

## V

(Ogłoszenia)

## POSTĘPOWANIA ZWIĄZANE Z REALIZACJĄ POLITYKI KONKURENCJI

## KOMISJA EUROPEJSKA

## POMOC PAŃSTWA – ZJEDNOCZONE KRÓLESTWO

**Pomoc państwa SA.44896 (2017/C) (ex 2017/NN) – Potencjalny program pomocy państwa w formie zwolnienia podatkowego dla finansowania grup w Zjednoczonym Królestwie**

**Zaproszenie do zgłaszania uwag zgodnie z art. 108 ust. 2 Traktatu o funkcjonowaniu Unii Europejskiej**

(Tekst mający znaczenie dla EOG)

(2017/C 400/03)

Pismem z dnia 26 października 2017 r., zamieszczonym w autentycznej wersji językowej na stronach następujących po niniejszym streszczeniu, Komisja powiadomiła Zjednoczone Królestwo o swojej decyzji w sprawie wszczęcia postępowania określonego w art. 108 ust. 2 Traktatu o funkcjonowaniu Unii Europejskiej dotyczącego wyżej wspomnianego środka pomocy.

Zainteresowane strony mogą zgłaszać uwagi na temat środka pomocy, w odniesieniu do którego Komisja wszczyna postępowanie, w terminie jednego miesiąca od daty publikacji niniejszego streszczenia i następującego po nim pisma na następujący adres lub numer faksu:

European Commission,  
Directorate-General Competition  
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Otrzymane uwagi zostaną przekazane władzom Zjednoczonego Królestwa. Zainteresowane strony zgłaszające uwagi mogą wystąpić z odpowiednio uzasadnionym pisemnym wnioskiem o objęcie ich tożsamości klauzulą poufności.

## PROCEDURA

Pismem z dnia 26 kwietnia 2013 r. Komisja przesłała Zjednoczonemu Królestwu wniosek o dostarczenie informacji w sprawie wprowadzenia – w ramach reformy krajowych przepisów dotyczących kontrolowanych spółek zagranicznych – zwolnienia podatkowego dla finansowania grup. W pismach z dnia 11 marca 2014 r., 4 czerwca 2015 r. i 19 grudnia 2016 r. Komisja zwróciła się o dostarczenie dodatkowych informacji.

## OPIS ŚRODKA, W ODNIESIENIU DO KTÓREGO KOMISJA WSZCZYNA POSTĘPOWANIE

Przepisy dotyczące kontrolowanych spółek zagranicznych to przepisy przeciwdziałające unikaniu opodatkowania, których celem jest zapewnienie opodatkowania w Zjednoczonym Królestwie dochodów, jakie przenoszone są ze Zjednoczonego Królestwa do nisko opodatkowanych zagranicznych spółek zależnych, przez co unika się płacenia z ich tytułu krajowego podatku dochodowego od osób prawnych w Zjednoczonym Królestwie. Przepisy dotyczące kontrolowanych spółek zagranicznych mają zastosowanie do różnych kategorii dochodów, w tym każdego rodzaju zysków finansowych.

Środek, w odniesieniu do którego Komisja wszczyną postępowanie, dotyczy przepisu, który wyraźnie zezwala na niestosowanie przepisów dotyczących kontrolowanych spółek zagranicznych do niektórych transakcji. W szczególności zwolnienie podatkowe dla finansowania grup umożliwia przedsiębiorstwom wielonarodowym częściowe lub pełne wyłączenie z opodatkowania dochodów z odsetek pochodzących od zagranicznych przedsiębiorstw wchodzących w skład grupy. Podstawą środka jest jednoznaczny zapis w przepisach prawa krajowego dotyczącego podatku dochodowego od osób prawnych. Środek nie wymaga wcześniejszego zatwierdzenia przez organy podatkowe Zjednoczonego Królestwa. Wszystkie przedsiębiorstwa wielonarodowe z siedzibą w Zjednoczonym Królestwie udzielające pożyczek zagranicznym przedsiębiorstwom wchodzącym w skład grupy mogą skorzystać z tego zwolnienia podatkowego.

Przepisy dotyczące kontrolowanych spółek zagranicznych są zawarte w rozdziałach 1–22 w części 9A ustawy podatkowej z 2010 r. (podatki międzynarodowe i inne przepisy, TIOPA). Na ich mocy dochody spółki kontrolowanej niebędącej rezydentem w Zjednoczonym Królestwie przypisywane są spółce kontrolującej ze Zjednoczonego Królestwa, jeżeli dochody te zostały sztucznie przekierowane ze Zjednoczonego Królestwa. Takie ponownie przypisane dochody podlegają opodatkowaniu krajowym podatkiem dochodowym od osób prawnych, tak jak każde inne dochody spółek będących rezydentami w Zjednoczonym Królestwie. Uznanie dochodów za sztucznie przekierowane ze Zjednoczonego Królestwa opiera się na kryteriach, które są różne dla różnych kategorii dochodów, co ma odzwierciedlać różnego rodzaju ryzyko sztucznego przekierowania dla poszczególnych kategorii dochodów.

Jedną z tych kategorii to zyski finansowe nieprzeznaczone do obrotu (odsetki). Rozdział 5 przepisów dotyczących kontrolowanych spółek zagranicznych zawiera kryteria ustalania sztucznego przekierowania dla tej kategorii dochodów. Rozdział 9 przepisów dotyczących kontrolowanych spółek zagranicznych (zwolnienie podatkowe dla finansowania grup) przewiduje zwolnienie dla niektórych zysków finansowych, nawet jeżeli, na mocy przepisów rozdziału 5, są one uznane za sztucznie przekierowane, między innymi dla odsetek pochodzących od przedsiębiorstw spoza Zjednoczonego Królestwa należących do grupy. W rezultacie przedsiębiorstwa ze Zjednoczonego Królestwa są wyłączone z zakresu stosowania przepisów dotyczących kontrolowanych spółek zagranicznych przeciwdziałających unikaniu opodatkowania w odniesieniu do odsetek pochodzących od zagranicznych przedsiębiorstw wchodzących w skład grupy, które uznawane są za sztucznie przekierowane do kontrolowanych spółek zagranicznych. Wyłączenie nie obejmuje innych sztucznie przekierowanych zysków finansowych, takich jak odsetki od spółek ze Zjednoczonego Królestwa należących do grupy lub odsetki od (brytyjskich lub zagranicznych) stron trzecich, które podlegają przepisom przeciwdziałającym unikaniu opodatkowania, a tym samym krajowemu podatkowi dochodowemu od osób prawnych w Zjednoczonym Królestwie.

#### OCENA ŚRODKA

Na obecnym etapie postępowania Komisja uważa, że zwolnienie z krajowego podatku dochodowego od osób prawnych zagranicznych zysków finansowych przekazywanych w ramach grupy stanowi program pomocy, który zapewnia selektywną korzyść stanowiącą pomoc państwa. Korzyść ta wydaje się wynikać z braku zastosowania przepisów dotyczących kontrolowanych spółek zagranicznych do zysków z finansowania zagranicznych przedsiębiorstw wchodzących w skład grupy, a tym samym – ze zwolnienia ich z krajowego podatku dochodowego od osób prawnych w Zjednoczonym Królestwie. Środek ten wydaje się na pierwszy rzut oka selektywny, ponieważ zwolnienie ma zastosowanie wyłącznie do podmiotów ze Zjednoczonego Królestwa kontrolujących spółki zagraniczne, które to podmioty uzyskują dochód z finansowania zagranicznych przedsiębiorstw wchodzących w skład grupy, a nie do podmiotów ze Zjednoczonego Królestwa kontrolujących spółki zagraniczne, które uzyskują innego rodzaju zysk finansowy, podczas gdy podmioty te są w porównywalnej sytuacji prawnej i faktycznej w świetle celu systemu odniesienia. Wydaje się, że nie ma uzasadnienia dla takiego traktowania ze względu na logikę lub ogólną strukturę systemu podatkowego, ponieważ zwolnienie dotyczy dochodów, które nawet w samych przepisach dotyczących kontrolowanych spółek zagranicznych określone są jako sztucznie przekierowane ze Zjednoczonego Królestwa, a zatem wchodzą w zakres celu systemu odniesienia.

Ze względu na fakt, że taka pomoc byłaby nową pomocą oraz że nie wydaje się, by któreś z odstępstw przewidzianych w art. 107 ust. 2 i 3 TFUE miało zastosowanie, Komisja postanowiła wszcząć względem przedmiotowego środka postępowanie określone w art. 108 ust. 2 TFUE.

## TEKST PISMA

The Commission wishes to inform the United Kingdom (hereafter: 'UK') that, having examined the information supplied by your authorities on the measure referred to above, it has decided to open the procedure laid down in Article 108 (2) of the Treaty on the Functioning of the European Union (TFEU).

## 1. PROCEDURE

- (1) By letter of 26 April 2013, the Commission requested the UK authorities to provide information on the reform of its Controlled Foreign Company (hereafter: 'CFC') rules that had entered into force on 1 January 2013. The UK authorities submitted the information on 14 June 2013.
- (2) Additional information was requested from the UK authorities by letter of 11 March 2014 including on the non-statutory CFC-clearances granted on the basis of the reformed CFC rules<sup>(1)</sup>. The UK authorities provided the information requested partly on 10 April 2014 and the remainder — a summary of non-statutory CFC clearances issued by Her Majesty's Revenue and Customs (hereafter: 'HMRC') up to 31 March 2014 — by a submission of 10 July 2014.
- (3) By letter of 4 June 2015, further specific information was requested on certain individual non-statutory CFC-clearances related to the reformed CFC provisions. The UK authorities provided the information requested by letter of 24 July 2015.
- (4) A final request for information was sent on 19 December 2016. The UK authorities sent its reply and submitted the information requested by letter of 1 February 2017.

## 2. DESCRIPTION OF THE UK CFC REGIME AND OF THE MEASURE

## 2.1. The UK CFC regime

2.1.1. *The UK CFC regime: presentation*

- (5) Under UK corporate tax law, companies are taxed on their profits. Companies are not taxed on the profits of their subsidiaries, wherever they are located. This holds true even if the subsidiary distributes its profits as dividends as a result of the general UK dividend exemption. This gives UK companies the possibility to set-up a non-resident subsidiary in a low-tax jurisdiction and to divert income from the UK to the non-resident subsidiary for tax reasons. The UK CFC rules aim to protect the UK corporate tax base by bringing into charge those profits which are artificially diverted from the UK into non-resident associated entities<sup>(2)</sup>.
- (6) The current UK CFC regime passed the UK Parliament as part of the Finance Act 2012. It is incorporated into the Taxes Acts as Part 9A of Taxation (International and Other Provisions) Act 2010 (hereafter: 'TIOPA'), Chapters 1 to 22. The reformed CFC rules apply to accounting periods beginning on or after 1 January 2013<sup>(3)</sup>. The introduction of the reformed CFC regime was part of a wider UK tax reform aiming to increase the attractiveness of the UK corporate tax system for international businesses by creating the most competitive corporate tax regime in the G20<sup>(4)</sup>.
- (7) Under the UK CFC regime any company resident in a country other than the UK and controlled by one or more UK persons is a CFC. As in most other countries, the UK CFC rules are anti-avoidance provisions; they are intended as a deterrent in order to protect the UK corporation tax base. They therefore only charge certain profits of a CFC to tax in the UK, namely profits that have been artificially diverted from the UK.
- (8) Control by UK residents is generally exercised by companies but also interests of individuals or trustees may be taken into account. Control can be legal, economic or accounting control and the rules also contain special provisions for joint ventures. An overseas company does not have to be directly controlled to be a CFC. If a UK resident company controls a non-UK resident company A, which in turn controls non-UK resident company B, then both A and B are CFCs. The CFC rules only apportion and charge profits of a CFC on UK resident companies that hold at least a 25 % interest in the CFC.

