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HMRC Draft Guidance

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CHANGES TO CONTROLLED FOREIGN COMPANIES RULES

Revised Draft Guidance published on 2007

This guidance supersedes the draft guidance published on 6 December 2006

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Introduction

1. Schedule 15 of Finance Act 2007 includes legislation that amends the UK controlled foreign companies (CFC) rules with effect from 6 December 2006.
2. This represents the Government's response to the decision of the European Court of Justice on 12 September 2006 in the case of Cadbury Schweppes (case C-196/04).
3. The case concerned the compatibility of CFC rules with the Freedom of Establishment provided by the EU treaty, which allows companies resident in one Member State to participate unhindered, on a stable and continuing basis, in the economic life of another Member State by the pursuit of genuine economic activities through an actual establishment in that State.
4. The ECJ decided that CFC rules pursue a legitimate aim and are compatible with European law – so long as they are not applied to the profits of genuine economic activities undertaken in an actual establishment in another Member State.
5. In such circumstances CFC rules must ensure that the parent company is “... *given an opportunity to produce evidence that a CFC is actually established [in another Member State] and that its activities are genuine*”. If it can, CFC rules must not be applied to the profits of any genuine economic activities in such a business establishment in another Member State.
6. The Government is satisfied that the UK's CFC legislation was compatible with European law as interpreted by the ECJ in *Cadbury Schweppes*. But the Government recognises that there may be circumstances at the margins where it may not have been entirely clear.
7. The Government therefore decided to amend the CFC legislation in Chapter IV of Part XVII ICTA to reflect the judgment explicitly in the rules, and to provide a clear and certain procedure for companies to produce evidence to prove the extent of a CFC's genuine economic activities undertaken in a business establishment in another Member State and establish what amount (if any) of a CFC's profits should be excluded from the CFC charge.
8. This [draft] guidance covers the period from 6 December 2006 onwards.
9. This draft guidance includes some cross references (prefixed “INTM”) to existing guidance in the International Manual, available at:

<http://www.hmrc.gov.uk/manuals/intmanual/index.htm>
10. Unless otherwise specified, references to legislation refer to the Income and Corporation Taxes Act 1988.

Overview of the new rules

11. The CFC rules provide a number of general exemptions. Where none of these are available the new rules provide an additional mechanism for excluding profits from apportionment to a UK company.
12. The new rules can apply in relation to any CFC that has individuals working for it (see paragraphs 40 & 41) in a business establishment (see paragraph 36) in another EEA state (see paragraphs 33-35). If the CFC's profits would otherwise have to be apportioned, the UK owners of the CFC may apply to HMRC (see paragraph 32) for the CFC's apportionable profits to be treated as reduced by an amount ("the specified amount" – see paragraphs 37-39) representing the "net economic value" arising to the group that is created directly by the work of those individuals (see paragraphs 15-27).
13. HMRC must grant the application providing the company's application demonstrates that the specified amount satisfies the criteria set out in the new rules. Once the UK Company's application has been granted, the CFC's chargeable profits and creditable tax are treated as reduced for the purposes of determining the UK Company's CFC charge.
14. The new rules also provide a new "effectively managed" condition in paragraph 8 of Schedule 25, for the purposes of applying the Exempt Activities exemption to a CFC resident in another EEA state.

"Net economic value" created directly by work in an EEA state

15. In concluding that CFC rules are an appropriate means of tackling tax avoidance within the EU, the ECJ distinguished between:
 - a) Groups genuinely exercising their freedom to establish anywhere within the EU by (re)locating genuine economic activities to another Member State (not tax avoidance even if only done so as to benefit from low tax rates); and,
 - b) Groups diverting profits from elsewhere to a CFC in another Member State, without locating in that Member State the genuine economic activity creating those profits (tax avoidance).
16. The ECJ gave broad guidance on what it meant by "genuine economic activities", which concentrated more on what they were not (e.g. activities that "do not reflect economic reality" or activities that involve "practices which have no purpose other than to escape ... tax") than what they were.
17. The distinction is in essence one between the creation of profits in another Member State and the diversion of profits to another Member State from elsewhere. And in relation to a CFC the distinction is, in essence, between profits, that arise from undertaking work in a business establishment in the other Member State and those that arise from holding assets. Profits created by work normally arise where the activities are located. Profits from holding

assets are mobile and derive from ownership - they have no necessary tie to where activities take place.

