

EUROPEAN BUSINESS INITIATIVE ON TAXATION

EBIT Contribution to the Commission on proposed new EU-wide rules on loss compensation

- (1) This paper forms the contribution of the **European Business Initiative on Taxation (EBIT)**¹ to the Commission on new EU rules for loss compensation for companies doing business in more than one Member State.

EBIT is a group of leading European-based businesses, which was created in September 2001 to respond to the challenge of modernising direct tax policy in Europe, in order to facilitate business compliance with tax regulations and optimise the environment businesses operate in.

EBIT thanks the Commission for consulting with business on the introduction of EU-wide rules for cross-border loss relief. EBIT welcomes the efforts undertaken by the Commission in recent months to reach progress in this important area, as part of its wider goal of eliminating existing direct tax obstacles in Europe.

- (2) At the same time, EBIT is concerned about the progress made thus far within the EU and the chances for real and practical progress in the near future. In the meantime, the lack of uniform rules on losses continues to obstruct the full potential for growth in cross-border business activity in Europe and increased intra-EU trade, and it is also not consistent with the EU's Lisbon Objective to improve the overall competitiveness of European companies.

EBIT urges the Commission and the EU Member States to act now and step up their combined efforts to agree as soon as possible on a new system which is acceptable to all and which takes the business view fully into account. EBIT invites policymakers at both European and Member State level to consider its recommendations for an optimised system as presented below.

This paper has been produced by the tax practitioners working in EBIT with the support of a team of experts from PricewaterhouseCoopers. It contains the collective views of EBIT and should not be read as a point of view of any individual member of EBIT or of PricewaterhouseCoopers.

¹ The European Business Initiative on Taxation includes amongst others Airbus, Bombardier, Buhrmann, Caterpillar, Deutsche Post, EADS, Electrolux, General Electric, Hewlett-Packard, Kappa Packaging, Marks & Spencer, Microsoft, Nutreco, Rolls Royce and Tupperware.

- (3) Regarding a new EU-wide system for loss compensation, as an ideal, EBIT:
- Advocates a system which allows for the offsetting of all profits and losses within one group irrespective of the location of the group members and their legal form (IFA London Congress 1998 conclusions);
 - EBIT is of the opinion that foreign subsidiaries should be treated equally to domestic participations with the ability to compensate profits and losses within the same group. In addition, EBIT considers that there should not be a distinction between foreign subsidiaries and foreign permanent establishments (PEs); applying the same rules to both would create uniformity and take away tax reasons to create different legal structures;
 - Believes that these principles should be fully and uniformly applied within the EU as a single territory, consistent with EC law as interpreted by the European Court of Justice.
- (4) However, EBIT considers that the creation of a true EU-wide common consolidated tax base (CCTB) allowing businesses to benefit fully from the Single Market is still some way off. Therefore, in line with its consistent approach, EBIT believes that in the meantime, an incremental approach should be adopted with the focus on short-term pragmatic solutions, which are easy to implement and can be complied with by business and are based on clear criteria.
- (5) EBIT recommends that, following the withdrawal of its earlier Proposal for a Directive on compensation of cross-border losses (COM(90) 595 final), the Commission, as a first step, should consider conducting further in-depth studies on identified best practice in Europe. EBIT welcomes the Commission's recent initial steps in this direction, as it believes that doing nothing and simply waiting for the outcome of the Marks & Spencer case is not an option. Eliminating categorically any possibility for tax consolidation, pooling of results and transfer of losses is not an option either and would clearly conflict with the EU's "Lisbon Objectives" of becoming the most competitive market place in the world.
- (6) EBIT is of the opinion that the identified best practices would in any case have to be optional, simple to manage and may indeed also take into account abuse situations. EBIT notes that the perception that business is focused on tax planning and abuse is simply not true. In most cases, internationally expanding businesses have to be involved in tax planning and structuring in order to avoid tax obstacles rather than taxation. EBIT emphasises that business is dictated by markets, clients, profitability and regulations, and not by the respective tax departments of companies or their tax advisors: "The tax tail is not wagging the dog". EBIT recalls that the European Court of Justice has confirmed on more than one occasion that abuse is to be dealt with on a case-by-case basis and that Member States are free to counter abuse in specific cases.

- (7) EBIT considers that the fact that where companies are working across borders, i.e. on a pan-European basis, national tax authorities are still to a large extent focused on the domestic revenue which they need to protect. However understandable, especially in the field of abuse, tax authorities have the tools to exchange information and make sure that particular tax avoidance schemes and tax evasion are countered adequately.
- (8) EBIT believes that best practices should include:
- Cross-border loss consolidation (e.g. Austrian (2005), Danish, French, and Italian systems); and
 - "Election Provisions for Foreign Losses" (EPFL): – i.e. an elective system where parent companies are free to treat certain foreign subs as branches and consequently offset branch losses in cases where the parent owns at least 50% plus 1 share in the subsidiary. The option could work for 3 (or no more than 5) years and there could be country-specific rules to recapture those losses and / or treat intercompany loss transfers similarly to foreign branches.
- (9) EBIT therefore welcomes the Commission's moves towards the introduction of what it calls the "comprehensive approach" and which includes consolidation of results of business group members. EBIT draws attention to the following:
- Upwards only loss compensation as proposed by the Commission could in practice still lead to potentially discriminatory domestic group relief options that are open to interpretation and not "ECJ-proof";
 - Failure to provide downwards loss compensation may equally be a breach of freedom of establishment and therefore should not be overlooked and should at least be acknowledged to be the next stage, if not included in the Commission's original proposal;
 - Sideways loss compensation particularly where there is a common EU holding company and consequently possibly a breach of freedom of establishment is also important;
 - Accessibility e.g.; automatic renewability / duration of application - for say 3 (or no more than 5) years;
 - The "comprehensive approach" system should be relatively straightforward and not be too burdensome and expensive to comply with for businesses.
- (10) EBIT will be happy to further contribute to shaping the new rules for loss compensation and is committed to constructive dialogue with the Commission.

The European Business Initiative on Taxation - July 2004

Disclaimer / Copyright: This document contains the collective views of EBIT and is provided to you courtesy of EBIT. Nothing in this document can be construed as an opinion or point of view of any individual member of EBIT or PricewaterhouseCoopers. Any reproduction, in part or in total, of this document, in any form whatsoever, is subject to prior written authorisation of EBIT. Such authorisation can be obtained from PricewaterhouseCoopers by sending an email to: paul.de.haan@nl.pwc.com