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<sup>(1)</sup> Where a clearance procedure is provided for in the legislation, this is referred to as a 'statutory clearance procedure'. Advance clearance on the application of a legislative provision in a certain situation can also be requested without being provided for in the legislation. This is referred to as a 'non-statutory clearance procedure'.

<sup>(2)</sup> See the letter from the UK authorities of 14 June 2013, paragraph 3.2 and of 1 February 2017, paragraph 12.

<sup>(3)</sup> The UK already had CFC rules before 2013 which were based on an entirely different concept. The old CFC provisions did not contain an exemption for international group financing.

<sup>(4)</sup> See the UK's 2010 Coalition Agreement: 'The Coalition: our programme for government', p. 10: 'Our aim is to create the most competitive corporate tax regime in the G20, while protecting manufacturing industries.' See also George Osborne (Chancellor of the Exchequer) and Lord Green (Minister of State for Trade and Investment), 'A guide to UK taxation' (published March 2013 by UK Trade & Investment), Foreword: 'The Government's goal is to make the UK the best place in the world to locate an international business.' and 'We are committed to creating the most competitive tax system in the G20, and we are delivering on this ambition'. Other elements of this package included the gradual reduction of the standard corporate income tax rate, the introduction of a dividend exemption, an elective branch exemption and the introduction of a 'patent box' regime.

- (9) Chapter 2 of Part 9A TIOPA sets out the steps for determining if UK tax is due on (part of) the profits earned by a foreign company once it is established that the latter is a CFC. Accordingly, there is a CFC charge if (and only if)
- The CFC has ‘chargeable profits’;
  - None of the CFC entity level exemptions apply <sup>(5)</sup>; and
  - There is a UK ‘interest holder’, a UK resident company that (together with connected companies) holds an interest of at least 25 % in the CFC.
- (10) The UK CFC rules do not apportion all profits of a CFC that meet certain conditions; it only apportions ‘chargeable profits’ of a CFC, i.e. profits that have been artificially diverted from the UK. To identify which (if any) of the CFC’s profits are chargeable profits, the UK regime applies different criteria to different categories of profits laid down in Chapters 4 to 8 of Part 9A TIOPA. This is referred to as the ‘CFC charge gateway’. The rules aim to provide objective criteria to distinguish between normal commercial behaviour on the one hand and artificial diversion on the other for each category of profits. Before applying these criteria, however, the CFC charge gateway itself has an initial filter in Chapter 3 with some general rules to establish whether any of the more detailed gateway rules in Chapters 4 to 8 need to be applied <sup>(6)</sup>. As for these detailed gateway rules:
- Chapter 4 deals with any profits other than non-trading finance profits and profits arising from a property business;
  - Chapter 5 deals with non-trading finance profits, essentially interest income from incidental and/or passive loans (see recital (15));
  - Chapter 6 deals with trading finance profits, essentially interest earned from an active finance business such as banks;
  - Chapter 7 deals with captive insurance companies;
  - Chapter 8 deals with certain subsidiaries of regulated financial companies.
- (11) The regime contains a number of entity level exemptions in Chapters 10 to 14. If an entity level exemption applies, there is no further need to test any of the CFC charge gateways. The entity exemptions apply where, according to the UK authorities, there is a general and foreseeable low risk of artificial diversion for the entire entity. They seem to reflect the fact that the majority of foreign subsidiaries will be set up for genuine commercial reasons and they thus could be said to increase efficiency in applying the CFC rules.
- Chapter 10 contains the exempted period exemption, a temporary (usually 12 months) exemption for CFCs that have come under UK control for the first time.
  - Chapter 11 contains the excluded territories exemption for those CFCs that pose a foreseeable low risk of artificial diversion due to their territory of residence and type of income earned <sup>(7)</sup>.
  - Chapter 12 contains the low profits exemption, an entity-level exemption for CFCs with low levels of profits in an accounting period (generally no more than GBP 500,000 of which no more than GBP 50,000 non-trading profits).
  - Chapter 13 contains the low profit margin exemption, i.e. profits are no more than 10 per cent of operating expenditure. The exemption relates to CFCs that perform substantial but relatively low value added functions.
  - Chapter 14 contains the tax exemption, meant to easily exclude a CFC from having to apply the CFC rules to its profits when it pays a normal to high level of effective tax in its territory of residence (at least 75 % of the tax that would have been due if its profits had been subject to UK tax and measured on UK rules).

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<sup>(5)</sup> See recital (11).

<sup>(6)</sup> Its purpose is to exclude CFCs that have no chargeable profits from the regime in a relatively simple way in order to keep the cost of administration of the CFC regime as low as possible. The conditions are relatively straightforward following a risk based approach to facilitate self-assessment without any special requirements for documentation. As regards non-trading finance profits, for example, non-trading finance profits that fall within a 5 % safe harbour (non-trading finance profits are incidental to business profits) are excluded from Chapter 5 under Chapter 3.

<sup>(7)</sup> The exemption requires a case by case approach applying several income based tests and looking at effective taxation rather than statutory rates. Nevertheless, a simplified test with fewer conditions is available for CFCs resident in Australia, Canada, France, Germany, Japan, and the United States of America. These countries are considered to pose less of a risk of artificial diversion of UK profits given the nature and stability of their corporate tax regimes.

- (12) The remaining chapters 15 to 22 contain various operating and administrative rules needed for the proper application and administration of the CFC rules, such as rules to prevent double taxation, rules about control, definitions and various rules relevant to the proper application of the CFC rules by the UK tax authorities.
- (13) In addition to the legal CFC framework laid down in Part 9A TIOPA, the UK has published extensive guidance relating to the CFC rules. The Guidance includes an introduction to the rules, a general overview as well as guidance on the specific rules chapter by chapter and a series of practical examples<sup>(8)</sup>.

#### 2.1.2. CFC Charge on Non-trading finance profits

##### 2.1.2.1. General — Scope of the provision

- (14) Provided none of the entity level exemptions apply and also the general Chapter 3 filter is passed, Chapter 5 determines whether non-trading finance profits earned by CFCs — either derived from lending to other members of the multinational group and/or to third parties — pass through the CFC charge gateway and hence should be subject to a CFC charge. Chapter 5 thus contains the general and horizontal conditions determining which, if any, of a CFC's non-trading finance profits are considered to have been artificially diverted from the UK and are therefore to be apportioned back to and taxed in the hands of the UK persons holding a relevant interest in the CFC.
- (15) Non-trading finance profits include all finance profits that are not trading finance profits which are dealt with by Chapter 6. It may include both finance income received from intercompany loans and from external financing (e.g. deposits), provided they are not derived from trading activities. For example, a foreign company with limited operational staff involved in one or more incidental intercompany finance transactions will need to apply the Chapter 5 tests to assess whether a CFC charge applies. Chapter 5 contains two general tests and two tests covering abusive situations not covered by those general tests. They are described in more detail below.

##### 2.1.2.2. Significant People Functions

- (16) The first general test checks whether UK activities are related to the non-trading finance profits of the CFC. Accordingly, a CFC charge applies to non-trading finance profits to the extent they are derived from assets and risks in relation to which any relevant significant people functions (hereafter: 'SPFs')<sup>(9)</sup> are carried out in the UK. The logic of applying a CFC charge in this case is that the UK should be able to tax profits which are earned thanks to activity undertaken in the UK<sup>(10)</sup>.

##### 2.1.2.3. UK Capital Investment

- (17) The second general test looks at how the loans generating the non-trading finance profits have been financed. Accordingly, regardless of where the SPFs are, non-trading finance profits will also be captured if the CFC has earned the profits from loans that are funded from *relevant UK funds*. According to the CFC rules, relevant UK funds are any funds or assets which represent or are (in)directly derived from:
- (a) direct or indirect, formal or informal contribution of capital by a UK connected company<sup>(11)</sup> into the CFC;
  - (b) any amount of CFC profits that were identified as 'artificially diverted profits' for any earlier accounting period. These CFC profits are seen as having a (deemed) UK connection if they are used to fund subsequent loans of the CFC.

At this stage, the Commission understands that the logic of applying a CFC charge in this case is that revenues from relevant UK funds are to be taxed in the UK and should not escape UK taxation by contribution to a CFC.

<sup>(8)</sup> HMRC Internal Manual — International Manual, INTM190000, <https://www.gov.uk/hmrc-internal-manuals/international-manual/intm190000>

<sup>(9)</sup> This test is very similar to the test applied under Chapter 4 of the CFC rules to assess artificial diversion of 'other profits' of a CFC, essentially normal business profits. In particular, the test whether non-trading finance profits from assets owned by the CFC and from risks allocated to the CFC are related to relevant SPFs which are carried out in the UK, refers to the principles from the authorised OECD approach (hereafter: 'AOA'), as set out in the 2010 Report on the Attribution of Profits to Permanent Establishments. It therefore also comprises the term 'key entrepreneurial risk-taking functions' (KERT functions) which is used for businesses in the financial enterprise sector.

<sup>(10)</sup> Consequently, if a CFC earns interest income from loans, whereby the relevant decision making and supervisory functions related to granting and managing the loan and interest payments are carried out from the UK, the interest income will be captured by the CFC rules and taxed in the UK.

<sup>(11)</sup> According to Section 371EC(6) of Part 9a TIOPA, a UK connected company is a UK resident company connected to the CFC or a non-UK resident company connected with the CFC acting through a UK permanent establishment. A detailed definition of 'connected' is given in Section 1122 of Chapter 1, Part 24 Corporation Tax Act 2010.

## 2.1.2.4. Arrangements in lieu of dividends to UK resident companies

- (18) The third test addresses specific arrangements involving UK resident companies which generate non-trading finance profits for the CFC. Accordingly, regardless of whether any of the two general tests are met, the CFC charge also applies if non-trading finance profits directly or indirectly arise from an arrangement with a UK corporate taxpayer connected with the CFC. The test is only met, however, if it is reasonable to suppose that the arrangement has been made for tax reasons as an alternative to distributing a dividend to the UK.

## 2.1.2.5. UK finance leases

- (19) The last test addresses specific arrangements involving non-trading finance income from UK related financial lease operations. Accordingly, even if neither of the two general tests are met, non-trading finance profits are still captured under the CFC rules if they arise from a relevant finance lease made by the CFC (in)directly to a connected UK corporate taxpayer, provided it is reasonable to suppose that the finance lease was agreed (instead of purchasing the asset) for tax reasons.
- (20) The third and fourth tests concern specific tax-driven arrangements reducing taxable profits in the UK and generating profits for the CFC, which are considered artificial diversion even without funding from relevant UK funds or SPFs in the UK.