18. By undertaking work on a long term basis in a business establishment in another Member State, a group participates, on a stable and continuing basis, in the economic life of the other Member State.
19. For the purposes of the new rules, therefore, in respect of profits not already exempt because one of the existing exemptions in the rules applies, the profits identified as arising from “genuine economic activities” undertaken in another Member State are those created directly by the work of the individuals working for the CFC in its EEA business establishment(s).
20. Profits from holding assets are not profits created by the work of individuals working for the CFC. Profits from holding assets includes any amount of profits arising in a CFC as a consequence of locating non-essential equity capital in the CFC, for example where a group chooses to use equity rather than debt to finance the activities of the CFC.
21. Further, arrangements that are entirely intra-group and, of themselves add no value to the group (e.g. intra-group lending) cannot give rise to profits of “genuine economic activities”. By definition, they simply move value from one part of the group to another. (This is in contrast to intra-group service provision comprising part of the work involved in delivering the group’s business; such work can create value for the group as a whole.)
22. The new rules make the necessary distinction (on the grant of an application under the new rules) by excluding from a CFC apportionment that part of a CFC’s chargeable profits that represents the “net economic value” to the group arising from the work carried out by the CFC’s staff in the CFC’s business establishment in the other Member State.
23. The “net economic value” is the real economic profit to the group as a whole **created directly** by the work of individuals working for the CFC in an EEA state, after allowing for the full economic costs to the group of carrying out the work.
24. The focus is on real economic value created by the work, before any tax reduction (see draft new section 751A(5)), though once the appropriate amount has been established, a CFC can benefit from any low local tax rate applicable to that amount of the CFC’s profits.
25. The value of the work must be assessed in relation to its actual content and the competence and level of independence/authority of the person carrying out the work. For example, work that has minimal content and nominally (or notionally) relates to capital or other assets placed artificially in the CFC may have some intrinsic value; however this value will be limited and very marginal when compared to the value of the profits that arise from holding the capital or other assets. In such circumstances, the profits in the CFC largely come from the diversion of profits to it, rather than those profits being created by its work. Such diversion of profits may be achieved, for example, by placing capital or other assets, such as intangible assets, in the CFC; or by arranging for capital to accumulate in a CFC, or ownership of new intellectual property to arise in a CFC. Such profits do not constitute “net economic value” to the group created directly by the work of the staff in the CFC.

26. A useful guide is that the “net economic value” should equate to what the group would be prepared to pay to a third party to undertake the work done by staff working for the CFC in the relevant state(s), over and above the full economic costs of undertaking the work.
27. Annex 1 illustrates the application of the new rules to different scenarios, including examples of methods that could be used to quantify the “net economic value”. (Documentation requirements are discussed in the Procedures and Process section below.)

Timing

28. The new rules apply from 6 December, the date of PBR 2006.
29. The legislation applies in relation to CFC accounting periods starting on or after 6 December 2006, or where an accounting period straddles that date, in relation to that part of the CFC’s accounting period running from 6 December 2006.
30. Applications must be made by the filing date for the UK Company’s tax return to which it is relevant. The company can only make its return on the basis of the application once the application has been granted. If a company has made its return before the application is granted, then the company will have 30 days after the grant of the application to amend its return to take account of its effect.
31. Annex 2 explains what information should be included in an application and where to send it to.

Conditions for making an application to treat a CFC’s profits as reduced

32. A UK resident company that has a “relevant interest” (as defined in s752A) in a CFC may make an application under the new rules if the following conditions are satisfied in relation to an accounting period of the CFC:
 - i) none of the exemptions provided for in s748 applies (and so the CFC’s chargeable profits and creditable tax fall to be apportioned under s747(3)); and,
 - ii) throughout the period the CFC has a business establishment in, and individuals working for it in, another EEA State (see below).

