

Luxembourg, 7 September 2015

*Informal meeting of economic and financial affairs ministers
11-12 September, Luxembourg*

Presidency Issues note

Minimum effective taxation

I - WOULD "MINIMUM EFFECTIVE TAXATION" CONTRIBUTE TO A FAIR TAX POLICY IN A GLOBALISED ECONOMY?

1. As one of the consequences of globalisation, it has become more challenging for States to ensure that all economic actors pay their fair shares of taxes.
2. Therefore, whilst the focus of international tax rules had been since the 1920s on avoiding double taxation, the attention of policy-makers has recently shifted to avoiding **double non-taxation**. This is the result of potentially **aggressive tax planning** in particular by multinationals, which were able to benefit from asymmetries and mismatches in national tax rules and, possibly, a lack of coordination among tax authorities in order to eliminate or significantly reduce taxation. This base erosion and profit shifting (BEPS) might have impacted national tax revenues.
3. Competition between tax jurisdictions in general, in combination with potentially aggressive tax planning by multinationals, has led to a progressive reduction of the corporate taxation *nominal* rates, but also to various tax advantages offered to businesses leading to further reductions of *effective* tax rates. This **tax competition** can be observed **both at the EU and global levels**. It has reinforced the wish of States to seek a level playing field in this area. Several Member States and third countries have in this context developed **blacklists** of



jurisdictions where there is no (or very low) effective taxation. Other types of blacklists address the level of cooperation of these jurisdictions in bilaterally exchanging information for tax purposes.

4. The concept of a '**minimum effective taxation**' at the EU level may be defined in this context as a possible protective measure to ensure that profits do not leave the Internal Market (external dimension) or are not shifted to another Member State (internal dimension) untaxed or taxed at a level which may be considered low, in particular when appropriate economic substance is not generated in that third country or other Member State.
5. Some Member States have expressed concern that jurisdictions within the EU may be used as gateways to third country tax havens. Such a risk of **outbound profit shifting** towards tax havens is considered as particularly high with regard to **intangibles**, notably intellectual property assets such as royalty payments.
6. Against this background, some Member States argue that low taxation *per se* is harmful whereas others underline the positive aspects of tax competition in terms of **competitiveness** both within the EU and towards the rest of the world. The level of taxation is indeed an important parameter for **investment decisions** by multinationals.
7. In addition, several Member States have stressed that direct taxation of multinationals is a matter of **national sovereignty** and have questioned in this context the legal compatibility of any EU "minimum effective taxation" rule with the Treaties and the freedoms they provide.
8. The **possible counter-measures** currently at the disposal of Member States to avoid non (or very low) effective taxation are limited:
 - a. **Controlled Foreign Company (CFC) Rules:** these provisions are precisely aimed at avoiding profit shifting to low tax jurisdictions but their possible implementation



within the EU has been constrained by the jurisprudence of the EU Court of Justice in the context notably of the EU freedom of establishment.

- b. **Anti-abuse rules:** these rules target arrangements that have been put in place for the main purpose or one of the main purposes of obtaining a tax advantage and that cannot be regarded as genuine.
- c. **Code of Conduct on business taxation (1997):** the Code of Conduct group reviews measures which may be considered harmful within the meaning of the Code. It is a process based on peer-to-peer review and soft law.

QUESTIONS:

- 1 - Do you share the above assessment of the challenges for national tax policies?
- 2 - Do you believe that discussing the concept of "minimum effective taxation" at EU level would be a useful contribution to facing these challenges?

II - SOLUTIONS BETWEEN MEMBER STATES (INTRA EU): ONGOING WORKS IN THE COUNCIL

9. In order to offer solutions to unwanted base erosion and profit shifting between Member States, a number of legislative proposals have been put forward to the Council with a view to their adoption. These proposals could form the basis for an introduction of the concept of "minimum effective taxation". In its EU BEPS roadmap (doc. 10649/15 FISC 93) the Luxembourg Presidency committed to discuss this issue. In order to focus these discussions and to make them most efficient, the Presidency considers that the debate should centre in the short term on concrete measures.

