is indeed true that the new general anti-abuse provision intends to have the combating of abuse under the Parent-Subsidiary Directive on one line in all the Member States. In order to achieve this, a common description of what should be considered abuse has been included in the Directive. The Member States are obliged to combat this abuse of the Parent-Subsidiary Directive. It is not so, however, that this means that the Member States have the discretion to also apply *further-reaching* national anti-abuse measures. This cannot be derived either from the preamble or from the text of the directive. It would also be contrary to the objective of the common minimum provision, the precise objective of which is to combat abuse in all Member States, under the same conditions in the same manner and thereby, achieving consistency. In other words: the new general anti-abuse provision does not give *carte blanche* to the Member States to introduce anti-abuse provisions which reach further than permitted by Art. 1, para. 2. If that were so, then this would jeopardize the objective and purpose of the Parent-Subsidiary Directive which exempts those dividends and other distributions of profit and endeavours to prevent double taxation. It cannot be so that due to a remark in the conclusions of the ECOFIN the purpose of the anti-abuse provision would be significantly extended i) contrary to the text of the provision itself, ii) contrary to the objective of the amendment, and iii) contrary to the objective and purpose of the directive as such. In the *Denkavit-VITIC-Voormeer* judgment (joined cases C-283/94, C-291/94 and C-292/94), the European Court had already ruled that expressions of intent made by the Member States in the Council, had no legal status ‘if they are not actually expressed in the legislation. Legislation is addressed to those affected by it. They must, in accordance with the principle of legal certainty, be able to rely on what it contains’.

The new general anti-abuse provision, therefore, does not give *carte blanche* to the Member States to introduce anti-abuse provisions which reach further than permitted by Art. 1, paragraph 2.

I note further that *other* anti-abuse provisions may still be possible on the basis of Art. 1, para. 4 of the Directive, which provision allows *non-mandatory* anti-abuse provisions for the combating of tax evasion, tax fraud and abuse. What anti-abuse provisions this provision allows besides the general anti-abuse provision is unclear (specific anti-abuse provisions or provisions directed at fraud?). Nevertheless, in my view, Art. 1, para. 4 does not allow any *further-reaching* anti-abuse provisions when compared with the definition such as is included in Art. 1, para. 2. This is demonstrated explicitly from observations of the Presidency at the formation of this provision, who remarked that on the basis of Art. 1, para. 4, domestic anti-abuse rules may be introduced ‘that are less strict than the “minimum standard” proposed for inclusion in the revised PSD’. (Italics DW).

Also this provision does not give *carte blanche* to the Member States.

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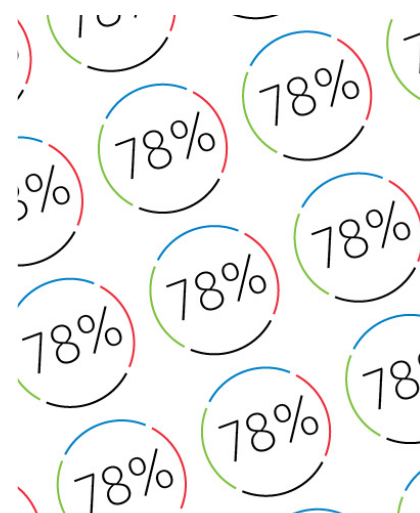
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