Geographical scope and other defined terms

Geographical Scope

33. The new rules will apply to CFCs that have a business establishment within another Member State, or another European Economic Area (EEA) State with which the UK currently has relevant legal instruments that provide appropriate procedures for collaboration and exchange of information between national tax administrations. References in this draft guidance to an EEA state are to a state meeting one or other of these criteria.
34. Currently, besides other EU Member States, the UK has International Tax Enforcement Arrangements (as defined in s173 FA 2006) with two other states in the EEA, namely Iceland and Norway. This therefore defines the current geographical scope of the new rules.
35. Where a CFC has business establishments in more than one state throughout the accounting period, the scope of the company's application must be limited to the company's business establishment(s) in EEA state(s) where the CFC has individuals working for it throughout the accounting period.

Interpretation of "business establishment"

36. The term "business establishment" means premises, as defined in paragraph 7 of Schedule 25. Existing guidance on this term is available at [INTM205030](#).

"Specified amount"

37. Any application made under draft new section 751A must specify the amount by which the CFC's profits should be treated as reduced, for the purposes of determining the profits to be apportioned for the relevant accounting period.
38. The amount specified should be that part of the CFC's chargeable profits that the applicant can show represents "net economic value" to the group created directly by the work of individuals working for the CFC from a business establishment in an EEA state.
39. HMRC must grant the application if they are satisfied that the whole of the amount specified in the application satisfies the criteria (draft new section 751A(4)), so amounts should only be included in the application if the applicant is submitting full evidence with the application to demonstrate that the criteria are satisfied.

"Individuals working for the CFC"

40. Individuals working for the CFC in a state are people employed by the CFC in that state, or people working there in essentially the same role as an employee of the CFC. This could include an employee of another group

company who is seconded to take up a post in the CFC in the state, or staff provided by an employment agency to work for the CFC in the state.

41. The category of individuals working for the CFC does not include either self employed individuals, or employees of a contractor contracted to provide services for (or deliver services on behalf of) the CFC - the value of such work arises to the contractor. Nor does it include any people working in the CFC in the state (whether or not they are formally employees of the CFC) who are, in practice, working for, or taking directions¹ from, another group company (for example, people based in the CFC who make transactions on the instructions of the parent company in essentially the same role as an employee of the parent company).

Procedures and process

Form, content and procedure for applications under draft new s751A

42. Applications should be made in writing, to HMRC's CFC Team at the address given at the end of Annex 2. The Commissioners of HMRC will need to review the information listed in Annex 2 in order to consider whether the CFC has a business establishment and individuals working for it in at least one EEA state, and whether the amount specified in the application is a part of the CFC's chargeable profits that represents net economic value created directly by the work of individuals working for the CFC in an EEA state where the CFC has a business establishment. So, the Commissioners of HMRC would expect to receive this information in all applications.
43. The legislation provides for a CFC to make a single application in relation to a particular accounting period, which can cover any / all EEA state(s) in which the CFC has a business establishment. (Though in the event that an application covers more than one EEA state, applicants may choose to organise their application into separate parts for each state.)

Documentation

44. Applicants should be prepared to provide a similar level of documentation to support their computation of the part of the CFC's chargeable profits representing "net economic value" for the purposes of these rules, as a UK company would be expected to be able to provide to support its application of transfer pricing rules (see INTM433030). Only the information listed in Annex 2 need be provided at the time the application is made – further documentation will only be required if HMRC request it.

Corporation tax instalments

45. The Corporation Tax (Instalment Payments) Regulations 1998 require large companies to make instalment payments in relation to their tax liability,

¹ Clearly, occasionally a parent company may, in its role as controlling shareholder, provide strategic direction to the officers of the CFC. This, alone, need not prevent those officers being individuals working for the CFC.

including any CFC charge. Where a UK resident company intends, or has made, an application under draft new s751A that the company expects to be granted, then the company can calculate its advance instalment payments on that basis. I.e. for this purpose the company can take account of any reduction in its CFC charge that would result from their application being granted, unless and until its application has been refused.

Right of Appeal

46. If HMRC refuse to grant an application under draft new s751A then the applicant will have a period of 30 days from the date the application is refused to give HMRC notice in writing, if the applicant wishes to appeal to the Special Commissioners (see draft new s751B(5)-(9)).

Discovery

47. Applications will be considered on the basis that they are true and disclose all the relevant facts. In the event that a return (or amended return) is based on an application that was granted on an incorrect basis, then a discovery assessment may be made subsequently, as provided for by paragraph 41 onwards in Schedule 18 FA 1998.

