

DISCUSSION PAPER ON POSSIBLE FUTURE MEASURES AGAINST NON-COOPERATIVE JURISDICTIONS AND AGGRESSIVE TAX PLANNING AND A POSSIBLE STRATEGY AT EU LEVEL – SEMINAR JULY 17 2012

The challenges raised by non-cooperative tax jurisdictions and aggressive tax planning need to be tackled urgently. In addition the European Council called on the Council and the Commission on the 2nd March 2012 to develop concrete ways to improve the fight against tax fraud and tax evasion, including in relation to third countries and to report by June 2012.

The Commission's response is the Communication¹ adopted on 27th June 2012, which deals more specifically with concrete ways to improve the fight against tax fraud and tax evasion. The Commission also announced that it would come forward later this year with an action plan on these suggestions and an initiative on tax havens and aggressive tax planning.

In order to assist in the preparation of this initiative, the Commission is holding this seminar in order to gather the views of Member States and stakeholders on possible measures.

Issues to be discussed with the Member States and interested Parties

1. ISSUE 1: CHALLENGES TO BE ADDRESSED

Problem description

EU Member States lose both individual and corporate income tax revenue from the shifting of profits and income into low-tax countries. The revenue losses from this tax avoidance and evasion are difficult to estimate, but some have suggested that the annual cost of offshore tax abuses may be around \$100 billion per year.

Whatever the precise amount of such losses, their importance contributes to an unfavourable tax environment for both MS and taxpayers. Indeed, the main challenges currently being faced are:

- the erosion of tax bases because of (national and international) tax avoidance and evasion and its economic consequences. Losses in EU MS' tax revenues cause undesired shifts of part of the tax burden to less mobile tax bases, such as labour, property and consumption, while international tax avoidance is facilitated by the use of non-cooperative jurisdictions and schemes abusing MS's tax systems;
- increasing administrative costs and compliance burdens on tax authorities and taxpayers may lead to discouraging compliance by all taxpayers.

¹ COM (2012) 351

Effectiveness of anti-abuse measures is also affected by free movement within the EU and with third countries;

- undermining the integrity and fairness of tax structures;
- distorting financial and, indirectly, real investment flows.

Possible solutions

A possible solution is to aim at building an EU favourable tax environment (for MS, taxpayers, and investors) where on the one hand erosion of tax bases would be efficiently tackled (within the EU and in relation to third countries) and on the other hand confidence of taxpayers would be enhanced (i.e. by stable tax policies, and if possible moderate levels of taxation).

Question 1:

- a) do participants agree that the main current challenges have been correctly identified? Should any others be mentioned?
- b) do participants agree that an EU solution is favourable to a series of individual national solutions? What other approaches could be considered?

2. ISSUE 2: THIRD COUNTRIES DIMENSION

Problem description

International tax avoidance is facilitated by schemes abusing MS' tax systems and by the use of non-cooperative tax jurisdictions. MS react individually with measures at national level, adopted by each country according to its own criteria. Moreover, EU MS and institutions currently use a number of different measures that could be seen as incentives or defensive measures towards third countries. However these individual or specific actions often seem to have limited effectiveness.

Possible solutions

- a) Identification of cooperative and non-cooperative jurisdictions

A coordinated approach could be developed within the EU towards non-cooperative jurisdictions so as to increase the effectiveness of defensive measures. This could include adopting at EU level a definition of non-cooperative jurisdictions, which could be based on how third countries implement the principles of good governance in the tax area (transparency, exchange of information and fair tax competition), and could be used by both EU MS and EU institutions.

- b) Toolbox of incentives and defensive measures

The Commission services would like to assess a toolbox of incentives and defensive measures to be used by MS and EU institutions according to their respective competences in order to better convince third countries to cooperate in the tax area with EU MS.