## 2.1.3. CFC Charge on Trading finance profits

- (21) Chapter 6 determines whether trading finance profits earned by a CFC, typically profits from banking or insurance activities, pass through the CFC charge gateway, again provided none of the entity level exemptions apply and also the general Chapter 3 filter is passed. Chapter 6 thus contains the general and horizontal conditions determining which of a CFC's trading finance profits, if any, are considered to have been artificially diverted from the UK and are therefore to be apportioned back and taxed in the hands of the UK persons holding a relevant interest in the CFC.
- (22) In essence, trading finance profits of a CFC are captured under Chapter 6 if the CFC is overcapitalised and to the extent that any overcapitalisation is the result of capital contributions from connected UK companies. The assessment of whether a CFC has Chapter 6 profits involves a two-step process<sup>(12)</sup>.
- a. Step 1: The first step looks whether the CFC holds free capital greater than that it would be expected to hold if it were not controlled by any other company (excess free capital). The step also looks at the UK connected capital contributions received by the CFC. The amount determined under this step is the lesser of the two amounts. Where a financial trading CFC has excess free capital but does not have any UK connected capital contributions, then there are no Chapter 6 profits and vice versa<sup>(13)</sup>.
  - b. Step 2: The second step identifies the trading finance profits subject to a Chapter 6 CFC charge by reference to the amount of profits that can reasonably be attributed to the investment, or other use, of the relevant amount determined in step 1.
- (23) The Chapter 6 test applies to all trading finance profits; it does not distinguish between trading finance profits derived from intercompany financial transactions and those derived from transactions with unrelated counterparts. Multinational groups frequently centralise financing functions in large and complex group finance companies or treasury companies. The operations of such companies may have characteristics sufficient for part or all of their activity to constitute a financial trade, so that their profits from the trade would fall to be considered under Chapter 6 (trading finance profits) rather than Chapter 5 (non-trading finance profits)<sup>(14)</sup>.
- (24) However, if a CFC is a group treasury company<sup>(15)</sup>, it can choose to have its trading finance profits treated as if they were non-trading finance profits (by giving notice to an office or the Revenue and Customs)<sup>(16)</sup>. The first consequence of such election is that the Chapter 5 tests apply to establish whether the 'deemed' non-trading finance profits are subject to a CFC charge. The second consequence is that the UK controlling entity can make a claim for the Group Financing Exemption for the 'deemed' non-trading finance profits earned by a group treasury CFC.

<sup>(12)</sup> For CFCs carrying on insurance business (insurance CFCs), an additional test is applied consistent with the business model of insurance companies and looking at free assets in addition to free capital.

<sup>(13)</sup> UK connected capital contributions are any capital contributions made to the CFC, directly or indirectly, by a connected UK resident company. This is to be determined based on the specific facts of a case and without any backward limitation in time.

<sup>(14)</sup> Such a company will effectively be operating in a manner similar to a retail bank: a high volume of transactions, a large number of incomings and outgoings, hedging activity. Structural lending activity will largely be funded from group deposits, and, overall, it will realise a profit based on margins between lending activities and deposit taking.

<sup>(15)</sup> To determine whether a CFC is a 'group treasury company', Section 316(5) to (11) of Part 7 TIOPA applies.

<sup>(16)</sup> Section 371CE(2) of Part 9A TIOPA.

## 2.2. The measure: the Group Financing Exemption

- (25) The Group Financing Exemption is laid down in Chapter 9 of Part 9a TIOPA (hereafter: 'Chapter 9'), 'Exemptions for profits from qualifying loan relationships'. It establishes the conditions under which certain non-trading finance profits that meet at least one of the four tests listed in Chapter 5 will nevertheless be partially or fully exempt from a CFC charge. The partial or full exemption, however, only applies to non-trading finance profits arising from 'qualifying loan relationships'.
- (26) A qualifying loan relationship is a loan from the CFC to a non UK resident related party (or a foreign permanent establishment of a UK resident related party), whereby the ultimate debtor is controlled by the UK resident person(s) that control(s) the CFC lending the moneys, or whereby the ultimate debtor and the UK entity controlling the CFC are under common control. Loans to non-related parties (e.g. bank deposits), loans to UK-resident related parties (or to a UK permanent establishment of non-UK resident parties) or loans to foreign related parties that are not under common UK control do not qualify for either the full or partial exemption. Consequently, non-trading finance profits from such non-qualifying loan relationships will always be subject to the full CFC charge when meeting at least one of the four tests listed in Chapter 5.
- (27) In order to benefit from the exemption, a UK resident company must make a claim that either the full or the partial exemption applies to some of the non-trading finance profits earned by the CFC it controls. A confirmation (ruling or clearance) by the tax authorities is not required.

### *Partial exemption*

- (28) The default rule for non-trading finance profits from qualifying loan relationships is that only a quarter of the CFC's profits will pass through the CFC charge gateway and so be included in the CFC charge. This is implemented by a 75 % exemption of the apportionment that would otherwise be due under Chapter 5.

### *Full exemption*

- (29) Provided certain specific additional conditions are met, non-trading finance profits from qualifying loan relationships may be eligible for a full (up to 100 %) exemption. This means that none of the CFC's non-trading finance profits that would otherwise be apportioned to the UK controlling entity under Chapter 5 will pass through the CFC charge gateway and therefore none of these profits will be subject to UK tax. The claim for a full exemption can be made if one of the two following conditions is met.
- (a) The full exemption can be claimed for a loan to a non UK resident group company to the extent it was funded either (a) out of certain assets of the CFC, namely those that have arisen in the territory to which the qualifying loan is made, or (b) out of newly issued group capital, i.e. funds raised by issuing shares from the group's top company. Collectively, this is referred to as funding from 'qualifying resources';
- (b) The full exemption can also be claimed to the extent that on a consolidated basis the net interest income of all UK resident members of the multinational group exceeds their net interest borrowings<sup>(17)</sup>. This is referred to as the 'matched interest' rule.
- (30) If a funding from qualifying resources cannot be demonstrated and the matched interest rule does not apply, interest from loans to non UK resident group companies by default fall back to the partial exemption.
- (31) Both the partial and the full exemption are in principle only available if the foreign group interest qualifies as artificially diverted non-trading finance profits subject to Chapter 5. The Group Financing Exemption in principle does not apply if the foreign group interest qualifies as artificially diverted trading finance profits subject to Chapter 6.

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<sup>(17)</sup> The calculation to apply the matched interest rule can be quite complex, requiring an examination of the finance costs of all the UK resident companies in the group as well as all the non-trading finance profits earned by non UK resident group companies that would be (partially) apportioned to those UK group companies if it was not for the matched interest rule.

- (32) However, as mentioned in recital (26), a group treasury company earning intercompany trading finance profits that would otherwise be subject to a CFC charge under Chapter 6<sup>(18)</sup> can elect to be treated as if it earned non-trading finance profits. As a consequence, the Group Financing Exemption optionally applies to all finance profits of a CFC derived from foreign group companies, be it from trading or from non-trading activities.

### 3. CFC RULES — INTERNATIONAL CONTEXT

- (33) To prevent taxpayers from avoiding or deferring taxes by shifting profits to low taxed foreign subsidiaries, many countries have introduced CFC rules<sup>(19)</sup>. All CFC rules have in common that they tax certain profits of certain non-resident entities at the level of certain domestic shareholders of the non-resident entity. However, the exact rules in different countries may vary significantly as regards their constituting elements<sup>(20)</sup>. The rules and criteria setting these elements need to be aligned with both the domestic corporate tax system of which they are part and will reflect the tax policy objectives of the relevant country.
- (34) In its 'Action Plan on Base Erosion and Profit Shifting'<sup>(21)</sup>, the Organisation for Economic Cooperation and Development (hereafter: 'OECD') notes that CFC rules have been introduced in many countries to address one of the sources of Base Erosion and Profit Shifting (hereafter: 'BEPS') concerns, notably the possibility of creating affiliated non-resident taxpayers and routing income of a resident enterprise through the non-resident affiliate. The final BEPS report on Action 3 concerning the use of CFC rules sets out recommendations for OECD and non OECD Member States for the design of effective CFC rules<sup>(22)</sup>. The report was prepared to ensure that jurisdictions that choose to apply CFC rules can do this in a manner that effectively prevents taxpayers from shifting income into foreign subsidiaries in order to avoid taxation.
- (35) At EU level, the Council on 12 July 2016 adopted an Anti-Tax Avoidance Directive (hereafter: 'the ATAD')<sup>(23)</sup>. The recitals of the ATAD explicitly refer to the final reports on the 15 OECD Action Items against BEPS and the Council Conclusions of 8 December 2015 underlining the need to find common, flexible, solutions at EU level consistent with OECD BEPS conclusions. The recitals also state:

*'Controlled foreign company (CFC) rules have the effect of re-attributing the income of a low-taxed controlled subsidiary to its parent company. Then, the parent company becomes taxable on this attributed income in the State where it is resident for tax purposes. Depending on the policy priorities of that State, CFC rules may target an entire low-taxed subsidiary, specific categories of income or be limited to income which has artificially been diverted to the subsidiary.'*

- (36) The CFC rule is laid down in Article 7 of the ATAD. The main rule is laid down in paragraphs 1, 2(a) and 3 of Article 7. Following Council discussions, an optional alternative rule was laid down in paragraphs 1, 2(b) and 4. Article 8 further illustrates the way to compute CFC income. The most relevant parts of Article 7 read as follows:

#### Article 7

#### **Controlled foreign company rule**

- (1) The Member State of a taxpayer shall treat an entity (...) as a controlled foreign company where the following conditions are met: (...)
- (2) Where an entity (...) is treated as a controlled foreign company under paragraph 1, the Member State of the taxpayer shall include in the tax base:
- (a) the non-distributed income of the entity or the income of the permanent establishment which is derived from the following categories:
- (1) interest or any other income generated by financial assets;
- (...)

<sup>(18)</sup> This would essentially be the case if its assets and risks are mainly managed from the UK and it is overcapitalised.

<sup>(19)</sup> While CFC rules in principle lead to income inclusions in the residence country of the (ultimate) parent company, they are also considered to have positive spill-over effects in source countries, i.e. the countries producing the income that is routed through the CFC because taxpayers have no (or much less of an) incentive to shift profits into a third, low-tax jurisdiction.

<sup>(20)</sup> This concerns for example the definition of control, low tax and shifted profits but also administrative provisions on the computation of the CFC income and the prevention of double taxation.

<sup>(21)</sup> OECD (2013), *Action Plan on Base Erosion and Profit Shifting*, OECD Publishing, <http://dx.doi.org/10.1787/9789264202719-en>

<sup>(22)</sup> OECD (2015), *Designing Effective Controlled Foreign Company Rules, Action 3 — 2015 Final Report*, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris, <http://dx.doi.org/10.1787/9789264241152-en>

<sup>(23)</sup> Council Directive (EU) 2016/1164 of 12 July 2016 laying down rules against tax avoidance practices that directly affect the functioning of the internal market, OJ L 193/1 of 19 July 2016. According to Article 11 of the Directive, Member States shall have implemented and apply the provisions of the Directive from 1 January 2019.



or:

- (b) *the non-distributed income of the entity or permanent establishment arising from non-genuine arrangements which have been put in place for the essential purpose of obtaining a tax advantage.*

(...)

- (3) *Where, under the rules of a Member State, the tax base of a taxpayer is calculated according to point (a) of paragraph 2, the Member State may opt not to treat an entity or permanent establishment as a controlled foreign company under paragraph 1 if one third or less of the income accruing to the entity or permanent establishment falls within the categories under point (a) of paragraph 2.*

*Where, under the rules of a Member State, the tax base of a taxpayer is calculated according to point (a) of paragraph 2, the Member State may opt not to treat financial undertakings as controlled foreign companies if one third or less of the entity's income from the categories under point (a) of paragraph 2 comes from transactions with the taxpayer or its associated enterprises.*

(...)

- (37) Article 7(2) lists several categories of a CFC's income that are to be taxed under the CFC rules, starting with interest in letter (a). Article 7(3) further stipulates that Member States can choose not to apply the CFC rule (i) if one third or less of the CFC income consists of interest, and (ii) if one third or less of the interest income of the CFC (financial undertaking) consists of interest from group companies. This implies that interest income received from group companies is considered by the ATAD as the most important income category to be covered by the CFC rules.