Exempt Activities Test

48. The new rules also introduce a distinction in the “effectively managed” condition in paragraph 8 of Schedule 25, between CFCs resident in another EEA state and other CFCs.
49. From 6 December 2006², a CFC resident in another EEA state will be regarded as “effectively managed” there if there are sufficient staff working for the company in the territory who have the competence and authority to undertake all, or substantially all, of the company’s business.
50. This condition will be met where the individuals working for the company in its territory of residence are sufficient in numbers, qualifications and experience to supervise, control and carry out the bulk of the company’s profit-making activities. (Paralleling the guidance in INTM205040 concerning “staff employed” by a CFC in its territory of residence that explains the application of the Exempt Activities Test to CFCs resident in other territories)
51. The conditions relating to CFCs resident in other states remain unchanged.
52. In all other respects, the Exempt Activities exemption applies in the same way to all CFCs, whether resident inside or outside the EEA.

² Where the accounting period straddles 6 December 2006, the pre-existing “effectively managed” condition should be applied in relation to the part of the period up to that date, and the new “effectively managed” condition should be applied in relation to the part of the period running from then. Other conditions for the Exempt Activities exemption should be applied in relation to the accounting period as a whole, as usual.

“Net economic value” created directly by work – Examples

NOTE: All these examples assume that the CFC is not eligible for any of the exemptions available in the CFC rules (though, as described, some would be).

Example 1a: Locating work in another EEA state - Operations

A UK parent company decides to set up a CFC in another EEA state to operate a call centre providing a helpline for the group’s European customers. The CFC opens an office in the other EEA state, appoints a management team there, installs the necessary call centre equipment and recruits local staff to man the help-lines.

The service to customers is part of the group’s real business. The work directly creates value for the group by contributing to the delivery of its business.

The UK company has already decided that an appropriate way to establish the “net economic value” of the work is to apply a “cost plus” method to estimate an appropriate profit for this work (see guidance on “Centrally provided services” in [INTM464055](#)). (The UK Company can use the supporting analysis and calculations as part of the evidence submitted with an application under the new rules.)

The local tax rate applicable to the profit for the work does not affect whether an application can be made under new s751A. So, even if the cost of undertaking the work in the other EEA state is the same as it would have been in the UK, and the only reason that the work has been located abroad is because the local tax rate on the profit for the work is lower than the UK tax rate, an application can still be made.

Provided that the chargeable profits simply reflect the arm’s length provision for the work undertaken by the CFC and take account of the full economic costs of undertaking the work, then, in principle, an application covering the whole of the chargeable profits of the CFC might be granted.

Example 1b: Locating work in another EEA state: Intra-Group Services

A UK parent company decides to set up a CFC in another EEA state and to relocate, say, group payroll administration work there. The CFC opens an office in the other EEA state, appoints a management team there, installs the necessary IT equipment, and recruits local staff to undertake the payroll administration work.

The payroll administration service is an essential part of the group’s real business. The work directly creates value for the group by enabling the group to employ staff to deliver its business.

As in Example 1a, the UK company applies a “cost plus” method to estimate an appropriate profit for this work, for the purposes of establishing the “net economic value” of the work. Again, providing the chargeable profits of the CFC are in line with this, then an application covering the whole of those profits could be granted - even if the cost of undertaking the work in the other EEA state is the same as it would have been in the UK, and the only reason that the work has been located abroad is

because the local tax rate on the profit for the work is lower than the UK tax rate.

Example 2: Diverting profits to a CFC using intra-group loans

A UK parent company decides to set up a CFC in another EEA state in order to route though it funds raised centrally through borrowings made in the UK to other group members. The funds are passed to the CFC by the UK parent in the form of equity. The CFC then passes them on to other group members, on the directions of the UK parent, in the form of interest-bearing loans. The CFC rents an office and pays two employees of a group company in the same Member State to carry out the necessary administration.

In this scenario, the income from the loans is not net economic value to the group as a whole. The loans simply transfer value from one part of the group to another. Even if there were any value, it would be attributable solely to the location of capital in the CFC and not to any work done by staff of the CFC.

No application under the new rules is likely to be granted.

