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# PLATFORM FOR TAX GOOD GOVERNANCE

## Discussion paper on the follow-up of the Commission Recommendations of 6 December 2012

## Building blocks

**Meeting of 2nd March 2015**

## Disclaimer:

*This is a Commission services working paper prepared by DG TAXUD for discussion purposes. It does not represent a formal Commission or Commission services position or policy. The paper is therefore without prejudice to any position which may be taken by the Commission in the future*

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## 1. INTRODUCTION

When adopting its Action plan and two Recommendations[1], the Commission committed to report within three years on the application of the Recommendations.

In response to the Recommendations, the Council invited Member States to consider the appropriateness of incorporating a General Anti Abuse Rule, such as that suggested in the Recommendation on aggressive tax planning, in their national legislation and invited consideration of whether developing a European list of third country non-cooperative jurisdictions is appropriate (ECOFIN conclusions of 14 May 2013 and European Council conclusions of 22 May 2013).

One of the purposes of the Platform of good tax governance is to assist the Commission in preparing its report[2] on the application of the Recommendations. This was one amongst the priorities in the agreed work programme of the Platform. Accordingly, the Platform held discussions on both Recommendations at its meetings on 16 October 2013, 6 February 2014, 10th June 214 and 19th December 2014.

All Member States support tackling tax avoidance and tax evasion, but there are differences of opinion on how that can be achieved.

The present document aims at preparing the field for this Commission report on the application of the two Recommendations. The paper is structured around building blocks and contains some suggestions for the way forward. Members of the Platform are invited to provide comments at the meeting. Written comments are also welcome.

## 2. APPLICATION OF THE RECOMMENDATION REGARDING MEASURES INTENDED TO ENCOURAGE THIRD COUNTRIES TO APPLY MINIMUM STANDARDS OF GOOD GOVERNANCE IN TAX MATTERS

The purpose of the Recommendation is to increase the overall effectiveness of the measures taken by each Member State in relation to third counties not meeting the minimum standards of good governance in tax matters (transparency, exchange of information, and fair tax competition). To this effect, the Recommendation provides criteria making it possible to identify third countries not meeting these minimum standards, and lists a series of actions that Member States may take in relation to such countries.

The Commission services intend to report on the basis of:

- the factual elements contained in the discussion paper presented to the Platform for its meeting on 19 December (*Platform/11/2014/EN*),

- the discussions held in the Platform,

[1] An Action Plan to strengthen the fight against tax fraud and tax evasion (COM(2012)722), Recommendation regarding measures intended to encourage third countries to apply minimum standards of good governance in tax matters (C(2012) 8805) and Recommendation on aggressive tax planning (C(2012) 8806).

[2] Formally, DG Taxation and Customs Union (TAXUD) will prepare a draft in consultation with other Commission services, for consideration by the College.

- and to draw possible conclusions on how the Recommendations have been followed-up by MS. Such conclusions may in fact go further, and outline ways of making the content of the Recommendations more easy to apply.

This structure is the one followed under each section (criteria used, lists, etc.).

It should be noted that no Member State has so far reported having fully followed the Recommendation.

The Recommendation regarding measures intended to encourage third countries to apply minimum standards of good governance in tax matters ('tax havens' Recommendation) was discussed at the Platform meetings of 16 October 2013, 6 February 2014, 10 June 2014 and 19 December 2014. A questionnaire, to which all MS replied, was circulated to allow a comparison across Member States (MS) on criteria applied and measures triggered.

## 2.1. Criteria used

### *2.1.1. Factual elements*

*Information based on document Platform/11/2014/EN*

Member States have reported using various types of criteria, sometimes in combination, for assessing the tax systems of other countries. However these criteria may be used for other purposes than establishing lists.

***Criteria provided for by the Recommendation***

- Compliance with transparency and exchange of information standards[3]: this criterion is used by 18 MS (BE, BG, CY, CZ, DE, EE, EL, ES, FR, HR, IE, IT, LT, LV, PL, PT, SE, UK), out of which 13 MS use it for blacklisting purposes[4] only one MS (DE) uses it as sole criterion for blacklisting purposes, and one MS (UK) uses it for a different listing system.
- Absence of harmful tax measures[5]: this criterion is used by 12 MS (BE, BG, CY, EE, EL, HR, IT, LT, LV, PL, PT, SE), but not all for blacklisting purposes. All 12 MS use the "absence of harmful tax measures" criterion in combination with the "transparency and exchange of information" criterion.