#### 4. POSITION OF THE UK AUTHORITIES

- (38) The UK authorities in general state that the UK CFC rules do not relieve any company of a UK tax liability it would otherwise have; the UK authorities argue that the CFC rules pose an additional tax liability on UK companies only in situations where profits have been artificially diverted from the UK<sup>(24)</sup>.
- (39) The UK authorities explain that the CFC rules address a wide range of different situations in which profits may be artificially diverted to CFCs and reintegrate a reasonable measure of profit for each specific situation tailored to the specific risk of diversion identified for that situation<sup>(25)</sup>. They explain that the term 'exemption' used in Chapter 9 and other sections of the CFC rules is not meant to describe a derogation from the rules<sup>(26)</sup>. According to the UK, the Group Financing Exemption simply covers circumstances that present a low risk of artificial diversion and thus avoidance. It therefore operates as a filter excluding profits for which the level of risk that such profits have arisen from avoidance is low and which thus are deemed not to have been artificially diverted. The Group Financing Exemption does not exclude profits that have been (artificially) diverted<sup>(27)</sup>.
- (40) According to the UK authorities, the exemptions operate to establish the proper boundaries of the regime. According to the UK authorities, to the extent that the CFC regime can be considered the appropriate reference system for State aid assessment, the Chapter 9 rules holding the Group Financing Exemption are to be seen as an integral part of that reference system, not as a derogation<sup>(28)</sup>. The UK authorities claim that the use of exemptions and thresholds is a standard feature of all CFC rules, including the CFC rule in the ATAD<sup>(29)</sup>.
- (41) The UK authorities explain that the CFC rules concerning a CFC's non-trading finance profits must be seen in connection with its general policy on taxation of overseas profits. The UK does not tax companies on the profits of their subsidiaries, be it domestic or abroad, even when distributed. At the same time, UK companies can deduct interest expenses incurred on borrowing used to fund investment in subsidiaries, domestic or abroad. The UK authorities explain that as a consequence a UK company controlling a CFC can determine the mix of debt and equity in that CFC. To the extent that this leads to overcapitalisation of the CFC, the CFC's funding costs could artificially be replaced with UK funding costs thus diverting UK profits to the CFC<sup>(30)</sup>.

<sup>(24)</sup> See the letter from the UK authorities of 1 February 2017, paragraph 3.

<sup>(25)</sup> See the letter from the UK authorities of 1 February 2017, paragraph 4.

<sup>(26)</sup> See the letter from the UK authorities of 1 February 2017, paragraph 6.

<sup>(27)</sup> See the letter from the UK authorities of 1 February 2017, paragraph 6.

<sup>(28)</sup> See the letter from the UK authorities of 1 February 2017, paragraph 19.

<sup>(29)</sup> See the letter from the UK authorities of 1 February 2017, paragraphs 6 and 13.

<sup>(30)</sup> See the letter from the UK authorities of 1 February 2017, paragraph 7 and 9.

- (42) Since it would be very difficult to trace or otherwise establish precisely the extent to which an equity investment in a CFC has been sourced from borrowings incurred by a UK member of a group, the UK authorities argue that the partial and full Group Financing Exemption are a proportionate and reasonable response measuring the extent to which the CFC is overcapitalised with capital sourced from UK borrowings<sup>(31)</sup>. It operates on the presumption that for a typical fully equity funded group financing CFC, the funding costs incurred by the UK instead of that CFC (i.e. diverted profits) can reasonably be taken as 25 % of the CFC's non-trade finance profits<sup>(32)</sup>. Using this presumption, according to the UK authorities, avoids the need for groups to keep records of complex flows of money leading to disproportionate compliance costs for them and the UK tax authority<sup>(33)</sup>.
- (43) The UK authorities consider the 75 % exemption/25 % charge a pragmatic proposal dealing with a wide range of circumstances and striking an appropriate balance between a number of competing factors. These include the fungibility of financial assets, the complexity and compliance burden of tracing, the need to combat the diversion of profits from the UK, and the extent to which intra-group lending is funded from non-UK sources<sup>(34)</sup>. Since none of these factors can be accurately quantified, the UK authorities state that the partial exemption rather than attempting to establish in each case the exact proportion of the CFC's funding which would under fully competitive conditions be debt rather than equity, applies a uniform assumption that 25 % of the CFC's non-UK intercompany non-trading finance profits are treated as diverted profits<sup>(35)</sup>.
- (44) At the same time, the UK authorities specifically clarify that the partial exemption does not aim to reflect to what extent the funds used by a financing CFC are ultimately sourced from a group's (external) borrowings. According to the UK authorities, this rule assumes that absent tax advantages and the group relationship, a CFC would have been funded with 75 % equity and 25 % debt<sup>(36)</sup>. Including just 25 % of the CFC's non-trading finance profits from group loans in the CFC's chargeable profits approximates the interest income missed by the UK that it would have earned from such 25 % debt funding. The partial CFC charge thus must be seen as an alternative to imputing additional interest income that would arise if the debt-equity ratio of the CFC was increased to 1:3, thus achieving a similar outcome but using a simpler rule<sup>(37)</sup>.
- (45) The larger exemption (up to 100 %) according to the UK authorities addresses circumstances where the underlying facts indicate that there has been no diversion of profits from the UK, either by the (near) absence of UK funding of the CFC (the 'Qualifying Resources' rules) or by the (near) absence of any net UK borrowing costs (the 'Matched Interest' rules)<sup>(38)</sup>.
- (46) The UK authorities state that the distinction between non-trade finance income received by the CFC from third parties and amounts which are received from related parties is that non-trade finance income received from third parties simply is an obvious example of the artificial diversion of profits, i.e. the classic 'money box' CFC<sup>(39)</sup>. According to the UK authorities, this is less clear for non-trade finance income from related parties which may or may not represent an artificial diversion of profits. The UK authorities claim that non-trade finance profits arising from lending to related parties pose less risk of artificial diversion of profits compared to non-trade finance profits arising from lending to third parties. The UK authorities claim this risk assessment to be consistent with the UK's overall tax policy<sup>(40)</sup>.
- (47) The UK authorities confirm that group financing CFCs providing loans to related parties are themselves generally funded by equity capital from the UK parent company. It claims, however, that from a group perspective the alternative would be for such equity capital to be provided directly from the UK to the related parties in the form of equity. A UK company providing equity to an overseas group company would not be considered to be diverting profits from the UK. This in spite of the fact that such equity finance could be backed by external debt in the UK giving rise to UK interest deductions while any return on that investment is likely to be in the form of dividends which are tax exempt in the UK<sup>(41)</sup>.

<sup>(31)</sup> See the letter from the UK authorities of 14 June 2013, paragraphs 4.17 to 4.19.

<sup>(32)</sup> See the letter from the UK authorities of 1 February 2017, paragraph 9.

<sup>(33)</sup> See the letter from the UK authorities of 14 June 2013, paragraph 4.15.

<sup>(34)</sup> See the letter from the UK authorities of 10 April 2014, paragraphs 3.2.

<sup>(35)</sup> See the letter from the UK authorities of 10 April 2014, paragraphs 3.3.

<sup>(36)</sup> See the letter from the UK authorities of 10 April 2014, paragraphs 3.5.

<sup>(37)</sup> See the letter from the UK authorities of 10 April 2014, paragraph 3.7.

<sup>(38)</sup> See the letter from the UK authorities of 10 April 2014, paragraph 4.4.

<sup>(39)</sup> See the letter from the UK authorities of 1 February 2017, paragraphs 29 and 74. A 'money-box' CFC is described by the UK (paragraph 30) as a situation where a company seeks to avoid taxation that would otherwise be due on non-trading finance profits by routing them through a non-resident company. A UK company with surplus capital in the UK placing that surplus capital on deposit with a third party bank results in non-trade finance profits for that UK company chargeable to tax under the normal UK corporation tax rules. However, if that UK company chose to use that surplus capital to equity fund a CFC, and the CFC then placed that surplus capital on deposit with a third party bank, then, absent the CFC rules, the profits which arose would be outside the scope of UK taxation.

<sup>(40)</sup> See the letter from the UK authorities of 1 February 2017, paragraph 32 and 74.

<sup>(41)</sup> See the letter from the UK authorities of 1 February 2017, paragraph 33.

- (48) The UK authorities claim that there is a clear distinction between UK equity provided to non-resident trading subsidiaries where funds are used for the overall trading or business purposes of the group, and UK equity use to fund an offshore 'money-box' where the funds are simply being held as a passive investment. In the latter case, absent the tax advantage, there is no reason why those funds could not be retained by the UK company and generate the same level of profits taxable in the UK<sup>(42)</sup>.
- (49) As regards the question why the partial exemption has been fixed at 75 %, representing a debt-equity ratio of 1:3 instead of more commonly used fixed ratios of 3:1 or 4:1 which would have led to a 20-25 % partial exemption, the UK authorities state that 75 % should not be seen as anything more than a reasonable figure to use<sup>(43)</sup>. The UK authorities argue that CFC rules frequently use fixed percentages and ratios which may not be capable of precise justification but simply minimise their administration costs. The UK authorities recall that the ATAD in Article 7(3) has the option to exempt a CFC from charge if one third or less of its income fall within the categories specified in Article 7(2)(a), which include 'interest or any other income generated by financial assets'. Also that ratio, according to the UK authorities, appears to be a pragmatic solution to the difficulty of identifying the 'correct' amount of profits that should be subject to a CFC charge<sup>(44)</sup>.
- (50) Moreover, the UK authorities hold that debt-equity ratios of 3:1 or 4:1 rather reflect the generosity of thin capitalisation safe harbours used in some territories. In order to assess in a proportionate manner whether and to what extent profits have been diverted from the UK, the likely or expected gearing of a typical company seems a more appropriate focus rather than a maximum permitted amount<sup>(45)</sup>. The UK authorities in that regard consider it more relevant to take into account on how much of its profits an operating (group) company typically pays interest, rather than focussing on the group financing CFC which is almost always a mere conduit. Using that rationale, the UK authorities claim that taxing more than 25 % of a group financing CFC's profits in relation to the partial exemption may result in the CFC charge being considered disproportionate<sup>(46)</sup>.
- (51) In summary, the UK authorities consider it a matter of policy that the UK CFC rules treat non-trade finance profits from related parties more favourably than non-trade finance profits from third parties on the grounds that it considers there to be a higher risk of artificial diversion in relation to non-trade finance profits from third parties.

## 5. ASSESSMENT OF THE MEASURE

### 5.1. The Group Financing Exemption is a scheme

- (52) At this stage, the Commission regards Chapter 9 of Part 9a TIOPA ('Exemptions for profits from qualifying loan relationships') as a tax scheme, insofar as it excludes multinational enterprises from a CFC charge on certain — actual or deemed — non-trading finance profits earned by CFCs they control.
- (53) Pursuant to Article 1(d) of Regulation (EU) 2015/1589<sup>(47)</sup> a scheme is to be considered as an act 'on the basis of which, without further implementing measures being required, individual aid awards may be made to undertakings defined within the act in a general and abstract manner'.
- (54) Chapter 9 of Part 9A TIOPA, can be considered as the basis for the full or partial Group Financing Exemption since no further implementing measures are required for being granted the exemption. The fact that the exemption is subject to the taxpayer making a 'claim' does not alter this since the conditions for eligibility are provided by the law. The same is true as regards the fact that taxpayers can file a request for a non-statutory clearance concerning the applicability of the Group Financing Exemption. In granting or refusing the clearance, HMRC only checks the fulfillment of the conditions for the applicability of the Group Financing Exemption in a specific fact pattern based on the information provided by the taxpayer. The advance clearance procedure is optional and is not a pre-condition for the applicability of the exemption if all conditions are fulfilled.
- (55) The Group Financing Exemption thus meets all criteria laid down in Article 1(d) of Regulation 2015/1589 and the Group Financing Exemption should be analysed as a scheme directly resulting from UK law.

<sup>(42)</sup> See the letter from the UK authorities of 1 February 2017, paragraph 35.

<sup>(43)</sup> See the letter from the UK authorities of 1 February 2017, paragraph 65.

<sup>(44)</sup> See the letter from the UK authorities of 1 February 2017, paragraph 66.

<sup>(45)</sup> See the letter from the UK authorities of 1 February 2017, paragraph 68.

