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PLATFORM FOR TAX GOOD GOVERNANCE

Discussion Paper on possible outputs of the Recommendation on aggressive tax planning¹

Meeting of 10 June 2014

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

The purpose of this paper is to follow-up the discussion held at the Platform meeting of 6 February 2014 on the Commission Recommendation on Aggressive Tax Planning of 6 December 2012. It prepares the discussion for possible outputs.

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.*

"The Platform will discuss possible ways to implement a tax treaty clause which ensures that treaty provisions aimed at avoiding double taxation do not enable double non-taxation. It will also discuss best-practices that could assist Member States in the practical application of such clauses."

1) EMERGING OUTPUTS

The discussion at the previous meeting on 6 February 2014 reflects a consensus amongst members who expressed themselves, on a positive approach to the question of the efficiency of a single GAAR as proposed in the EU Recommendation (question 8 of document *Platform/006//2014/EN*): members who expressed themselves, mainly non-MS organisations, stated that a single GAAR at EU level would be preferable, since part of the problem comes from legal uncertainty due to the accumulation of rules. MS did not express themselves on this point.

1) Platform members are invited to confirm this consensus of the Platform that the recommended single GAAR be adopted.

2) ISSUES REMAINING FOR DISCUSSION

Several points on which the Commission requested the opinion of the Platform members remain open and need to be further discussed during this meeting in order to clarify the opinions of Platform members. These questions are indicated below with the corresponding text of document *Platform/006//2014/EN*.

2.1. Limitation to the application of rules intended to avoid Double Taxation.

On the basis of title A of document *Platform/006//2014/EN*, a discussion took place at the meeting on 6 February 2014. At the time of the meeting, no MS had already introduced such a clause in their double taxation conventions to ensure that a commitment not to tax a certain item only applies where this item is subject to tax in the other party to that convention.

Recommendation C(2012) 8806 provides for an example of such a clause:

'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'.

The Recommendation also states that:

'... 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.'

2.1.1. Review of progress.

2) Platform members are invited to report on the state of play and progress in including such a clause in double taxation conventions.

2.1.2. Agreement of the parties.

The EC underlines that the clause in the Recommendation reading: "*... shall be precluded from taxing such item only if this item is subject to tax...*", means that, with this clause, **a MS is not forced to tax if the Double Non Taxation is deemed legitimate, i.e. known and accepted by both MS.** Without this clause, if a MS has given up its right to tax in a Double Taxation Convention, it cannot tax anymore, The purpose of the Recommendation is not to force MS to tax, but to better enable a MS to tax if it considers the situation abusive. This Recommendation is aimed at ensuring DTCs cannot prevent MS from taxing income in situations where Double Non Taxation (DNT) would otherwise arise, not at forcing MS to tax in situations where the DNT is considered legitimate.

3) Do the Platform members foresee practical or administrative difficulties in applying this approach in practice? If so, how can these difficulties be addressed?

2.1.3. EU or OECD approach

Several members have mentioned the OECD actions to insert anti-abuse rules in the DTC and stated that they would favour an OECD solution which would have a broader scope than an EU one.

4) Do Platform members believe that all MS should wait for an OECD solution?

5) If the answer to this question is yes, what should the EU be looking for in such a solution? How would this solution differ from the Commission Recommendation?

2.1.4. Remaining questions

Several questions have not been addressed during the last meeting. The Commission services would like members to express their views on the following questions.

- 6) Do the Platform members see other double non-taxation issues that ought to be considered in relation to Double Taxation Conventions?**
- 7) Do Platform members have suggestions on best practices to address non-taxation in Double Taxation Conventions?**

2.2. General Anti-Abuse Rule (GAAR)

2.2.1. State of play

On the basis of paragraphs 6-10 of document *Platform/006//2014/EN*, the majority of those who spoke at the meeting on 6 February 2014 were in favour of a single GAAR within the EU, since various models would lead to various interpretations.

However, the discussion did not review the state of play and progress in including a GAAR in national legislations.

2.2.2. Common interpretation

The GAAR in the Recommendation on Aggressive Tax Planning (ATP) takes account of discussions in the proposal concerning the CCCTB, which should allow a common interpretation of the provision.

Some members referred to the CCCTB proposal as part of the solution.

- 8) Would Platform members have other suggestions to ensure a common interpretation of a General Anti-Abuse rule?**

The explicit reference to a GAAR 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.

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.

- 9) Do the Platform members foresee practical or administrative difficulties in applying the General Anti-Abuse rule in practice? If so, how can these difficulties be addressed?**
- 10) Would the GAAR approach need to be supported by other specific anti-abuse rules or initiatives (e.g. limitation of benefits clause)?**
- 11) What are Platform members' views on other possible areas where a common approach could be encouraged?**
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