***Additional or different criteria***

- Tax level: 8 MS (BE, BG, EL, FI, LT, LV, PT, SI) report using the level of taxation for blacklisting purposes[6]. Out of these 8 MS, 6 (BE, BG, EL, LT, LV, PT) combine it with the two criteria of the Recommendation, and 2 MS (FI and SI) use the level of taxation as sole criterion. The tax rate/level threshold varies from 4%[7] (BG) to 15%[8] (FI); it is expressed either as a fixed percentage or by reference to the tax rate of the MS concerned.

[3] Type of criterion recommended in Commission Recommendation C(2012) 8805 point 3a
[4] Out of these, 3 MS have no list system (CY, CZ, IE), one use it for white list (SE) and one has another listing system (UK)
[5] Type of criterion recommended in Commission Recommendation C(2012) 8805 point 3b
[6] 4 other MS (AT, CY, HU, SE) refer to the level of taxation for other purposes than blacklisting.
[7] 40% of BG corporate tax rate (10%)= 4%

- Other criteria: existence of a double tax convention, an exchange of information agreement or a convention on mutual assistance (13 MS: BG, EE, EL, ES, FI, FR, HR, HU, LV, PL, SI, SK, UK), non-EU or non-EEA countries (8 MS: BG, CZ, EL, FI, HU, LV, SI, SK), artificiality of transactions (RO), automatic exchange of information and least developed countries (UK). These criteria are used for blacklisting, whitelisting or for other purposes.

### *2.1.2. Discussions in the Platform*

- **Transparency and exchange of information** (TEOI). Platform members agreed that the work of the Global Forum should form part of any assessment of the Transparency and Exchange of Information criteria under the Recommendation, and Platform members foresee no major practical or administrative difficulties in applying this approach in practice. Several MS take the Global Forum rating into account, complemented by their own evaluation based on their experience of effective exchange of Information with the jurisdiction concerned.

- **Harmful tax measures** Platform members recognised the usefulness of this criterion; they agreed that the Code criteria and existing Code assessments should be used as a benchmark for the purpose of applying the fair tax competition criterion of the Recommendation. This is also used in relation to discussions with some third countries (CH, LI). However, assessing this criterion appears onerous in terms of workload, especially for small Member States, and some suggested that this could be solved by providing or sharing reliable information.

- **Possible additional criteria**

    - Platform members agreed that existing intra-EU tax standards and regulations are important as benchmarks prior to promoting tax standards and regulations towards third countries, and reviewing internal standards is needed to raising the bar in the context of recent international developments;

    - Various views were expressed on the tax rate/effective level of taxation criterion used by some Member States. Some consider it should not be taken into account in relation to third countries since it is not currently applied within the EU, some others suggest that this should be further considered, in the light of recent OECD and EU developments.

[8] 3/4 of FI corporate tax rate (20%) = 15%. The FI domestic tax law includes a regime on special controlled foreign corporations (CFC) by virtue of which a "grey list" is established over countries, in which the tax burden is deemed to significantly differ from the corporate tax paid by Finnish companies. The level of tax actually paid in a non-EU tax treaty country is deemed substantially lower as compared to the corresponding Finnish tax on the income if the foreign tax is, **on average**, lower than 3/4 of the corresponding Finnish tax. However, an entity in a grey list country cannot be considered to be a CFC as long as the entity itself pays taxes which are 3/5 or more of the taxes that would have been paid in Finland.

*2.1.3. Possible conclusions on criteria*

***For comments by Platform members***

- Recommendation C(2012) 8805 contains 2 sets of criteria. Ten MS (out of 18) already comply with these two criteria, since for listing purposes they use the presence of harmful tax measures criterion in combination with the one on transparency and exchange of information. The other MS apply other criteria like the tax level, either alone, or in combination with one or both criteria of the Recommendation.

- The 2 criteria provided by the Recommendation (transparency and exchange of information; fair tax competition) are the most relevant for assessing the good governance criteria. They may be supplemented by criteria on effective cooperation (i.e bilateral/multilateral instruments).

- The Commission services might also suggest to give further consideration, in the light of OECD and EU developments, to the relevance of other criteria, such as the level of taxation, in particular towards those jurisdictions having no taxation at all. In addition, since the adoption of the Recommendation, automatic exchange of information has become the norm, it would be logical to use this also as a criterion.

## 2.2. Lists

*2.2.1. Factual elements*

*Information based on document Platform/11/2014/EN*

Out of 28 replies received, 18 MS have a (black/white/other) listing system, 10 MS having no list at all.

