



EUROPEAN COMMISSION
DIRECTORATE-GENERAL
TAXATION AND CUSTOMS UNION
Direct taxation, Tax Coordination, Economic Analysis and Evaluation
Company Taxation Initiatives

Brussels, January 2014
Taxud/D1/

DOC: Platform/006/2014/EN

PLATFORM FOR TAX GOOD GOVERNANCE

Discussion Paper on the Recommendation on aggressive tax planning¹

Meeting of 6 February 2014

Contact:

Secretariat Platform, Telephone (32-2) 29.55.762

E-mail: taxud-platform@ec.europa.eu

¹ Commission Recommendation of 6.12.2012, C(2012) 8806 final, on aggressive tax planning.

1. This paper is submitted to the Platform, according to the agreed work program, to initiate a discussion on the monitoring of the Commission Recommendation on Aggressive Tax Planning of 6.12.2012, and should be read in close conjunction with it.
2. Following the adoption of the Commission Recommendation on Aggressive Tax Planning on 6.12.2012, the ECOFIN Council welcomed the work by the Commission on developing measures to combat tax fraud, tax evasion and aggressive tax planning and recognised the useful role of the Recommendation in this regard.
3. In addition, the Council:
 - *"recognised that aggressive tax planning is a global issue and consists in taking advantage of the technicalities of the tax system or of mismatches between two or more tax systems for the purpose of reducing tax liabilities. Member States find it difficult to protect their national tax bases from erosion through aggressive tax planning. With a view to improving the functioning of the internal market and protecting tax revenues, it is necessary to encourage Member States to take all necessary steps to tackle aggressive tax planning, where appropriate, which would help diminish existing distortions;*
 - *called upon Member States to consider where appropriate, to what extent their current national legal framework may include a General Anti Avoidance Rule which allows effective action, in compliance with the EU Treaties, against abusive tax arrangements;*
 - *invited Member States to consider the appropriateness of incorporating a General Anti Avoidance Rule, such as that suggested in the Recommendation (17617/12), in their national legislation;*
 - *invited incoming Presidencies (...) to reinforce efforts in promoting standards of good governance in tax matters to third countries, underlining the importance of strengthening cooperation with the OECD and G20, sharing views, experiences and best practices between Member States".²*

The Recommendation contains essentially two elements:

- Limitation of the application of rules intended to avoid double taxation
- Introduction of a General Anti-Abuse Rule (GAAR) in Member States legislation.

² ECOFIN Council conclusions 14 May 2013, 9549/13, FISC94.

A. LIMITATION TO THE APPLICATION OF RULES INTENDED TO AVOID DOUBLE TAXATION

4. States often undertake, in their double taxation conventions, not to tax certain items of income. In providing for such treatment, they may not necessarily take account of whether such items are subject to tax in the other party to that convention, and thus whether there is a risk of double non-taxation. Such risk may also occur if Member States unilaterally exempt items of foreign income, irrespective of whether they are subject to tax in the source state.

5. In order to address this issue, the Recommendation provides the following:

- 3.1. *Where Member States, in double taxation conventions which they have concluded among themselves or with third countries, have committed not to tax a given item of income, they should include an appropriate clause in their double taxation conventions to ensure that such commitment only applies where this item is subject to tax in the other party to that convention.*

To give effect to point 3.1, Member States are encouraged to include an appropriate clause in their double taxation conventions. Such clause could read as follows:

'Where this Convention provides that an item of income shall be taxable only in one of the contracting States or that it may be taxed in one of the contracting States, the other contracting State shall be precluded from taxing such item only if this item is subject to tax in the first contracting State'.

- 3.2. *In case of multilateral conventions, the reference to the "other contracting State" should be replaced by a reference to the "other contracting States".*
- 3.3. *Where, with a view to avoid double taxation through unilateral national rules, Member States provide for a tax exemption in regard to a given item of income sourced in another jurisdiction, in which this item is not subject to tax, Member States are encouraged to ensure that the item is taxed.*
- 3.4. *For the purposes of points 3.1, 3.2 and 3.3 an item of income should be considered to be subject to tax where it is treated as taxable by the jurisdiction concerned and is not exempt from tax, nor benefits from a full tax credit or zero-rate taxation.*

Questions to be addressed by the Platform

1) Platform members are invited to report on the state of play and progress in

including such a clause in double taxation conventions.

- 2) Do the Platform members foresee practical or administrative difficulties in applying this approach in practice? If so, how can these difficulties be addressed?**
- 3) Do the Platform members see other double non-taxation issues that ought to be considered in relation to Double Taxation Conventions?**
- 4) Do Platform members have suggestions on best practices to address non-taxation in Double Taxation Conventions?**

B. GENERAL ANTI-ABUSE RULE (GAAR)

6. With a view to moving to a better functioning of the internal market, it is necessary to encourage all Member States to take the same general approach towards aggressive tax planning, which would help diminishing existing distortions.
7. As tax planning structures are ever more elaborate and national legislators are frequently left with insufficient time for reaction, specific anti-abuse measures often turn out to be inadequate for successfully catching up with novel aggressive tax planning structures. Such structures can be harmful to national tax revenues and to the functioning of the internal market. Therefore, the Commission has recommended the adoption by Member States of a common general anti-abuse rule, which should also avoid the complexity of many different ones, and taking account of the limits imposed by Union law with regard to anti-abuse rules.
8. The explicit reference to a General Anti-Abuse rule is intended to counteract aggressive tax planning practices which fall outside the scope of specific anti-avoidance rules, and to bring consistency in the struggle against international aggressive tax planning at EU level. The overall level of protection inside the EU is equal to that of the lowest MS protection. Thus, once a payment flows into the market, after having entered from the weakest jurisdiction, it may then move freely across the borders within the Union.
9. Thus, the recommended GAAR is adapted to domestic and cross-border situations confined to the Union as well as to situations involving third countries to counteract aggressive tax planning practices which fall outside the scope of Member States' specific anti-avoidance rules.
10. Point 4.2 gives the text of the recommended GAAR, and points 4.3 to 4.7 provide for explanations of the GAAR. Point 4.4 of the Recommendation gives different criteria to assess whether an arrangement or a series of arrangements is artificial or not.

Questions to be addressed by the Platform

- 6) Platform members are invited to report on the state of play and progress in including a General Anti-Abuse rule in national legislation.**
- 7) Do the Platform members foresee practical or administrative difficulties in applying this approach in practice? If so, how can these difficulties be addressed?**
- 8) What are Platform members' views on the efficiency of such a General Anti-Abuse rule within the EU?**

C. OTHER MEASURES AGAINST AGGRESSIVE TAX PLANNING.

- 9) Do Platform members have any other suggestions on how to address aggressive tax planning?**