10. The **Interest and Royalties Directive (IRD)** presents a good opportunity to deepen this **subject**, in particular given the fact that some Member States stress that the issues of double



non taxation and "minimum effective taxation" need to be tackled before any agreement can be reached on this file. The inclusion of such a clause would imply withdrawing the benefits of said Directive in case of low taxation. In case of agreement in this area, a similar provision could potentially be subsequently inserted into the Parent-Subsidiary Directive.

11. Similarly, the issue could be further discussed in the context of the Code of Conduct Group.
12. Past discussion on the possible insertion of a "minimum effective taxation" clause in the IRD confirmed the **cleavage between delegations**:
 - a. those considering low effective taxation as harmful per se;
 - b. those open to complement it with additional criteria (economic substance, arms' length principle); and
 - c. others opposed to any such rule on the basis of national sovereignty.
13. Another legislative dossier where "minimum effective taxation" considerations have emerged is the Commission's proposal for a **Common Consolidated Corporate Tax Base (CCCTB)**, which includes notably proposals for **common CFC rules** at the EU level. The recent adoption of the final OECD report on BEPS action 3 (strengthening CFC rules) was an opportunity to resume more general discussions at Working Party level, with a view to a first-step Council agreement on international aspects of the CCCTB proposal (possible anti-BEPS directive).

QUESTION:

3 - In order to tackle BEPS challenges between Member States, would you support introducing the concept of "minimum effective taxation" in the EU legislation mentioned above (in particular in the IRD and CCCTB proposals)?



III - THE EXTERNAL DIMENSION: ENSURING FAIR TAXATION IN RELATION TO THIRD COUNTRIES

14. In 2012, the European Commission issued **Recommendations on aggressive tax planning and on good governance in tax matters in third countries**, which were supported by the ECOFIN Council in May 2013. The aim was to build a common approach to identifying and dealing with so-called non-cooperative tax jurisdictions. The **Platform on Tax Good Governance** was set up to monitor implementation of the recommendations. As far as the Council is concerned, discussions on good governance have started in the High Level Working Party as set out in the EU-BEPS Presidency roadmap.
15. In May 2013, the Council adopted a mandate for the Commission to negotiate **updated savings taxation agreements with Switzerland, Liechtenstein, Monaco, Andorra and San Marino** in line with international developments. In May 2015, an agreement on automatic exchange of information was signed with Switzerland reflecting the new global standard on automatic exchange of information for tax purposes. Similar agreements with the four other countries are expected to be signed later this year. Equivalent savings taxation agreements with **dependent and associated territories** of the United Kingdom and the Netherlands will have to be adjusted as well.
16. These updated taxation agreements with five third countries do not, however, address the **level of tax rates** nor potentially harmful tax measures in these third countries.
17. The Code of Conduct on business taxation commits Member States to promote the adoption of its principles in third countries to counteract potentially harmful tax regimes. In this respect, the Code of Conduct Group has opened a **dialogue with Liechtenstein and Switzerland**. The dialogue with Switzerland was successfully closed in October 2014, with Switzerland committing to phase out harmful corporate tax regimes identified by the EU. Discussions with Liechtenstein in this area have recently been restarted.



18. As for the level of effective tax rates in third country jurisdictions, this is usually tackled through **national tax avoidance rules such as CFC rules**. Member States generally use one of the two following methods in this respect: they either compare the effective tax rate (ETR) in the third country to a particular fixed rate that is considered low tax, or they compare the ETR in the third country to a portion or percentage of their own ETR (usually below 50 to 75% of their own ETR is considered as low taxation). Several Member States furthermore use **white/grey/black lists** of jurisdictions to simplify the process and usually prefer to operate on a company-by-company basis (rather than country-by-country or sector-by-sector) in order to reduce complexity. As mentioned above, the opportunity of a **common** CFC rule at EU level is now being discussed at Working Party level in the context of the CCCTB proposal.

19. The European Commission has published in June 2015 a **list of "third country jurisdictions"**, compiled from Member States' national lists. The list, published on the Commission's website, raised concerns by several Member States, which noted that it may undermine significant efforts made by some of these third countries with regard to transparency and contains some factual inaccuracies. At the High Level Working Party on Taxation (HLWP) meeting of 2 September 2015, the Commission informed Member States that it intended to publish a corrected version in the very near future.

QUESTION:

4 - Do Member States agree that the external dimension of BEPS should be examined more closely within the Council?

*

*