**CONTENT OF LISTS**

***1 - Blacklisted jurisdictions***

The number of black listed jurisdictions ranges from 0 in DE to 85 in PT. The use of the criteria mentioned under point 1.1 *supra* gives the following results.

- Transparency and exchange of information

The 13 MS (BE, BG, DE, EE, EL, ES, FR, HR, IT, LT, LV, PL, PT)) using this criterion (solely or in combination with others) list between 0 (DE) and 85(PT) jurisdictions (see **table 1**). Only DE uses solely this criterion.

- Harmful tax measures

The 10 MS (BE, BG, EE, EL, HR, IT, LT, LV, PL, PT) using this criterion in combination with the first one result in listing between 24 (BE) and 85 (PT) jurisdictions. However these are not always the same (see **table 2**).

Amongst the 4 MS (EE, HR, IT, PL) using only the 2 criteria of the

Recommendation (see **table 3**), there are some discrepancies: 31 jurisdictions are blacklisted by these 4 MS, 7 by 3 of them, 20 jurisdictions are blacklisted by 2 MS, and 27 by only one (not always the same MS). In total, EE has blacklisted 55 jurisdictions, HR 50, IT 68 and PL 39. If we compare the 4 MS (EE, HR, IT, PL) that use only both criteria from the Recommendation, to the 2 MS (FI, SI) using the tax level criterion only, the first group (Recommendation criteria) lists between 39 (PL) and 68 (IT) jurisdictions, while FI and SI list 15 and 19 jurisdictions respectively. 10 jurisdictions blacklisted by FI and/or SI had not been blacklisted by any of the 4 MS using both Recommendation criteria only.

- Level of taxation

The 6 MS (BE, BG, EL, LT, LV, PT) using this criterion in combination with those of the Recommendation result in listing together 10 jurisdictions (see **table 4**). However, 22 jurisdictions are listed by 5 of them, 12 jurisdictions are listed together by 4 of them, 13 by 3 MS, 18 jurisdictions are blacklisted by 2 MS, and 41 by only one (not always the same MS). In total, BE has blacklisted 24 jurisdictions, BG 45, EL 58, LT 60, LV 62 and PT 85.

The 2 MS (FI, SI) using solely the level of taxation for blacklisting purposes list 15 and 19 jurisdictions (see **table 5**).

These various points show a wide range of differences between MS' evaluations when using a comparable set of criteria.

***2 - White lists***

There are 5 MS having whitelists (IT, EE, LT, SE, SK).

However, the IT is used for withholding tax exemptions on interest payments on bonds issued by the state banks or quoted companies and not for anti-avoidance issues. It is therefore not suggested to be considered for the purpose of this process.

Estonia (EE) has a white list of countries not considered as low tax jurisdictions as well as a blacklist. They are both used for CFC and non-deductibility of cost purposes. It is worth to note that EE white lists countries such as Bahrain (blacklisted by 8 MS), FYROM (blacklisted by 2 MS), the Isle of Man (blacklisted by 9 MS), Jersey (blacklisted by 6 MS), Singapore (blacklisted by 4 MS), Switzerland (blacklisted by 2 MS) or the United Arab Emirates (blacklisted by 8 MS).

SE has reported having a white list linked to CFC rules: in case a CFC is established in a white listed country, it is not necessary for the tax administration to perform the CFC-rules tests.

***3 - Other listing system***

The UK categories for offshore penalties considers the efficiency with which tax information is received from third countries.[9] Category 1 includes those countries from which information is received automatically, Category 2 includes those from

[9] The UK does not consider its differentiated penalty regime to be a black list since it only applies higher penalties to individuals who are found to have been non-compliant in their activities in particular countries rather triggering any measures of general application (e.g. withholding taxes).

which information is received on request whilst Category 3 includes countries which are not compliant with EOI on Request as well as those where exchange of information arrangements are not in place.

**MANAGEMENT OF MS' LISTS**

- The 18 MS having lists indicated they were publicly available and provided links to their websites;

- Very few MS have a periodical review of their list, which takes place each year (EL, FR) or every 2 years (BE). The other 15 MS review their lists on an ad hoc basis. However, several updating issues have been identified.

### *2.2.2. Discussion in the Platform*

- Non-MS members were in favour of a single EU blacklist given the difficulty in their view to achieve coherence between 28 MS blacklists, and in order to have a level playing field for all companies in all MS. One MS suggested that the Commission should assess the compatibility of Member States lists with EU law.

