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PLATFORM FOR TAX GOOD GOVERNANCE

Discussion paper on General Anti-Abuse Rules (GAAR)

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1. INTRODUCTION

The purpose of this paper is to follow-up the discussion held at the Platform meetings of 6 February 2014 and 10 June 2014 on the Commission Recommendation on Aggressive Tax Planning of 6 December 2012.

The agreed work program provides that *'the Platform will discuss how a common interpretation of the General Anti Abuse Rule (GAAR) recommended by the Commission can best be ensured. Where needed, the Platform will discuss how the application of the GAAR relates to tax incentives introduced by individual Member States'*.

At its last meeting, the Platform agreed to compare Member States' GAAR with the Recommendation, consider the work achieved in the OECD (including on a limitation of benefits clause), and consider possible ways forward.

This paper presents an overview of the current state of play of General Anti-Abuse Rules (GAAR) legislation inside the EU, on the basis of the replies provided by Member States to the questionnaire sent on 3 July, and considers possible ways forward.

2. MS'S GAAR AND THE COMMISSION RECOMMENDATION

2.1 Analysis of replies

From the replies received, it appears that many MS take a rather cautious stance as regards an intention to adopt a GAAR or to review their current GAAR using the template provided by the Commission Recommendation.

- Nevertheless, 6 MS¹ have indicated to support the Commission Recommendation concerning the GAAR. Three of them – **EL**, **RO** and **SK** declare having introduced a GAAR that has been drafted following the Recommendation on Aggressive Tax Planning. The other three – **HR**, **IT** and **PL** – are still in the process of following up on the Recommendation
- **HR** replied to have the intention to review their existing GAAR, using the template of the Recommendation.
 - In **IT**, the Government has been officially charged by the Parliament to proceed with a general fiscal reform, which will be comprehensive of new anti-avoidance rule. Article 5 of the law, specifies that this new rule must be consistent with the EC Recommendation n. 2012/772/UE of 6th December 2012.
 - **PL** has launched a legislative initiative to introduce a GAAR in 2016 that will take into account the Recommendation.

¹ This concerns EL, HR, IT, PL, RO and SK.

- 4 MS are as of yet undecided². They report to still consider the question of implementing the Commission Recommendation. Some explicitly state that more clarity would be needed on the working of the Commission Recommendation and how that interacts with international developments.
- The remaining 18 MS report not to see the added value of introducing or revising their GAAR on the basis of the 2012 Commission Recommendation³. Most of these MS consider that the GAAR or GAAR-equivalent provision that they currently have works well and/or is very similar in effect to the GAAR proposed in the Commission Recommendation. Some, such as IE, express concerns over increased uncertainty if their tried and tested provision was to be revised. Others, such as LT, are concerned that MS could interpret the Commission Recommendation differently in the absence of EU guidance.

2.2 Differences between the Commission Recommendation and MS's GAAR

One MS (EL) has already a GAAR drafted with a wording very similar to the EU Recommendation. Other MS are planning to introduce a new GAAR inspired by the Recommendation (see 2.1).

The other MS having a GAAR use different principles: substance over form principle, arm's length principle, sham transactions, operation opposed to the objectives of the law. These GAAR are most of the time older than the Recommendation and therefore not inspired by the Recommendation.

For FR and HU the GAAR text states that tax advantage has to be the **sole purpose** of the operation/series of operations. For BE, DE, EL, IE, LT, MT, PT, RO, SE, SK tax advantage must be the **main** or **essential** purpose (depending on the MS). Since the IT and PL draft are inspired by the Recommendation, it can be assumed that tax advantage will have to be the **essential** purpose (wording of the Recommendation).

ES and FR both have an advisory board that has to be consulted prior to the application of the GAAR (ES) or in case of disagreement between the tax payer and the tax administration (FR).

One of the main reasons for issuing the Recommendation on a GAAR in 2012 was to provide MS with a model GAAR provision that is fully compatible with the limitations set by the CJEU on anti-abuse provisions that restrict the freedoms laid down in the TFEU. The MS that currently operate a different GAAR and that have decided not to amend it following the Commission Recommendation may therefore continue to be exposed towards a legal risk of possible incompatibility.

By way of example, DE consider its own GAAR to be a better template for other MS, since it covers all relevant issues and is not limited to wholly artificial arrangements. In

² This concerns DK, FI, LU and SI.

³ This concerns AT, BE, BG, CY, CZ, DE, EE, ES, FR, HU, IE, LT, LV, MT, NL, PT, SE and the UK.

that regard, it is useful to recall that the Commission Recommendation does not use the term 'wholly artificial' but instead talks about an "*artificial arrangement (...) which has been put into place for the essential purpose of avoiding taxation and leads to a tax benefit*". The DE provision refers to choosing an "inappropriate legal option" which leads to tax advantages unintended by law. The inappropriateness of an arrangement is to be determined on a case-by-case basis. The CJEU jurisprudence on the wholly artificial character is referred in the DE guidance in case of cross border arrangement.

3. SUMMARY OF MEMBER STATES (MS) REPLIES TO THE QUESTIONNAIRE

3.1 Existence of a GAAR

From the replies it shows that 24 MS have (at least) one GAAR in their legislation⁴. From the 4 MS that presently do not have any GAAR, **AT** states that important international developments, in particular the BEPS initiative, should be awaited prior to considering the introduction of a GAAR. **DK** states it considers the question but is as of yet undecided. **NL** states that aggressive tax planning schemes can be countered via the 'fraus legis' doctrine and the principles based TP approach. And finally, **PL** is in the process of introducing a GAAR per 1 January 2016 that will take into account the Commission Recommendation.