<sup>(46)</sup> See the letter from the UK authorities of 1 February 2017, paragraph 69. The UK refers in that regard to data included in Table B.4 of the OECD (2015), Limiting Base Erosion Involving Interest Deductions and Other Financial Payments, Action 4 — 2015 Final Report. These data show that in 2012, only 6 % of large cap MNEs have interest to EBITDA ratios exceeding 25 %.

<sup>(47)</sup> OJ L 248 of 24.9.2015 p. 9.

## 5.2. Existence of aid within the meaning of Article 107(1) TFEU

- (56) According to Article 107(1) TFEU 'any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market'.
- (57) State aid rules only apply to aid granted to undertakings, i.e. entities involved in economic activities. The criteria laid down in Article 107(1) TFEU are cumulative. Therefore, the measure under assessment constitutes State aid within the meaning of the Treaty if all the above mentioned conditions are fulfilled. Namely, the measure should:
- (a) be granted by the State and through State resources,
  - (b) favour certain undertakings or the production of certain goods,
  - (c) distort or threaten to distort competition, and
  - (d) affect trade between Member States.

### 5.2.1. Selective advantage

- (58) According to settled case-law, 'Article 107, paragraph 1 of the Treaty requires it to be determined whether, under a particular statutory scheme, a State measure is such as to favour "certain undertakings or the production of certain goods" in comparison with others which, in the light of the objective pursued by the scheme in question, are in a comparable legal and factual situation. If it is, the measure concerned fulfils the condition of selectivity' <sup>(48)</sup>.
- (59) In order to classify a tax measure as conferring a selective advantage, it is first necessary to identify and examine the common or 'normal' regime applicable in the Member State concerned. It is in relation to this reference tax regime that it is necessary, as a second step in the selectivity analysis, to assess and determine whether the measure derogates from that common regime inasmuch as it differentiates between economic operators who, in light of the objective pursued by the reference tax system, are in a comparable legal and factual situation <sup>(49)</sup>. If this is the case, the measure is considered prima facie selective. Thirdly, a measure which constitutes an exception to the application of the general tax system may still be justified if the Member State concerned can show that that measure results directly from the basic or guiding principles of its reference tax system <sup>(50)</sup>. If a deviation from the reference tax system is justified by the nature and general scheme of that tax system, the derogation is not selective. The burden of proof in that third step lies with the Member State.

#### 5.2.1.1. Reference tax system

- (60) According to the case-law, a measure is selective if it leads to a difference in treatment between undertakings that are in a comparable legal and factual situation in view of the objective of the reference system <sup>(51)</sup>. At this stage, the Commission is of the opinion that the appropriate reference system is the UK CFC regime <sup>(52)</sup>.
- (61) The objective of the UK CFC regime is to ensure taxation of profits which are artificially diverted from the UK into UK controlled non-resident associated entities <sup>(53)</sup>. To this end, the UK CFC rules lay down the criteria under which profits of a CFC are to be considered artificially diverted.

<sup>(48)</sup> Judgment of the Court of Justice of 3 March 2005, *Heiser*, C-172/03, ECLI:EU:C:2005:130, paragraph 40.

<sup>(49)</sup> Judgement of the Court of Justice of 8 September 2011, *Paint Graphos and others*, Joined Cases C-78/08 to C-80/08, ECLI:EU:C:2009:417, paragraph 49.

<sup>(50)</sup> Judgement of the Court of Justice of 8 September 2011, *Paint Graphos and others*, Joined Cases C-78/08 to C-80/08, ECLI:EU:C:2009:417, paragraph 65.

<sup>(51)</sup> Judgment of the Court of Justice of 15 November 2011, *Commission and Spain v Government of Gibraltar and United Kingdom*, C-106/09 P and C-107/09 P, EU:2011:732, paragraph 75. See also Judgment of the Court (Grand Chamber) of 21 December 2016, *European Commission v World Duty Free Group SA and others*, C-20/15 P and C-21/15 P, EU:C:2016:981, paragraph 54.

<sup>(52)</sup> As a secondary line of reasoning, it could be argued that the reference system is the specific provisions within the CFC regime determining artificial diversion for (deemed) non-trading finance profits, mainly laid down in Chapters 3, 5 and 6 of Part 9A TIOPA, but this would not affect the analysis concerning the derogation.

<sup>(53)</sup> See also recital (5).

- (62) As a consequence, a derogation could arise if some UK resident companies were not taxed on certain artificially diverted finance profits earned by a CFC they control whereas other artificially diverted profits of CFCs, controlled by other UK resident companies in a comparable legal and factual situation, were taxed.
- (63) The Commission will therefore review the objective criteria for artificial diversion under the general UK CFC regime and to what extent Chapter 9 constitutes a derogation from the reference system.

#### 5.2.1.2. The Group Financing Exemption is a derogation to the reference system

In order to assess whether and to what extent profits earned by a 'qualifying CFC' <sup>(54)</sup> are considered artificially diverted profits, the UK CFC rules apply different criteria / tests to different categories of profits in Chapters 3 to 8 of Part 9A TIOPA. The differentiation between categories of profits seems to reflect a difference in ease and likelihood of that category of profits being artificially diverted from the UK. For example, since finance income is much more mobile than business income, a higher threshold is applied for business profits to be considered artificially diverted than for finance profits. According to the UK authorities, the different tests applied per category of income are risk-based tests and serve to ensure the effectiveness of the anti-abuse rule, applying a proportionate measure of artificial diversion for different categories of profits <sup>(55)</sup>.

- (64) As for the category of finance profits, a distinction is made between trading finance profits and non-trading finance profits. Non-trading finance profits are defined negatively in section 371CB of Chapter 3 of Part 9A TIOPA as finance profits that are not trading finance profits <sup>(56)</sup> and that do not arise from investment of funds held in relation to a property business <sup>(57)</sup>. Chapter 5 of Part 9A TIOPA describes when and which of the CFC's non-trading finance profits are considered to be artificially diverted from the UK and thus captured by the CFC provisions, as illustrated under Section 2.1.2.
- (65) The situations described in Chapter 5 of Part 9A TIOPA are examples of income that should normally have arisen in the UK and been subject to UK corporation tax, but that due to a special arrangement involving a CFC now arise at the level of that CFC. Under the UK CFC rules, the general rule for non-trading finance profits therefore is that non-trading finance profits earned by a qualifying CFC meeting one of the four Chapter 5 tests are subject to UK corporation tax at the level of the UK company controlling the CFC.
- (66) Trading finance profits imply the exercise of a trade or business involved in financial activities — essentially banking or insurance — and the finance profits being attributable to those activities <sup>(58)</sup>. Chapter 6 of Part 9A TIOPA describes when and which of the CFC's trading finance profits are considered to be artificially diverted from the UK and thus captured by the CFC provisions. This is essentially the case if the CFC is overcapitalised and to the extent that any overcapitalisation is the result of capital contributions from connected UK companies <sup>(59)</sup>.
- (67) When comparing the tests for trading and non-trading finance profits, it is clear that the test for trading finance profits requires a higher threshold in order to be treated as artificially diverted.

— Firstly, both tests see the provision of equity to the CFC from UK connected capital as an indication of artificial diversion. For active financing (banks), however, finance profits are only labelled as artificially diverted to the extent they are funded with excess equity from UK connected capital. Conversely, for passive financing (investment), finance profits are labelled as artificially diverted to the extent they are funded with any equity from UK connected capital.

— Secondly, overcapitalisation with UK connected capital is the only test for trading finance profits, whereas capitalisation with UK connected capital is only one of four tests for non-trading finance profits. Non-trading finance profits can still be considered artificially diverted even if the CFC is not capitalised with UK connected capital, i.e. if one of the other three tests is met.

<sup>(54)</sup> The term 'qualifying CFC' is used to clarify that it concerns a controlled foreign company that meets the control tests and that does not qualify for any of the general entity exemptions.

<sup>(55)</sup> See the letter from the UK authorities of 14 June 2013, paragraph 3.5.

<sup>(56)</sup> See recital (67).

<sup>(57)</sup> Active group treasury companies in principle carry on a trade and would therefore earn trading finance profits. However, Section 371CE, subsection (2), offers such CFCs the possibility for their trading finance profits to be treated as non-trading finance profits. As a result, the Group Financing Exemption is also available to the trading finance profits of such foreign group treasury companies.

<sup>(58)</sup> 'Finance profits' are defined in Section 371VG of Chapter 22 of Part 9A TIOPA which contains references to various other provisions in UK corporate tax law dealing with financial activities.

<sup>(59)</sup> UK connected capital contributions are any capital contributions made to the CFC, directly or indirectly, by a connected UK resident company. This is to be determined based on the specific facts of a case and without any backward limitation in time. See also recital (23).

This differentiation reflects the risk-based nature of the criteria, with a higher threshold for less mobile active finance income (less easily labelled 'artificially diverted') and a lower threshold for highly mobile passive finance income (more easily labelled 'artificially diverted').

- (68) Chapter 9 of Part 9A, TIOPA determines that some non-trading finance profits that meet one of the four Chapter 5 tests will nevertheless remain fully or partially exempted from the application of the CFC rule. The exemption applies only to non-trading finance profits that are derived from 'qualifying loan arrangements' <sup>(60)</sup>, essentially finance profits derived from loans to related companies that are not resident of the UK and that are not attributable to a UK permanent establishment.
- (69) The exemption can be 100 % of the non-trading finance profits to the extent that the qualifying loan arrangements are funded out of qualifying resources (full exemption). The exemption is 75 % of the non-trading finance profits in all other cases <sup>(61)</sup>. Similar to the term 'qualifying loans', the provisions describing what does and what does not constitute 'qualifying resources' are detailed and complex. Essentially, however, they aim at granting the full exemption only if the CFC's funding is ultimately derived from non-UK sources, with a partial exemption where the funding ultimately is from UK (or unknown) sources.
- (70) Because trading finance profits can upon request be treated as non-trading finance profits for the purpose of the UK CFC rules, the Group Financing Exemption is optionally available to all UK entities controlling a CFC that earns interest from foreign group companies, be it from trading or non-trading.
- (71) The Group Financing Exemption seems to constitute a derogation to the reference framework: UK entities controlling a CFC that earns artificially diverted profits from financing foreign group companies are exempted from tax while other artificially diverted profits earned by a CFC, are not.
- (72) The UK authorities argue that the Group Financing Exemption laid down in Chapter 9 merely provides an additional filter preventing profits from being caught by the CFC rules which according to UK tax policy are not (or not entirely) to be considered artificially diverted. The UK authorities thus essentially hold that the Group Financing Exemption is part of the reference system defining its boundaries rather than being a derogation to it. To support that statement, the UK authorities argue that UK companies in a group context can choose to provide equity directly to a foreign subsidiary instead of providing the equity to a CFC which finances the foreign subsidiary with a loan. In the former case any return — dividends received — would be exempt from UK corporate income tax under the dividend exemption. Since funding foreign subsidiaries directly with equity from the UK does not produce UK taxable income, interest income earned by a CFC from loans to foreign subsidiaries is not considered by the UK authorities as being artificially diverted.
- (73) The Commission at this stage has serious doubts concerning the consistency and accuracy of this reasoning.
- (74) First, intercompany interest from foreign group companies earned by a qualifying CFC and meeting one of the four tests of Chapter 5 seems to meet the test for being regarded as artificially diverted profits by the UK's own standards. The UK CFC rules start with identifying the type of income actually earned by the CFC and then applying horizontal criteria (tests) which factor in the objective risk or likelihood of artificial diversion for that type of income <sup>(62)</sup>, with different criteria for different categories of income earned by the CFC <sup>(63)</sup>.
- (75) The 'counterfactual' brought forward by the UK authorities — direct equity financing from the UK would not have produced UK taxable income — ignores this and instead of looking at the actual facts — a CFC has earned group interest meeting at least one of the Chapter 5 tests — introduces a hypothetical counterfactual involving equity instead of debt financing of the ultimate debtor. That counterfactual seems irrelevant for the purpose of applying the UK CFC rules. Direct equity financing generates dividend income and since dividend income is generally tax exempt for UK resident companies, it is not amongst the income categories potentially triggering a CFC charge. If the CFC provides equity there is equally no CFC charge; dividend income is outside the scope of the UK CFC rules (and therefore outside the reference system).

