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Tax Treaties, Transfer Pricing and Financial Transactions Division
OECD/CTPA

Per e-mail to: taxtreaties@oecd.org

PUBLIC CONSULTATION ON THE PROPOSED CHANGES TO COMMENTARIES IN THE OECD MODEL TAX CONVENTION ON ARTICLE 9 AND ON RELATED ARTICLES

Comments by Fortum Oyj (EU Transparency register ID 03501997362-71)

Dear Madam, Dear Sir,

Fortum Group is the third largest producer of non-emitting power in Europe. Our strategy is to phase out from emitting power production within the terms of the Paris Climate Convention. We aim to be carbon neutral in our European generation by 2035 at the latest. Meeting this climate target means material changes in our operative fleet and our operations – our future investments will be measured in billions. Predictability, simplicity and clarity of regulations, including tax regulations, are key underlying factors for the success of our transition.

Our purpose is to drive the change for a cleaner world. We are securing a fast and reliable transition to a carbon-neutral economy by providing customers and societies with clean energy and sustainable solutions. This will require and result in material changes in the energy business, even on a long-term basis. Low predictability of future tax consequences and high risks of economic double taxation are a serious challenge, as long-term investments in new power production are being decided now and in the near future.

Deductibility of arm’s length payments

The proposals as made are not self-explanatory and therefore more elaboration on the reasons for the changes and the expected consequences would be welcome.

As we understand them, the proposal to the OECD Model Tax Convention on Article 9, which tackles the taxation of transactions between associated enterprises, is concerning, as it creates an obstacle to economic growth through the promotion of new in investments. The proposed changes allow jurisdiction to assess deductibility based on domestic law, and any mismatch arising from the computation of tax under domestic law would not yield economic double taxation for purposes of the treaty. Therefore, there would be no obligation to make a corresponding adjustment to an affiliated company when mismatches due to domestic law differences occur. The mechanism of corresponding adjustments is critical and ensures that allocation of profits between the two states is

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consistent and allows the avoidance of economic double taxation resulting from a primary adjustment. The proposed update would lead to an increase in the levels of economic double taxation, an increase in the investment costs for businesses and a rising in the number of disputes and mutual agreement procedures (Article 25 of the Model Tax Convention). Denial of access to it, as stated in the Article, will be against the objective of the Convention. This development does not promote our investments; instead, we see a risk of rising tax costs and nationally driven disputes about discriminatory domestic laws causing double taxation.

In our view, any deduction limitation rule that is applied to related party payments only should be tested against the object and purpose of tax treaties and the arm's-length principle. Only in exceptional cases a difference in treatment between related and unrelated parties should be considered in line with this object and purpose. The proposal could undermine the arm's-length principle embodied in the existing treaties.

In our view, the interest deductibility secures the tax neutrality in the case of genuine business activities and would maintain the cost of capital at a level that encourages new investments. The proposed update to Article 9 of the OECD Model Tax Convention goes far beyond the Base Erosion and Profit Shifting, Action 4 recommendations that limit the interest deduction on excessive interest expenses and does not reflect the level of economic activity within the jurisdiction.

Conclusion

For Fortum, meeting the climate targets means material changes in our operative fleet and our operations. Predictability, simplicity and clarity of regulations, including tax regulations, are key underlying factors for the success of our transition. The proposal presented by the OECD creates the risk of higher investment cost and lower predictability of the tax consequences of long-term investments. We hope that also tax policies would be aligned with climate targets and policies. This could be done by stating a clear requirement to respect legitimate business reasons and the arm's-length principle in both debt and equity funding.

We would like to thank the OECD for considering the comments provided and to include them in the further work on changes to commentaries in the OECD Model Tax Convention on Article 9 and on related articles. We would also welcome a public consultation meeting on this topic to discuss the underlying aims and consequences of this proposal.

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