Such toolbox could cover a range of measures among which, for instance:

- incentives for cooperative jurisdictions (i.e. jurisdictions implementing the criteria under a) above) could cover measures to be adopted:
 - o at national level (removal from national blacklists, conclusion of double tax conventions (DTC), twinning programmes, ad hoc detachment of experts to answer request from EU MS ...),
 - o at EU level (possible enhancement of development aid for capacity building against strict conditionality,...),
- defensive measures against non-cooperative jurisdictions could similarly be identified for possible adoption:
 - o at national level (suspension/ termination of DTC, blacklisting, application of a uniform rate of withholding tax on payments to these countries reported by a third party, denial of deductions in respect of expense payments to payees resident in a non-cooperative jurisdiction, application of transfer pricing rules for transactions between non associated companies resident in a non-cooperative jurisdiction, penalties...)
 - o at EU level in the tax area (application of tax anti-abuse measures such as the CCCTB GAAR mentioned below, examining the possibility of an EU-wide framework whereby MS introduce a targeted tax regime to balance an aggressive one from a third country, possible penalties defined at EU level,...) or in other areas (discouraging project financing in NCJ, discouraging EU companies from establishing related entities in NCJ, impact to be taken into account when concluding preferential economic relations such as free trade agreements or when granting financial support and technical assistance...),

Question 2 :

- a) Do participants believe that a joint action of EU MS could increase the effectiveness of defensive measures towards third countries?
- b) Do participants agree that an EU definition of non-cooperative jurisdictions could be based on the implementation of the principles of good governance in the tax area? Would participants see any other relevant (tax and non-tax) criteria to be taken into account?
- c) Do participants agree with the suggested toolbox of incentives and defensive measures? What other measures could be taken into consideration?

3. ISSUE 3: ANTI-ABUSE MEASURES

Problem description

Anti-abuse measures adopted by MS may raise some issues of compliance with EU rules or other international rules when applied to third countries.

Possible solutions

Following the 2007 EC Communication on anti-abuse measures in the area of direct taxation (COM(2007)785)² and in reaction to the case law of the Court of Justice of the EU, the Council adopted a resolution in 2010³ on coordination of tax policies in anti-abuse measures. This mainly focused on CFC and thin capitalisation. In addition, article 80 of the proposed CCCTB Directive⁴ contains a General anti-abuse rule stipulating that artificial transactions carried out for the sole purpose of avoiding taxation shall be ignored for the purposes of calculating the tax base. On this basis, the Commission could assist MS in designing anti-abuse measures in full compliance with EU and other international commitments.

Question 3

- a) Could the introduction of an EU-wide general anti abuse rule such as the one provided for in the CCCTB improve the effectiveness of the fight against aggressive tax planning?
- b) How useful would it be for MS to design their anti-abuse measures on the basis of the one provided for in the CCCTB proposal? Could the Commission have a role in assisting them in designing such measures?

4. ISSUE 4: DOUBLE TAX CONVENTIONS

Problem description

EU businesses operate in a Global Economic Scenario and therefore aggressive tax planning is not limited to the Internal Market. Schemes of aggressive tax planning frequently imply the use (or abuse) of Double Tax Conventions (DTCs) which often leads to double non taxation.

Possible solutions

² <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2007:0785:FIN:en:PDF>

³ Council Resolution, The coordination of the Controlled Foreign Corporation (CFC) and Thin Capitalisation rules within the European Union, 10597/2010, 08.06.2010.

⁴COM (2011) 121/4, 16.03.11,

Some DTC between Member States contain a provision to ensure that double non taxation is avoided⁵. Such a type of approach could be, subject to agreement on article 1 of the revised Interest and Royalty proposal⁶, be a possible solution for cross-border interest, royalty and licence fee payments between MS, and also between MS and third countries.

Question 4

a) Do you find the concept above suggested appropriate in order to tackle aggressive tax planning? If not, what are the strength and weaknesses of it? Do you have other suggestions?

5. ISSUE 5: ANY OTHER SUGGESTIONS

As pointed out the above concepts should not be seen as exhaustive. Other more general concepts could also be considered, for example:

Measures to increase transparency and to introduce enhanced reporting obligations or final withholding taxes at source (in cases of many taxpayers and relatively low amounts.

Question 5

a) We would therefore ask you to provide any other suggestion you might have for ways in which non-cooperative jurisdictions and aggressive tax planning could be tackled?

⁵ e.g. the Protocol of the DTC between France and Italy point 15 provides that exemption shall only be granted if and to the extent such income is taxable in the other State.

⁶ Council directive on a common system of taxation applicable to interest and royalty payments made between associated companies of different Member States, COM(2011)714, 11.11.2011.