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PLATFORM FOR TAX GOOD GOVERNANCE

Discussion paper on External Strategy for Effective Taxation

Meeting of 24 September 2015

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INTRODUCTION

As part of the ongoing work to ensure effective taxation within the EU, Member States have called for an EU approach to address external threats to their tax bases. In order to effectively tax profits generated in the EU, it is agreed that common defensive measures are needed against outbound profit shifting. Discussions are ongoing at political level to determine what these EU counter-measures should be, particularly within the framework of the CCCTB.

The implementation of BEPS will also require Member States to re-examine their national defensive measures and how they are applied. Beyond the implementation of EU anti-avoidance measures, there will be a need to ensure that Member States apply their external anti-abuse provisions in a consistent way, to avoid new burdens for businesses and new loopholes for aggressive tax planners. This will require clear, common criteria for assessing third countries' tax systems and a coordinated approach in determining which countries should be subject to defensive measures, and when.

This paper intends to launch the discussion on the criteria and tools that should underlie an external strategy for effective taxation in the EU and how a common EU approach on the application of defensive / incentive mechanisms in relation to third countries can be achieved.

CLARIFYING AND REFINING EU GOOD GOVERNANCE CRITERIA

The 2012 Recommendation on measures to encourage third countries to apply minimum standards of tax good governance was an important step in defining an EU approach to external base erosion threats. The Recommendation confirmed transparency, information exchange and fair tax competition as the EU good governance criteria to assess third countries and proposed common counter-measures for those that breached these principles. The Recommendation was endorsed by Member States in May 2013 and discussed extensively by the Platform.

However, despite general consensus on the need for a common EU approach, the agreed EU criteria are still being used in a patchwork manner by Member States, or not at all. Even when the same criteria are applied, there are inconsistencies between how two Member States interpret and apply them. As a result, third countries receive mixed messages about what EU Member States expect in terms of tax good governance and when defensive mechanisms will be triggered. The result is legal uncertainty and unnecessary administrative burden for both businesses and international partners.

Moreover, in the three years since the Recommendation was issued, there have been a number of major developments in the field of tax good governance, at EU and international level. In particular, automatic exchange of information has become the global standard and the OECD BEPS work is close to finalisation, creating new minimum standards at international level which will need to be integrated into the EU and national tax frameworks in a manner which respects EU law.

In addition, the new political focus on ensuring effective taxation in the EU calls for a fresh look at the criteria used to assess third countries' tax regimes. The question has arisen as to whether other criteria, such as the level of taxation, should be taken into account when assessing third countries, particularly for no tax jurisdictions.

In this light, there is a need to re-examine and further define the common criteria that the EU should use in assessing third countries' tax systems. The three criteria set out in the Recommendation (transparency, information exchange and fair tax competition) may need to be further developed and refined, in light of international developments and in order to ensure more consistent application by Member States.

Issues for discussion:

- 1. Do you agree that a common approach to assessing the good governance standards of third countries, and identifying problematic jurisdictions, is needed in the EU?*
- 2. Do you agree on the need to update and clarify EU good governance criteria, taking into account experience to date and new developments in EU and international tax policy?*
- 3. Do you believe that there is a need to consider new EU criteria beyond those set out in the 2012 Recommendation e.g. level of taxation in third countries, to ensure effective taxation?*

DEVELOPING AN EU TAX GOOD GOVERNANCE TOOLBOX

In parallel to securing common and coherent EU criteria to assess third countries' good governance standards, the Platform should consider the most appropriate toolbox to ensure that these criteria are respected.

Currently, effective taxation in relation to third countries is usually tackled through national anti-avoidance measures, such as white/grey/tax lists, specific provisions for low/no tax jurisdictions or case-by-case provisions against abuse. The implementation of BEPS, however, requires a more coordinated approach, to provide consistency for businesses and prevent the "weakest link" in the Single Market from being exploited for aggressive tax planning purposes.

In line with Member States' requests, work is underway to develop an EU approach to implementing BEPS, along with additional anti-avoidance initiatives to prevent external profit shifting from undermining effective taxation in the EU. In particular, common anti-avoidance measures (e.g. harmonised CFC rules) are being discussed in the context of the CCCTB. The EU will need well-defined tools to determine which third countries should be subject to these common defensive measures – and when – once they are in place.

The Platform should consider the most appropriate tools to incentivise third countries to meet the common EU criteria, and the conditions for triggering coordinated defensive/incentive measures. The options below are among those that the Commission considers could be the most appropriate and effective. However, these are intended as a basis for first discussions and do not exclude other options that Platform members may wish to examine.