<sup>(60)</sup> The exemption is available provided the CFC meets certain minimum substance requirements in the foreign territory as laid down in section 371DG.

<sup>(61)</sup> This includes situations where the funding is from known non-qualifying resources or from unknown resources.

<sup>(62)</sup> According to the UK authorities, these objective tests are applied for administrative ease to avoid the need for an individual 'artificial diversion assessment' in every single situation.

<sup>(63)</sup> For example, it is *prima facie* less likely for business profits to be artificially diverted from the UK than it is for finance profits or captive insurance profits, simply due to the greater mobility of the latter profit categories.

- (76) Even if equity financing and debt financing may have the same economic purpose within 100 % owned groups (i.e. funding a subsidiary), they are not treated the same under the UK corporate tax system and they therefore cannot be seen as equivalent for the purpose of avoiding UK corporate tax either. Indeed, the fact that equity and debt funding within groups have similar economic but distinctly different tax effects, is precisely the reason why intercompany interest income is generally considered as being at high risk of artificial diversion for the purpose of CFC rules.
- (77) To illustrate this further, the Commission observes that hypothetical tax exempt alternative counterfactuals are equally available for all other non-trading finance profits that are excluded from the Group Financing Exemption. For example:
- Instead of capitalising a CFC which puts the funds on a loan deposit (3<sup>rd</sup> party debt financing), a UK controlling entity could also make a direct portfolio equity investment in an investment fund.
  - Instead of capitalising a CFC which makes a loan investment in a UK group company (debt financing UK resident group company), a UK controlling entity could also make a direct equity investment in the UK resident group company.
- (78) In both cases, the proceeds of the direct equity investment would be tax exempted under the general UK dividend exemption just like the direct equity investments in foreign group companies in the UK authorities' argumentation. Nevertheless, these types of non-trading finance profits are *per se* treated as artificially diverted profits when meeting one of the Chapter 5 tests and cannot benefit from the Chapter 9 exemption. When assessing artificial diversion of a CFC lending money, it therefore seems that the UK authorities are inconsistent in their argumentation, applying a different logic to otherwise legally and factually comparable situations.
- (79) Second, the doubts raised by the Commission in the previous two recitals are strengthened as the logical conclusion when accepting the UK authorities' reasoning would necessarily be a complete exemption as applicable for dividends, and not a partial exemption. This seems to suggest that even the UK authorities consider foreign intercompany interest income at least in part to be artificially diverted from the UK to the CFC, thereby rendering the UK authorities' argument intrinsically inconsistent.
- (80) Third, the determination of the reference system and derogation do not depend on regulatory techniques, but on the effect of a measure<sup>(64)</sup>. The UK authorities' argumentation would effectively mean that Member States could classify every derogation to a rule as a mere adjustment of the scope of the reference system for that rule. In principle, the scope of an anti-abuse measure such as the CFC regime is within the competence of the Member State. This includes defining the criteria based upon which profits earned by a qualifying CFC will be considered artificially diverted from the UK. However, in setting these criteria, the UK must apply objective criteria that can reasonably be considered to reflect the objective pursued by the reference system at stake.
- (81) There may be good reasons to differentiate between the criteria under which business profits are to be characterised as being artificially diverted from the UK (Chapter 4) and those doing this for non-trading finance profits (Chapter 5), for example because the latter are more mobile, thus carrying a higher risk of artificial diversion. Similarly, when considering in what circumstances non-trading finance profits of a CFC are to be within the scope of the CFC rules, the UK may well introduce as one of the objective criteria whether the CFC has been capitalised with UK funds. As confirmed by the UK authorities, overcapitalising a CFC is the most prominent form of diverting non-trading finance profits from the UK to a foreign subsidiary.
- (82) Nevertheless, such objective criteria must be applied consistently and equally to similar types of non-trading finance profits. Applying more lenient criteria or exemptions to some situations and stricter criteria to other similar ones has the effect of treating some operators that are in a legally and factually comparable situation in view of the objective of the reference system concerned better than other operators. In the case of intercompany non-trading finance profits, this seems even more inconsistent as such income is much easier to divert from one jurisdiction to another through cross-border tax planning structures. If anything, one would expect stricter rules for intra-group situations compared to non-related situations considering the objective of the CFC rules<sup>(65)</sup>.

<sup>(64)</sup> The Court has been clear that it cannot be accepted that national tax rules 'fall from the outset outside the scope of control of State aid merely because they were adopted under a different regulatory technique although they produce the same effects in law and/or in fact', cf. Judgment of the Court of Justice of 15 November 2011, *Commission and Spain v Government of Gibraltar and United Kingdom*, Joined Cases C-106/09 P and C-107/09 P, ECLI:EU:C:2011:732 paragraph 92.

<sup>(65)</sup> In this sense the OECD report 'Limiting Base Erosion Involving Interest Deductions and Other Financial Payments', Action 4 — 2015 Final, OECD, 2015, stresses the risk of profit shifting related to finance income in transactions between related party by the means of an overleveraging of the parent and overcapitalisation of the CFC (paragraph 78): '[...] The general concern underlying the treatment of interest and financing income is that this income is easy to shift and therefore could have been shifted by the parent into the CFC, possibly leading to overleveraging of the parent and overcapitalisation of the CFC. Interest and financing income is more likely to raise this concern when it has been earned from related parties, when the CFC is overcapitalised, when the activities contributing to the interest were located outside the CFC jurisdiction, or when the income was not earned from an active financing business [...]'].

- (83) In the *Sanierungsklausel* case<sup>(66)</sup> the General Court has confirmed that an exemption from an anti-avoidance provision that is inconsistent with the objective of that provision constitutes a derogation. Thus, not applying an anti-abuse rule to a certain type of transactions or enterprises that meet the objective and general criteria for being classified as abusive, favours certain economic operators compared to others who, in light of the objective pursued by the anti-abuse rules, are in a comparable legal and factual situation.
- (84) Indeed, the effect of the Group Financing Exemption is that certain non-trading finance profits with a high risk of diversion, as objectively defined under the general rules of Chapter 5, are excluded from the normal application of the anti-abuse rule. That constitutes a derogation which, at this stage, the Commission does not deem as a mere fine-tuning of the scope of the reference system.
- (85) Fourth, of all profit categories non-trading (passive) finance profits are (one of) the most mobile types of profits and thus objectively bear the highest risk of diversion. Moreover, since finance arrangements, loans, interest flows and within margins even interest rates can be freely designed and set up in particular between related parties, intercompany finance profits are objectively seen as bearing the highest risk of artificial diversion<sup>(67)</sup>. This is also reflected in the ATAD as well as in the comprehensive G20/OECD Report on BEPS Action 3 covering CFC provisions<sup>(68)</sup>.
- (86) For the above reasons, the Commission at this stage does not agree that the more advantageous treatment selectively granted through Chapter 9 can be seen as limitation of the reference system (as claimed by the UK authorities) instead of a derogation to it. The Commission at this stage regards the Group Financing Exemption as a provision excluding some situations and transactions which are considered abusive under the UK's own criteria from the normal application of the CFC rules<sup>(69)</sup>. An exemption introduced contrary to the purpose and logic of an anti-abuse provision alleviating certain multinational companies from a tax charge due under the normal application of that provision forms a derogation to and not a constituting part of that provision.
- (87) Concluding, the Commission at this stage sees the Group Financing Exemption as a derogation from the reference system identified in recital (60). That is because some artificially diverted (finance) profits are exempted from UK taxation while other artificially diverted profits are taxed. The Commission considers that the exemption from the CFC charge for certain artificially diverted foreign intercompany finance profits provides a selective advantage as it is available only to some economic operators and not to others that are in a legally and factually comparable situation in view of the objective of the reference system. More specifically, the Group Financing Exemption treats operators which carry out finance transactions involving certain related foreign debtors better than operators which carry out finance transactions involving related UK debtors<sup>(70)</sup> or finance transactions involving (UK or foreign) third party debtors, whereas all are in a comparable legal and factual situation in the light of the objective of the reference system<sup>(71)</sup>.

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<sup>(66)</sup> Judgment of the General Court of 4 February 2016, *Heitkamp BauHolding GmbH v European Commission*, T-287/11, ECLI:EU:T:2016:60 and Judgment of the General Court of 4 February 2016, *GFKL Financial Services AG v European Commission*, T-620/11, ECLI:EU:T:2016:59.

<sup>(67)</sup> It is for that reason that CFC provisions around the world may all have a different scope and apply different methods to define abuse, but they consistently target as a minimum passive (non-trading) interest income and in particular interest income earned from related parties.

<sup>(68)</sup> Article 7(3) of the ATAD, for example allows Member States not to apply a CFC charge if 1/3 or less of the income earned by the CFC comes from transactions with related parties, so exactly contrary to the Group Financing Exemption logic, see recital (38). Similarly, the G20/OECD BEPS Report on Action 3 states in par 78: '*The general concern underlying the treatment of interest and financing income is that this income is easy to shift and therefore could have been shifted by the parent into the CFC, possibly leading to overleveraging of the parent and overcapitalisation of the CFC. Interest and financing income is more likely to raise this concern when it has been earned from related parties, when the CFC is overcapitalised, when the activities contributing to the interest were located outside the CFC jurisdiction, or when the income was not earned from an active financing business.*' The underlined situations — equity funded CFCs earning passive interest income from group companies — according to the OECD cause most concern for income shifting. Nevertheless, it is in exactly these circumstances that the UK grants the Group Financing Exemption, claiming that there would by definition be no (risk of) artificial diversion.

<sup>(69)</sup> These doubts are strengthened by the fact that the height of the exemption seems to ensure a sufficiently attractive effective tax rate for intercompany finance profits from an international tax competition point of view. During the drafting of the reformed CFC regime, the Group Financing Exemption was discussed with UK business representatives. The minutes of the consultation indicate that the UK initially considered a 50 % exemption (leading to an effective tax rate of 10 %). Business representatives insisted on a higher exemption leading to an effective tax rate of 2-6 % (Point 6 of the Minutes of the CFC Monetary Assets working group meeting of 4 February 2011).

<sup>(70)</sup> Judgment of the Court of Justice of 21 December 2016, *European Commission v World Duty Free Group SA and others*, C-20/15 P and C-21/15 P, EU:C:2016:981, paragraph 119.

<sup>(71)</sup> Judgement of the Court of Justice of 8 September 2011, *Paint Graphos and others*, Joined Cases C-78/08 to C-80/08, ECLI:EU:C:2009:417, paragraph 49.