- However, Platform members welcomed the comparison of various lists from MS and the Commission services' suggestion to publish a consolidated version on the Platform website. They also recognised the need to improve consistency of assessments made under similar criteria.

- On transparency, Platform members recognised the usefulness of keeping lists up-to-date on a regular (i.e. at least annual) basis. They noted that this could be resource-intensive for some MS, and called for an appropriate procedure.

### *2.2.3. Possible conclusions*

***For comments by Platform members***

- Those MS having no listing process have not reported they are considering adopting one.

- The Commission services might suggest solutions to improve the consistency of assessments of similar criteria.

  This could include sharing information on:

  - effectiveness of exchange of information mechanisms with the jurisdiction concerned, in particular for those jurisdictions not having yet passed the phase 2 review of the Global Forum;

  - the presence of potentially harmful tax measures detected by MS or by the Commission services.

Possible mechanisms could range from informal/multilateral ones (between MS and with Commission services), or/and with some monitoring by the Platform or by an institutionalised instance (such as an appropriate Council group).

- The Commission services might also suggest that such monitoring mechanisms could also cover the updating of MS lists, to ensure that any update from a MS would be reflected in due time in the list consolidated for publication on the TAXUD webpage.

## 2.3. Measures applied towards third countries

### *2.3.1. Factual elements*

- The Recommendation contains a series of positive and negative measures (de-listing/listing with a reference to the Recommendation, initiation/termination of double tax conventions, technical assistance…) that MS may apply towards third countries, depending on whether they comply with or are committed to the minimum standards of good governance.

- Member States have not reported using two of the measures (treaty renegotiation or incentives). They have however reported using on an individual basis a number of other tax measures, such as non-deductibility of costs (11 MS), CFC rules (8 MS), and measures related to withholding taxes (10 MS).

### *2.3.2. Discussion in the Platform*

- Platform members recognised the general relevance of the measures provided in the Recommendation as a mean to convince third countries to adopt minimum standards of good governance. However, some Platform members expressed reservations on granting incentives to jurisdictions not yet complying with minimum requirements, while other members stressed the need to strengthen EU assistance to developing countries on policy making, administrative support and capacity development.

- Platform members noted the variety of measures currently applied by MS, with 3 main categories (non-deductibility of costs, CFC, withholding taxes).

- Platform members recognised that the threat of being collectively blacklisted in combination with positive measures should often suffice to convince most third countries to comply with such standards. It was understood that practical application of the measures needs to be proportionate and to allow flexibility based on a case by case assessment of both the seriousness of the non-compliance and of interests other than tax good governance. In this respect, some Platform members expressed concerns on the difficulty to apply on an individual basis negative measures against a big powerful jurisdiction because of the risk of countermeasures, or that countermeasures should not undermine progress on Automatic Exchange of Information.

- The Recommendation does not require coordinated actions but some discussions in the Platform underlined that collective/coordinated actions would be more

effective than individual actions in relation to third countries. A coordinated action could bring some of the most problematic jurisdictions to amend certain practices.

*2.3.3. Possible conclusions*

***For comments by Platform members***

- MS have not reported having taken additional actions as a follow-up to the Recommendation. However, incidentally and as a result of their existing rules, some MS comply *de facto* with some of the criteria and a few measures contained in the Recommendation.

- The Commission services note that, while aiming at the same goals as those of the Recommendation, the fact that MS do not follow the same approach leads to additional work. They should at least cooperate to convince third countries to comply with the minimum standards of good governance in tax matters. The lack of appetite from MS to act collectively against non-compliant countries seems to be justified by 3 main reasons: the lack of resources to assess third countries' tax regimes, the lack of willingness of some MS to take action against non-compliant countries, and the wish of MS to keep a margin of manoeuver and to decide what appropriate measures to apply to third countries.

- The Commission services note that a variety of MS measures apply to third countries without an overall consistency in relation to the minimum standards of good governance, and that some non-targeted third countries operate harmful tax measures. Based on experience shared with Platform members, the Commission services consider that limited collective action could be sufficient to convince these third countries to comply with the minimum of good governance. Efficiency of such collective action also relies on its visibility.

- The Commission services may therefore suggest an initiative for further action, aiming at third countries' effective compliance with minimum standards of good governance in tax matters (and further standards if necessary) in their relations with EU MS. This initiative would provide for further practical assistance on how to apply the content of the Recommendation. For instance, the Joint Transfer Pricing Forum successfully agrees on Codes and guidance on how to apply OECD transfer pricing rules; the Platform could contribute in a similar way. In practical terms such (soft or hard law) initiative could:

    - Provide for an assessment mechanism that could be relied upon by MS;

    - Propose that MS would promote compliance with the minimum standards in their relationship with the third countries concerned, so that collective action may not always be necessary;

    - Foresee minimum measures to be applied collectively, building on

those of the Recommendation;

- Foresee that MS could individually adopt additional criteria and take further actions towards the third countries concerned.