1. Listing third countries for tax purposes

The publication of the pan EU list of third countries has highlighted the fact that an EU list has a stronger impact than national lists in motivating third countries to address good governance concerns. Feedback received since the pan EU list was published suggests that many listed countries had been unaware that they were on certain national lists until the consolidated EU list was published. Some even suggested that they did not care if they were on national lists, but were extremely concerned to be on the pan EU list. Some Member States have also reported positive new interactions with listed jurisdictions, prompted by the publication of the pan EU list. There is clearly scope, therefore, for the pan EU list to evolve into a highly efficient tool to support the EU's external strategy against aggressive tax planning.

As announced in the June 17 Action Plan, the pan-EU list will be updated on a period basis, to reflect the latest situation with Member States' national lists. In the longer term, the goal should be to have a common EU list, rather than just a consolidated version of Member States' national lists.

A necessary first step in this work will be to gain a clearer understanding of the basis for Member States' current lists – the criteria used in compiling them and the triggers for listing/de-listing third countries. The Commission also fully recognises that the pan EU list only represents the practices of half the Member States. Therefore, more details on the tools used by non-listing Member States to apply defensive mechanisms and a debate on the merits of the various approaches would be very useful.

Issues for discussion:

- 1. What are your views on the future evolution of the pan EU list?*
- 2. On the basis of your own Member State's experience, what additional options could be considered?*

2. Tax good governance clauses in EU bilateral and regional agreements

In May 2008, ECOFIN conclusions asked for a good governance provision to be included in relevant agreements with third countries or regions. The aim was to ensure a commitment to the EU's three principles of good governance (transparency, exchange of information and fair tax competition). However, experience from the majority of agreements concluded since then is that the final wording of the provision tends to vary significantly, is often considerably weakened or is not accepted at all.

At political level, EU Member States are currently discussing a new general good governance clause to be inserted into EU regional and bilateral agreements with third countries. However, if this is to have any effect, it will need to be accompanied by a political commitment to systematically introduce the clause into all relevant agreements, without compromising on its substance.

Moreover, once a commitment to tax good governance is included in a bilateral or regional agreement, its implementation needs to be monitored to ensure that it is fully respected. To date, there has been no formal process for monitoring and reporting on the impact of good governance clauses on third countries' tax systems.

The Platform is invited to exchange ideas on ways to ensure the proper monitoring of third countries' tax good governance commitments within such agreements, and to reflect on counter-measures and/or incentives to ensure such provisions are respected.

Issues for discussion:

1. What would be the most effective way to ensure that tax good governance clauses are respected and implemented by third countries? How can this be properly monitored?

3. EU support to developing countries on tax good governance matters

EU support to developing countries in strengthening their administrative capacity in taxation and applying tax good governance standards is critical for two core reasons. First, it responds to the EU's wider development commitments by helping these countries to build sustainable domestic revenues and fight off threats to their tax bases, including from aggressive corporate tax planning. Second, it helps to prevent aggressive tax planners from exploiting lapses in developing countries' good governance standards to artificially shift profits away from other countries.

In addition, special attention needs to be given to the situation of developing countries in the context of BEPS implementation. For example, some changes to DTAs will have to be made due to new international tax rules and norms. Some developing countries fear that renegotiating their DTAs could lead to a worse outcome than at present. A possible solution could be for the EU to agree on common principles and a common approach for (re-)negotiating DTAs with developing countries, drawing on experience from other "development friendly" international agreements.

The Platform should assess how the EU can further assist developing countries in implementing good governance standards, with a view to developing recommendations in this area.

Issues for discussion:

1. What further measures can the EU take to assist developing countries in the area of tax good governance? What should be the primary focus in this assistance?

2. Do you agree on the need to define a common EU approach for Double Tax Agreements (DTAs) with developing countries?

Next steps

As a follow up to this initial discussion, the Commission will send a questionnaire to all Platform members requesting detailed information on Member States' criteria for assessing third countries and the basis on which national counter-measures are triggered.

This questionnaire will be addressed to all Member States, to gain an overview of all national practices - not just those related to national lists. The feedback received will serve as the basis for a more in-depth and informed discussion within the Platform on EU criteria and tools to promote tax good governance in third countries.

The Commission suggests holding separate Platform sessions on point 2 (monitoring bilateral/regional agreements) and point 3 (assistance to developing countries), to allow a more in-depth discussion on each subject. Platform members are invited to submit contributions to this end.