## 5.2.1.3. Absence of a justification by the nature and general scheme of the system

- (88) A derogation may be justified by the nature or the general scheme of the reference system at issue if, first, it is consistent with both the characteristics forming an essential part of the tax system at issue and with the implementation of that system, and second, if it is consistent with the principle of proportionality so that it does not go beyond what is necessary and that the legitimate objective being pursued could not be attained by less far-reaching measures<sup>(72)</sup>.
- (89) At this stage, the Commission has not been able to identify any grounds for justifying the preferential treatment granted by the Group Financing Exemption that could be said to derive directly from the intrinsic, basic or guiding principles of the reference system or that is the result of inherent mechanisms necessary for the functioning and effectiveness of the UK CFC regime<sup>(73)</sup>. At this stage, there appears to be no justification within the reference system why (deemed) non-trading finance profits meeting the objective tests given under Chapters 5 should not be considered as artificially diverted if derived from non-UK group companies.
- (90) A measure which is prima facie selective can still be justified if the Member State can show that that measure results directly from the basic or guiding principles of its reference tax system<sup>(74)</sup>. The UK authorities have not formally put forward any argument to provide a justification for the derogation from the reference system. However, the Commission (on its own motion) will rebut below arguments that were put forward by the UK authorities in other contexts, to explain further why at this stage these arguments do not seem to justify the derogation identified in section 5.2.1.2 above.
- (91) The Group Financing Exemption laid down in Chapter 9 includes two different variants: a partial and a full exemption. Since the criteria for being entitled to either the partial or the full exemption are different, also their potential justification requires a separate analysis. There is, however, one element which concerns both exemptions, notably the fact that the Group Financing Exemption — both full and partial — is limited to finance profits derived from ‘qualifying loan relationships’. In other words, only interest received from non-UK group companies can enjoy the (full or partial) Group Financing Exemption.
- (92) The UK authorities hold that both exemptions are justified since they tune down excessive effects of the CFC rules. Subsequently, they explain the conditions for the full and partial exemption and why these conditions should be considered reasonable. They do not, however, explain why the criteria determining artificial diversion for (deemed) non-trading finance profits in Chapters 5 would lead to excessive results only for interest earned by the CFC from foreign group companies and not for all other types of finance profits.
- (93) In that regard, the Commission notes that all tests to assess artificial diversion under the UK CFC regime are risk-based tests. All entity exemptions and other conditions excluding certain subsidiaries or income from a CFC charge can be justified as they exclude from the scope certain situations or transactions either for administrative simplicity or because the risk of avoidance is objectively low. The Group Financing Exemption, however, applies to finance profits from cross-border intercompany financing, a highly mobile type of income where the risk of artificial diversion via tax avoidance schemes is particularly prominent. Providing an exemption for such a high risk income category seems contrary to the nature and general scheme of the CFC regime, rather than following from it, and therefore does not seem justified<sup>(75)</sup>.
- (94) The Commission acknowledges that, while respecting Union law, it is in principle up to the UK to decide upon the scope of its anti-abuse provision. Nevertheless, from a State aid perspective, the term ‘artificial diversion’ used in the CFC regime must avoid a selective application of the anti-avoidance rule. In that regard, artificial diversion arises where a UK company diverts finance profits (interest) to a CFC, which income would have accrued directly to and be taxed in the UK absent the CFC structure. Diversion (or the risk of it) does not depend, under the UK system, on the source of the non-trading finance income, i.e. on whether the finance profit was derived from a ‘qualifying loan arrangement’. Since interest income is generally taxed regardless of who paid the interest or where the debtor is located, domestic or foreign source does not seem a logical criterion for the UK CFC rules to consider the diversion of that interest to be artificial or not. What matters under the UK CFC rules seems to be the nature of the diverted profits (finance profits) in combination with the objective tests for artificial diversion given in the relevant chapters. Given these concepts, the Commission at this stage considers a differentiated treatment of finance income depending on the nature and residence of the debtor not to be justified by the logic of the CFC rules.

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<sup>(72)</sup> Judgement of the Court of Justice of 8 September 2011, *Paint Graphos and others*, Joined Cases C-78/08 to C-80/08, ECLI:EU:C:2009:417, paragraphs 73 to 75 and Judgment of the General Court of 4 February 2016, *Heitkamp BauHolding GmbH v European Commission*, T-287/11, ECLI:EU:T:2016:60, paragraph 160.

<sup>(73)</sup> Judgement of the Court of Justice of 8 September 2011, *Paint Graphos and others*, Joined Cases C-78/08 to C-80/08, ECLI:EU:C:2009:417, paragraph 69.

<sup>(74)</sup> Judgement of the Court in Joined Cases C-78/08 to C-80/08 *Paint Graphos*, ECLI:EU:C:2009:417, paragraphs 64-65.

<sup>(75)</sup> Intercompany loans are considered ‘high risk transactions’ compared to external loans, because, groups can more easily organize their internal financing arrangements in order to optimise their overall tax burden by the means of transfer pricing, thin-capitalisation, hybrid instrument mismatches etc.

- (95) The UK authorities also hold that it is a matter of UK policy to regard intercompany financing as carrying a lower risk for artificial diversion than third party financing which merits more lenient rules in order for the rules to be proportionate. In that regard the Commission recalls that the highest risk for tax motivated structures, especially where it concerns finance arrangements exploiting arbitrage between debt and equity is generally considered to be in intercompany relations. That is a matter of fact rather than a matter of policy. It may be a UK policy choice not to address the artificial diversion of foreign group interest income for other reasons. However, the Court of Justice has already held in the case *P Oy* that treating some situations better than other legally and factually comparable situations for reasons unrelated to the objective of the system must be regarded as favouring 'certain undertakings or the production of certain goods' <sup>(76)</sup>.
- (96) The UK also argues that it considers non-trade finance profits from third parties subject to a higher risk of artificial diversion as such arrangements are analogous to 'money-box' arrangements, i.e. a situation where UK funds have been used to acquire a passive asset, such as a bank deposit, but this has been arranged by using the funds to capitalise a CFC (a 'money box') which has acquired the asset. The Commission at this stage does not see the relevant difference between that situation and the situation where UK funds have been used to acquire a passive asset, such as a loan to a foreign group company, but this has been arranged by using the funds to capitalise a CFC (a 'money box') which has acquired the asset. Concerning the first situation the UK authorities state that 'the entire profits of the CFC have been artificially diverted from the UK and are reintegrated by the CFC rules'. The Commission agrees but at this stage does not see why that should be different for the second situation.

#### *The partial exemption*

- (97) More specifically as regards the arrangements covered by the partial exemption, the UK authorities consider that only a part of the qualifying non-trading finance profits is to be seen as artificially diverted within the objective of the CFC provisions. The UK authorities confirm that group financing CFCs are typically wholly equity financed but claim that such arrangements only merit a CFC charge to the extent that the group financing CFC under arm's length conditions would have been financed through a loan from its UK parent instead of equity. In other words, the 'artificial diversion' test for interest received from foreign group companies according to the UK authorities is whether the intercompany loans granted by the CFC are excessively funded from UK capital, whereas the test for all other interest is just whether the loans granted by the CFC are funded from any UK capital.
- (98) The non-trading finance profits earned by a CFC that are considered artificially diverted from the UK according to the general rule — and therefore captured under the CFC rules — are those described in Chapter 5 of Part 9A TIOPA. One of the tests listed in Chapter 5 is funding of the loan from a UK capital investment. Therefore artificial diversion in relation to interest derived from non-related debtors or related UK debtors is assumed to the extent they are funded from any UK capital investments. In relation to interest derived from foreign group companies through a CFC wholly funded from UK capital investments, however, artificial diversion is assumed only to the extent of deemed excessive UK capital investments at the CFC level. The Commission at this stage doubts whether there is a justification for this distinction.
- (99) Chapter 5 of Part 9A TIOPA has been designed to capture CFCs that have been funded with UK sourced capital to the extent that they generate low taxed non-trading finance profits with that UK sourced capital. As regards non-trading (passive) interest, there seems to be a logic in this test since capitalising a CFC is the most straightforward way of artificially diverting interest income from a UK entity to the CFC. Accordingly, Chapter 5 dealing with non-trading finance profits addresses situations in which passive interest income was funded from any (not just 'excessive') UK capital investment. This means that for a CFC which is wholly funded with UK sourced capital, all passive interest income is considered artificially diverted, but for a CFC which is 50 % funded with UK sourced capital (and 50 % with debt), only half of its passive interest income is considered artificially diverted. Since the test itself already has an embedded mechanism differentiating between wholly, largely and partly equity financed CFCs, there seems no logic in additionally granting a standard 75 % exemption to address (deemed) overcapitalisation.
- (100) In the same vein, as regards active interest income (trading finance profits) dealt with by Chapter 6, this covers all situations involving trading finance profits with excessive UK capital funding. The distinction between the two categories with a higher threshold for trading finance profits is understandable and justified in view of the lower mobility of active interest income vis-à-vis much more mobile passive interest income <sup>(77)</sup>. In the case of trading finance profits, that higher threshold is consistently applied to all trading finance profits, again except those earned by foreign group treasury companies which can elect for their trading finance profits to be treated as if they were non-trading finance profits allowing also UK (over)capitalised group treasury companies to benefit from the Group Financing Exemption <sup>(78)</sup>.

<sup>(76)</sup> Judgment of the Court of Justice of 18 July 2013, *P Oy*, C-6/12, ECLI:EU:C:2013:525, paragraph 27.

<sup>(77)</sup> As mentioned before, the higher risk for diversion exists in particular for non-trading finance profits within multinational groups, which makes the more generous provisions for cross border intercompany financing even less justified.

<sup>(78)</sup> See recital (68).

- (101) Even if it could be justified to apply different tests to non-trading finance profits from foreign group companies (artificially diverted when funded from deemed excessive UK capital investments) and other non-trading finance profits (artificially diverted when funded from any UK capital investments) — which the Commission at this stage doubts — the Commission also doubts whether a standard 25 % inclusion (75 % exemption) is a proportionate response to address the deemed excessive UK capitalisation.
- (102) Many States limit the deduction of interest if the company paying the interest has been thinly capitalised, i.e. in case of excess debt which leads to 'excessive' interest deductions. In some States, including the UK, the rule only applies to intercompany debt and the question whether there is excess debt is assessed case by case on the basis of the arm's length principle: excess debt is debt which a non-related company operating under comparable circumstances would not have been able to attract<sup>(79)</sup>. The Commission is aware that some other States instead of applying a case by case arm's length analysis use fixed debt-equity ratios as a safe harbour. This means that a company will not be considered to have excess debt if it respects the fixed ratio.
- (103) The UK authorities hold that it is reasonable to suppose that under arm's length conditions the financing CFC would have been funded according to a debt-equity ratio of 1:3, i.e. 25 % debt and 75 % equity<sup>(80)</sup>. The UK authorities claim that the likely or expected gearing of a typical company is an appropriate measure to assess overcapitalisation.
- (104) At this stage, the Commission has doubts as regards such justification. The CFC rules address the diversion of profits from the UK to a CFC. Where this concerns non-trading finance profits (passive interest), artificial diversion is present to the extent that the financing CFC was equity financed from the UK so that the interest is earned by the financing CFC instead of the UK.
- (105) The relevance of the typical gearing of a typical operating company to establish artificial diversion is doubtful at this stage as the UK authorities confirm that the intercompany financing CFC in reality is almost always fully equity financed: it is a money box collecting interest otherwise collected by the UK controlling entity. Moreover, if a CFC was not wholly equity financed, only the part of the non-trading finance profit attributable to the CFC's equity would be considered artificially diverted. This means that the 75 % exemption allegedly based on a deemed debt/equity ratio of 1:3 applies equally to CFC's that are wholly equity financed and to CFC's that are funded with just — say — 20 % equity, for which there is no reason whatsoever to apply a fat capitalisation doctrine.
- (106) The UK authorities also state that the use of fixed percentages and ratios is common in CFC rules to minimise administration costs, referring to Article 7(3) of the ATAD.
- (107) The Commission in that regard acknowledges that fixed ratios indeed can be useful for administrative reasons to exclude situations in which the risk of avoidance/diversion is foreseeably and objectively low. Article 7(3) of the ATAD for example allows Member States to exempt a CFC from being captured by the CFC rules if one third or less of its income concerns high risk income, i.e. interest received from related parties. The Group Financing Exemption, however, does the exact opposite, exempting a fixed ratio of a CFC's income which has the highest risk of diversion.
- (108) Moreover and without prejudice to the acceptability of fixed ratios in a transfer pricing context, the Commission also notes that the UK does not use a fixed debt/equity ratio in determining whether UK resident companies are excessively debt financed but claims to do so for controlled foreign companies to justify the 75 % exemption. That seems to be inconsistent. Finally, the Commission notes that debt-equity ratios to assess under capitalisation generally tend to be set in the area of 3:1 or 4:1 instead of 1:3. In that case, the ratio application reasoning would require— a CFC exemption of maximum 20 % to 25 %, not 75 %.
- (109) For the reasons set out above, the selectively granted partial exemption, based on generous and hypothetical debt/equity ratios, seems neither necessary nor proportionate. It does not seem necessary as it does not seem to pursue any logical or legitimate aim and even if it did, it seems disproportionate since the ratios applied are both extremely generous and applied without any regard to the actual capitalisation.