### 2.4. Conclusion

The Commission services will take into consideration the discussion held in the Platform and written comments from Platform members when moving to the next stage of preparing a report for consideration by the Commission.

## 3. APPLICATION OF THE RECOMMENDATION ON AGGRESSIVE TAX PLANNING

The purpose of the Recommendation is to better enable Member States to address aggressive tax planning by reducing double non-taxation and ensuring a minimum level of protection across the EU MS by the adoption of a general anti-abuse rule taking into account the limits imposed by Union law.

The Recommendation was discussed at the Platform meetings of 16 October 2013, 6 February 2014, 10 June 2014 and 19 December 2014.

### 3.1. Limitation to the application of rules intended to avoid double taxation

#### *3.1.1. Discussion in the Platform*

Concerning the clause to prevent double non-taxation in double tax conventions (DTC), some MS expressed reservations on the scope, which by being too broad in their view could be used by other contracting parties to tax items that the MS concerned wanted to exempt. Some suggested that this could be prevented with a more specific (tax or jurisdiction) scope. Some members mentioned that the systematic inclusion of this clause would require the renegotiation of all Double Tax Conventions (DTC).

One MS indicated it would introduce a subject to tax clause only on a case by case basis.

Several MS and non-MS members mentioned the parallel OECD work anti-abuse rules in the DTC; and suggested to wait for the outcome of the OECD work before taking a final stance.

It seems from the discussion that no MS intends to include the recommended clause in a foreseeable future.

Several members support the CCCTB as part of the solution.

#### *3.1.2. Possible conclusions*

***For comments by Platform members***

- Since no MS seems to support the right to tax clause as included in the Recommendation, the Commission services intend to report that no MS

has decided to follow-up the Recommendation on this point, and that there is a need to find other ways of treating this issue, having due regard to the outcome of the OECD on BEPS (notably Actions 6 (Prevent Treaty Abuse) and 15 (Multilateral Instrument text)).

## 3.2. General Anti Abuse Rule (GAAR)

A GAAR is a powerful means of protection against novel tax planning schemes and the common GAAR proposed in the Commission Recommendation takes account of primary and secondary EU legislation and European Court of Justice (ECJ) rulings.

The Platform agreed to collect more information from MS concerning the GAARs currently operated at national level. The replies received from MS on the questionnaire have been summarised in the Discussion Paper *Platform/12/2014/EN* for the 19 December 2014 meeting. It contains useful information on MS having (or not) a GAAR, when GAARs have been introduced and amended and on the operation of the various GAARs.

A significant new development is the agreement at ECOFIN on 9 December 2014, on a common anti-abuse rule in the parent-subsidiary directive (PSD).

### *3.2.1. Factual elements*

*Information based on document Platform/12/2014/EN*

- 6 MS[10] 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.
- 4 MS are as of yet undecided[11]. 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

[10] This concerns EL, HR, IT, PL, RO and SK.

[11] This concerns DK, FI, LU and SI.

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 Recommendation[12]. 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 in relation to the effectiveness of their tried and tested provision if it were to be revised. Others, such as LT, are concerned that MS could interpret the Commission Recommendation differently in the absence of EU guidance.

### *3.2.2. Discussion in the Platform*

Platform members support improving anti abuse rules support although it is important to leave some flexibility to MS.

Several Platform members expressed concerns over the GAAR recommended by the Commission, amongst others: on the manageability of a GAAR by the tax administrations (complex to use) and by taxpayers (legal uncertainty). Some guidance would be needed on the application of a GAAR. It was also observed that even if all MS adopt the same GAAR, different interpretations by different courts may still occur.

### *3.2.3. Possible conclusions*

***For comments by Platform members***

- The follow-up of the recommended GAAR has to be seen in the light of the agreement on the Parent-Subsidiary directive anti-abuse rule (AAR) and as a minimum level of protection that should be adopted by all MS.
- The Commission services intend to report that MS not having taken additional action after the Recommendation consider that they already have anti-abuse rules that meet the objectives of the Commission Recommendation in tackling Aggressive Tax Planning. This might lead to further consideration and assessment on possible action to be taken.

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