Example 3a: Diverting profits to a CFC by locating intellectual property in the CFC

A UK parent company decides to set up a CFC in another EEA state and place intellectual property in the CFC so that royalties are received there.

The CFC opens an office in the other EEA state appoints a small team of staff to undertake work involved in administering the intellectual property in the CFC and receiving the royalties.

In this scenario, little of the CFC's income can be considered to constitute net economic value created directly by the individuals working for the CFC in the other EEA state. This is because the real economic value arises not from the administrative work carried out by the CFC's staff but from the legal ownership of the intellectual property by the CFC.

In this case an application is only likely to be granted if the specified amount reflected just that part of the chargeable profits that reflected an arm's length net return for the administrative work undertaken in the CFC.

Example 3b: Diverting profits to a CFC by routing ownership of group companies through the CFC

A UK parent company decides to set up a CFC in another EEA state and place shares in group companies in the CFC, so that profits distributed by those subsidiaries as dividends are received by the CFC.

Similarly to Example 3, generally this dividend income arises from legal ownership of the shares in the group companies, and is not net economic value created directly by the work of individuals working for the CFC in the other EEA state.

Example 4: Mixed activities

Instead of setting up a new CFC in another EEA state in order to route through it funds raised centrally through borrowings made in the UK to other group members, as in Example 2, the UK parent company decides to do this using the CFC that is operating the European call centre as described in Example 1.

As in Example 1, the appropriate way to establish the net economic value for the work of the call-centre is to establish the profit a third party would be likely to earn for the work. For example, it may be appropriate to use a 'cost plus' method to come up with an appropriate profit for the work.

As in Example 2 however, the income from the loans is not net economic value to the group as a whole, as the loans simply transfer value from one part of the group to another.

An application under the new rules would only be granted if the amount specified in the application was limited to the appropriate profit for the work undertaken in the call centre, as in Example 1.

Example 5: Treasury operations

A UK parent company decides to set up a CFC to undertake group treasury operations in another Member State so benefiting from a low rate of tax. The CFC has an office in the other state with sufficient competent workers with the authority to borrow on the markets, manage the group's exchange risks and on-lend the borrowed funds to group members; and they do all the work themselves in the other Member State.

The net economic value to the group that is created directly by the work in the CFC arises out of the treasury management and administration that, for example, enable the group to achieve economies of scale by borrowing on better terms than individual group companies could achieve. On third party terms, this might be rewarded with a small turn (say 25 basis points) on the interest rate to reflect the value of the work to the group and UK parent. An application can be made under the new rules, to the extent that the CFC's profits comprise or include such an amount.

An application under the new rules is likely to be granted if the amount is specified on this basis.

Example 6: Captive insurance, established in two other EEA states

A UK parent decides to set up a captive insurance CFC in another EEA state. The CFC has two agency staff in a business establishment in its territory of residence to handle administration and one employee to handle claims based in a rented office in another, different, EEA state. The UK parent has arranged for the investment activity to be outsourced from the CFC to third parties.

The administration and claims activity would be rewarded at arm's length equivalent to, say, cost plus a modest mark-up in line with the provision of such services on third party terms. Such a reward would constitute the net economic value of the activity for these purposes. None of the profits from the investment activity will represent net economic value to the group from the work of the CFC, as it is not carried out by the staff of the CFC.

An application under the new rules would only be granted if it is limited to the CFC's profits representing the net economic value of the administration and claims work that the CFC's staff do in the CFC's two business establishments in other EEA states.

Example 7: Essential capital

A UK parent sets up a CFC in another EEA state to provide banking services. The CFC opens premises in the other EEA state, appoints a management team there, installs the necessary IT equipment, and recruits local staff to provide the banking services from the premises.

The local banking regulator specifies Tier 1 capital requirements for the CFC that are consistent with international norms on the essential capital required to undertake the relevant banking activity, but the UK parent chooses to keep three times as much capital in the CFC as equity.

An application can be made and granted under the new rules if it is limited to the profits representing the net economic value arising from the banking activity undertaken in the EEA establishment by the CFC's staff working there – after taking account of the economic costs of undertaking the activity, including the economic cost of financing the activity, over and above the essential equity capital.