#### *The full exemption*

- (110) The UK authorities justify the full exemption essentially by stating that if the additional conditions for the applicability of the full exemption are met, then there is in fact no abusive behaviour which the CFC provisions aim to address. The additional conditions for the granting of the full exemption — see recital (30) — essentially address situations where there is no interest deduction in the UK related to the receipt of the non-trading finance income by the CFC. This could be the case if (i) the funding for the loans provided by the CFC to foreign group companies can be traced to 'good' sources, i.e. capital from newly issued shares or proceeds from the same territory, or (ii) if on a consolidated basis the UK group controlling the CFC does not bear any interest costs in connection with the capitalisation of the CFC.

<sup>(79)</sup> HMRC Internal Manual — International Manual INTM511015, <https://www.gov.uk/hmrc-internal-manuals/international-manual/intm511015>

<sup>(80)</sup> See recital (44).

- (111) Though understandable *in abstracto* as a theoretical concept, the Commission notes that a relation between the non-trading finance income earned by the CFC and a tax deduction in the UK is not used as a criterion by the UK in defining artificial diversion under the general rules of Chapter 5 (or Chapter 6 for that matter). The main tests to classify non-trading finance income earned by a CFC as artificially diverted income are, according to Chapter 5, the existence of UK SPFs in relation to the income or funding of the loans generating the income through capital investments from the UK. A corresponding tax deduction in the UK is not relevant in that regard under Chapter 5<sup>(81)</sup>.
- (112) At best the conditions for the full exemption could be seen as a secondary justification explaining the need to limit the derogation to certain qualifying group loans from certain qualifying resources. They do not, however, provide a justification for the full Group Financing Exemption itself. Putting it differently, preventing the excessive erosion of the UK tax base may be the reason why the derogation has been made subject to strict conditions. That, however, is merely a means to manage the costs of the derogation to the UK treasury, not a justification for its existence.
- (113) The Commission therefore has doubts as to why artificial diversion would not be present in relation to interest from foreign group companies (i.e. qualifying loan arrangements) if funded from 'good' resources, while artificial diversion is considered present in relation to other non-trading interest (i.e. non-qualifying loan arrangements), such as interest derived from non-related debtors or from domestic related debtors regardless of whether they are funded from 'good' resources.
- (114) Finally, the Commission notes that the general UK corporate tax system does not make any distinction as regards the tax treatment of non-trading finance profits earned by a UK corporate tax payer. Non trading interest from third parties, domestic groups companies and from foreign group companies are all fully subject to the normal UK corporate tax rate. There are no conditional or partial exemptions from tax for group interest income received from abroad — which would also raise doubts from a State aid point of view. The CFC rules aim to address the artificial diversion of profits that without diversion would be taxed under the general UK corporate tax system. Both are therefore intrinsically linked. It is hard to see why the diversion of non-trading finance profits would be considered abusive subject to a set of objective criteria, whereas it would not be considered abusive only for certain non-trading finance profits meeting the exact same objective criteria.
- (115) In sum, the Commission acknowledges that the UK is free to have or not have CFC provisions<sup>(82)</sup> and to design and introduce those anti-avoidance provisions that it deems necessary to protect its tax base, provided they are consistent with Union law. However, introducing anti-avoidance rules while including only some operators or transactions in these rules and not others that are in a legally and factually comparable situation is contrary to State aid rules if there is no valid justification within the internal logic of the reference system. For the reasons set out in recitals (89) to (115) above, at this stage neither the partial or full exemption as such nor their level seems to be justified by the nature and general scheme of the reference system. In view of the objective of the UK CFC rules, there is no need or logic to partially or fully exclude from the scope of the CFC regime a specific type of (deemed) non-trading finance profits that have been artificially diverted from the UK.

#### 5.2.2. *Transfer of State resources and imputability to the State*

- (116) The selective advantage identified in Section 5.2.1 results directly from the application of a tax law provision. Advance clearance on the application of the provision given a specific fact pattern is available, but is neither compulsory nor needed for the applicability of the scheme. Chapter 9 determining the intercompany finance profits that will be exempted from the CFC charge subject to a claim by the UK entity controlling the CFC finds its origin in the action of the UK State. It is therefore imputable to the UK State.
- (117) The measure involves State resources as the State allows for the full or partial exemption of the intercompany finance profits that would normally result from the application of the CFC rules. That full or partial exemption translates into a reduction of the amount of corporate income tax collected by the UK which thereby foregoes State resources. In line with the case law of the Court of Justice of the European Union, the foregoing of revenues that would have otherwise been due to the State amounts to the use of State resources<sup>(83)</sup>.

<sup>(81)</sup> The two specific tests concerning financial lease transactions and abusive circular transactions do relate to a deduction in the UK, but they are additional tests for clearly abusive transactions that might not be caught by the general rule. They are complementary to the general rule.

<sup>(82)</sup> Until 31 December 2018. By then, all Member States will have to transpose the Anti-Tax Avoidance Directive, see recitals (36) and (1).

<sup>(83)</sup> See Judgment of the Court of Justice of 15 November 2011, *Commission and Spain v Government of Gibraltar and United Kingdom*, C-106/09 P and C-107/09 P, EU:2011:732, paragraph 72 and the case-law cited therein.

### 5.2.3. Distortion of competition and effect on trade

- (118) When aid granted by a Member State strengthens the position of an undertaking compared with other undertakings competing in intra-Union trade, the latter must be regarded as affected by that aid<sup>(84)</sup>. It is sufficient that the recipient of the aid competes with other undertakings on markets open to competition<sup>(85)</sup>. The beneficiaries are UK multinationals trading in all possible sectors including those characterized by intense competition between operators from different Member States and global operators. The Commission also observes that there are many international players which are active in the market segments of the beneficiaries of the Group Financing Exemption, and that the reasons put forward to promote the Group Financing Exemption seem to aim at attracting multinationals to locate their holding and financing activities in the UK. The tax exemptions are therefore liable to affect trade on the internal market.

### 5.2.4. Beneficiary

- (119) The beneficiaries are certain UK entities belonging to multinational groups that have claimed full or partial exemption from the CFC charge to be levied on certain (deemed) non-trading finance profits earned by a CFC on the basis of Chapter 9 and more specifically section 371I).

### 5.2.5. Conclusion

- (120) In conclusion, the Commission's preliminary view is that the Group Financing Exemption laid down in Chapter 9 ('Exemptions for profits from qualifying loan relationships') and effective as of 1 January 2013 constitutes State aid within the meaning of Article 107(1) TFEU.

## 5.3. Compatibility of the aid

- (121) As the measure appears to constitute State aid, it is therefore necessary to determine if such aid might be compatible with the internal market. State aid measures can be considered compatible in particular on the basis of the exceptions laid down in Article 107(2) and 107(3) TFEU.
- (122) So far, the Commission has doubts as to whether the measures in question can be considered compatible with the internal market. The UK authorities did not present any argument to indicate that any of the exceptions provided for in Article 107(2) and 107(3) TFEU, under which State aid may be considered compatible with the internal market, applies in the present case.
- (123) The exceptions provided for in Article 107(2) TFEU, which concern aid of a social character granted to individual consumers, aid to make good the damage caused by natural disasters or exceptional occurrences and aid granted to certain areas of the Federal Republic of Germany, do not seem to apply in this case.
- (124) Nor does the exception provided for in Article 107(3) (a) TFEU apply, which allows aid to promote the economic development of areas where the standard of living is abnormally low or where there is a serious unemployment, and for the regions referred to in Article 349 TFEU, in view of their structural, economic and social situation. Such areas are defined by the UK regional aid map. This provision does not seem to apply in this case.
- (125) As regards the exceptions in Article 107(3) (b) and (d) TFEU, the aid in question is not intended to promote the execution of an important project of common European interest nor to remedy to a serious disturbance in the economy of the UK, nor is it intended to promote culture or heritage conservation.
- (126) Aid granted in order to facilitate the development of certain economic activities or of certain economic areas could be considered compatible where it does not adversely affect trading conditions to an extent contrary to the common interest, according to Article 107(3) (c) TFEU. At this stage, the UK has not claimed that the tax advantages granted by the measure under examination are related to specific investments, to job creation or to specific projects eligible to receive aid under the State aid rules and guidelines. In addition, in the absence of any element to support the compatibility of such pursuant to Article 107(3) (c) TFEU, the Commission concludes at this stage, that the measures in issue seem to constitute a reduction of charges that should normally be borne by the entities concerned in the course of their business, and should therefore be considered as operating aid. According to the Commission practice, such aid cannot be considered compatible with the internal market in that it does not facilitate the development of certain activities or of certain economic areas, nor are the incentives in question limited in time, digressive or proportionate to what is necessary to remedy to a specific economic handicap of the areas concerned.

<sup>(84)</sup> See in particular Judgment of the Court of Justice of 17 September 1980, *Philip Morris*, 730/79, ECLI:EU:C:1980:209, paragraph 11, Judgment of the Court of Justice of 22 November 2001, *Ferring*, C-53/00, ECLI:EU:C:2001:627, paragraph 21, and Judgment of the Court of Justice of 29 April 2004, *Italian Republic v Commission of the European Communities*, C-372/97, ECLI:EU:C:2004:3679, paragraph 44.

<sup>(85)</sup> Judgment of the Court of First Instance of 30 April 1998, *Het Vlaamse Gewest (Flemish Region) v Commission of the European Communities*, T-214/95, ECLI:EU:T:1998:77.

#### 5.4. Unlawful aid

- (127) Article 108(3) TFEU states: ‘*The Commission shall be informed in sufficient time to enable it to submit its comments, of any plans to grant or alter aid. (...)*’ New aid put into effect in contravention with this provision is referred to as ‘unlawful aid’. The UK authorities have not informed the Commission of its intention to introduce the Group Financing Exemption upon the reform of the CFC rules. Consequently, if the Commission’s doubts laid down in Chapter 5.2 were to be confirmed, the measure would qualify as unlawful aid.

In light of the foregoing considerations, the Commission’s preliminary view is that Chapter 9 (‘Exemptions for profits from qualifying loan relationships’) effective as of 1 January 2013 seems to constitute State aid within the meaning of Article 107(1) TFEU and the Commission has doubts at this stage as to the scheme’s compatibility with the internal market. The Commission has therefore decided to initiate the procedure laid down in Article 108(2) TFEU with respect to that measure and requests the UK to submit its comments within one month of the date of receipt of this letter.

The Commission wishes to remind the UK authorities that Article 108(3) TFEU has suspensory effect, and would draw attention to Article 16 of Council Regulation (EU) 2015/1589<sup>(86)</sup>, which provides that all unlawful aid may be recovered from the recipients.

The Commission warns the UK that it will inform interested parties by publishing this letter and a meaningful summary of it in the Official Journal of the European Union. It will also inform interested parties in the EFTA countries which are signatories to the EEA Agreement, by publishing a notice in the EEA Supplement to the Official Journal of the European Union, and will inform the EFTA Surveillance Authority by sending a copy of this letter. All such interested parties will be invited to submit their comments within one month of the date of such publication.

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<sup>(86)</sup> OJ L 248 of 24.9.2015 p. 9.