3.2 Scope of the GAAR

Out of the 24 MS that have a GAAR, 15 (CY, CZ, DE, EE, EL, ES, FR, HU, IE, LT, LV, PT, SE, SI, SK) apply their GAAR to all taxes existing in that MS; the other 9 (BE, BG, FI, HR, IT, LU, MT, RO, UK) operate a GAAR that is limited to one or more separately identified taxes that vary from one MS to MS.

3.3 Date of adoption, latest revision and foreseen review

Of the 24 MS that have some sort of GAAR, 14 have their GAAR already for more than ten years⁵, but 7 of these – BE, DE, EE, FR, IE, IT, MT – have revised their GAAR in recent years; IT and HU foresee another review in 2015. Three MS – BG, ES and SI – introduced their GAAR between five and ten years ago whereby BG has recently revised it. Six have introduced their GAAR fairly recent in the last five years and not revised it since⁶. SK, finally, has not specified the date of introduction of their GAAR, though it indicated a revision in 2014.

As mentioned above, PL does not have a GAAR currently but considers introducing one in 2016.

⁴ Only AT, DK, NL and PL at present do not have a GAAR.

⁵ This concerns BE, CY, DE, EE, FI, FR, HU, IE, IT, LT, LU, MT, PT and SE.

⁶ This concerns CZ, EL, HR, LV, RO and the UK,

3.4 Written guidance

Of the 24 MS that have some sort of GAAR, 6 have published specific comprehensive guidance on the application of their GAAR (BE, DE, ES, FR, IT, UK). Another 7 report having some form of either very general guidance or – in contrast – very topical guidance on the application of the GAAR in very special circumstances (BG, FI, HR, IE, LT, LU, MT). The remaining 11 MS (CY, CZ, EE, EL, HU, , LV, PT, RO, SE, SI, SK) report having either no guidance or relying on either jurisprudence or the parliamentary history of the bill in interpreting and applying the GAAR.

3.5 MS assessment of the successfulness of their GAAR

It may be difficult to measure or evaluate the success of a GAAR. On the one hand, the absence of many court cases can be an indicator for success since the presence of a GAAR may provide a disincentive for tax payers to engage in arrangements that may trigger the application of the GAAR. On the other hand, a (significant) number of court cases where the court has denied the application of the GAAR, may indicate that the tool is not as strong as tax administrations would wish. The absence of a formal evaluation mechanism in most MS operating a GAAR probably reflects the above difficulties.

- 3 MS – EL, RO and UK – have introduced their GAAR only recently so it would be too early for an evaluation.
- 2 MS – FR and PL – report having a formal assessment procedure.
 - FR has a reporting system since 2008 for the "avis" of the "Comité de l'abus de droit fiscal". But not all GAAR based tax procedures are submitted to this Comité, and this reporting only concerns the position of the Comité and does not take into account the final fate of this procedures before the Courts.
 - The PL draft GAAR foresees that the Council of Ministers makes its assessment concerning the application of the GAAR and the system of issuing preventive opinions and will submit to Parliament relevant information in this area after final and binding termination of 20 cases, however no later than within 3 years from the date the act becomes effective.
- The other MS having a GAAR in their legislation report having never evaluated its successfulness

4. POINTS FOR DISCUSSION

A discussion of a GAAR in an EU context can be divided in two parts. In the first place, the GAAR must meet the objectives for which it has been designed: tax administrations must be able to effectively apply the provision, it must be sufficiently predictable and certain for tax payers and it must be sufficiently strict to curb abusive practices. Secondly, the GAAR must be legal in the sense that it must be compatible with the limitations set by the CJEU in order to prevent a risk of being successfully challenged by tax payers.

A discussion could therefore focus on the following points.

(A). Do Platform members want to comment on the content of the GAAR operated by MSs and/or the Commission Recommendation, in particular:

- (i). Can the provision actually be used by tax administrations as a tool or a deterrent?**
- (ii). Is the provision sufficiently predictable for tax payers to prevent uncertainty?**
- (iii). Is the scope of the provision sufficiently strict to actually curb tax abuse?**

(B). Do Platform members see a potential legal risk that could reduce its effectiveness in any of the MS' GAARs that are different from the GAAR in the Commission Recommendation?

Ad (A)

Considering the absence of a formal evaluation mechanisms in most MS as regards the effectiveness of the GAAR and the comments made by some MS, it may be useful to hear the Platform members' view on when a GAAR is effective/successful/useful and when this is not the case. For example:

- Is there a coordinating unit within the tax administration responsible for coordinating and monitoring a consistent application of the GAAR?
- Do tax inspectors need the prior approval of a centralised unit to invoke the GAAR?
- Is the number of (un)successful applications of the GAAR by tax administrations being registered and would that be useful?
- Is the number of (un)successful applies in court concerning the application of the GAAR being registered?
- Do Platform Members consider it useful to discuss possibilities to develop a model assessment mechanism that could be used by MS?

Some MS have amended their GAAR since its introduction. Were these amendments related to any of the points for discussion raised or where there different reasons for it? Could these MS expand whether the amendment has had the intended effects?

Ad (B)

Several MS claim having a GAAR that is at least equivalent to the GAAR proposed in the COM Recommendation. Do Platform members consider it useful to do a detailed assessment, MS by MS, of the various provisions operated by MS in order to assess a potential legal risk of incompatibility with EU law?