To the extent that the extra capital has been used to finance the banking activity, with the result that the profits of the activity are higher than would otherwise have been the case, a deduction would need to be made for the purposes of establishing the amount of those profits that could be included in an application under the new rules. For example, by reference to how much it would have cost the CFC to have borrowed the extra capital.

(If any of the CFC's capital is not used to finance the banking activity undertaken in the CFC's EEA establishment but is instead invested with a third party, then the CFC's investment income cannot be included in an application under the new rules, as it does not represent net economic value created directly by the work of individuals working for the CFC in the other EEA state.)

Example 8: Sales / Supply chain

A UK group trading in the UK sets up a CFC in another EEA state to hold ownership of traded goods, issue invoices for UK sales and receive UK sales income. The CFC opens premises in the other EEA state, appoints a management team there, installs the necessary IT equipment, and recruits local staff to administer the issue of invoices and receipt of income. The managers in the UK group HQ undertake work to set up an intra-group contract for a UK member of the group to undertake work chasing and collecting overdue trade debts on behalf of the CFC.

The issue of invoices and receipt of payments is an essential element of the group's trading activity, but the net economic value created by the work of individuals working for the CFC in the other EEA state is limited to the appropriate profit for undertaking this administrative work. Typically, this could be estimated by using a cost plus method. An application could be made under the new rules if it is limited to CFC profits representing this amount.

Any extra profit arising in the CFC cannot be included in such an application - for

example, if the group has located in the CFC the “buy / sell” margin created by the trading activity undertaken in the UK in the CFC. (Also, the net economic value to the group of the work undertaken to chase and collect overdue trade debts is created by the UK group member contracted to do this work.)

Information to be included in applications under draft new s751A

All the following information should be provided, in a level of detail appropriate to the nature and complexity of the activities / arrangements covered by the application.

1. Name of controlled foreign company (CFC)
2. United Kingdom Company's interest in the CFC's share and loan capital (by virtue of S749B)
3. Tax district and reference number of United Kingdom interest holders where known
4. Territory of residence of the CFC and details of branches including those in the United Kingdom.
5. Place, and for new companies, date of incorporation of the CFC
6. Confirmation that no other exemption is available to the CFC under the legislation at s748.
7. The other EEA state(s) where the CFC has a business establishment and individuals working for the CFC in the state(s).
8. A copy of the most recent accounts of the CFC (or where these have not yet been drawn up, management accounts or financial projections)
9. Actual or expected equity at the beginning and end of the CFC's accounting period
10. Details of all investments held by the CFC and actual or projected income from these during the accounting period for which the application is made
11. Details of all direct or indirect transactions between the United Kingdom and the CFC. This will include interest on loans (direct or indirect), royalties, payments for services, purchase or sale of goods etc.
12. Full details (including address) of the CFC's business establishment(s), the number of hours, days etc. occupied on the company's business, the size of premises, whether premises are shared, in particular with group affiliates, the amount of rent paid by the CFC etc.
13. Full details of staff working for the CFC in business establishment(s) in EEA states, including details of duties, experience, position of authority and salary.
14. Details of any outsourced business activity.
15. Full details of the business activity undertaken by the CFC. Where there is more than one business activity, details of where each activity is carried out and which individuals in each territory as detailed above at 13 are involved in carrying out each business activity.

17. Details of sources of funding for the CFC's activities, in particular sources of equity and intra-group borrowing.

18. A computation of the CFC's chargeable profits and creditable tax for the relevant accounting period.

19. The computation of how the specified **amount** was arrived at and the reasons why it is considered that this amount is a part of the CFC's chargeable profits that represents the net economic value created directly by the work of individuals working for the CFC in another EEA state where the CFC has a business establishment. Include details of the work directly carried out by individuals and how the net economic value to relevant interest holders or other members of the group was arrived at.

20. Provide a computation of the amount by which the creditable tax of the CFC for the relevant accounting period should be reduced and an explanation of why you consider this to be the correct amount on a just and reasonable basis.

Applications, or potential applications under the new rules, should be sent to:

CFC Team
International CT
HMRC03C/01
100 Parliament Street
London SW1A 2BQ
For Attn: Mary Sharp, Team Leader

Telephone 020 7147 2656

Note: In considering applications HMRC may request further information and documentation in relation to the application, though it is thought that the above information should be sufficient in most cases.