HLWG 18/03/11 - summary record

The HU Presidency put two issues on the agenda of the second HLWG meeting: (i) savings taxation directive and (ii) common approach on FATCA. The HU Presidency also informed the HLGW that under AOB it intended to present its ideas on how to proceed with the CCCTB Proposal. In its introduction the Presidency also announced its intention to discuss financial sector taxation at the next HLWG on 28 April with a view to preparing an interim report for the May ECOFIN.

Savings taxation

The HU **Presidency** referred to the orientation debate at the February ECOFIN and the Council's request to continue discussions in the HLWG. The Presidency concluded that all MS agree on the need to make progress and that most MS agreed that amending the EUSD should be the first priority. The Presidency confirmed its intention to separate the discussion on amending the scope of the Directive from the issue of the end of the transitional period whilst noting AT and LU concerns in this respect. It also indicated that the majority of MS rejected external conditionality but have shown some sympathy towards discussions with third countries to promote a certain degree of equivalence. The Presidency concluded that the latest compromise text had been essentially agreed and suggested that it should be frozen for the negotiations with third countries as the Commission needs an agreed text in order to start negotiations and to solve the problem of the level playing field. The Presidency proposed to basethe discussions on their note no. 6946/11 of 4 March 2011 and to concentrate mainly on the 2 questions included therein: (i) would it be useful to invite the Commission to start negotiations with the third countries with a view to ensuring the continued equivalence of the savings agreements? (ii) does the current text of the amendments providing for the extended scope of the Savings tax directive contain all the necessary elements so that it could be considered as agreed in order to allow the Commission to conduct the negotiations on its basis?

The **Commission** stressed that there is no doubt that we need to make progress and we need to make it now. The latest compromise text is a reasonable text which was practically agreed by ministers. What complicates the discussion are the issues of the end of the transitional period (not part of the Commission proposal) and equivalence (and whether or not it should be conditional). As regards the level playing field, the world has changed. The work of the OECD global forum has resulted in the implementation of the standard of exchange of information on request. There is however also increasing pressure towards automatic exchange of information. FATCA is a *de facto* one way reporting of information on an automatic basis. In this context, the EU's credibility and the financial interests of MS are at stake. As far as the text of the amending proposal is concerned we should not prolong technical discussions – we need it to be agreed reasonably quickly so that we can go forward and we need to disentangle the different aspects of the file in order to do so.

(i) would it be useful to invite the Commission to start negotiations with the third countries with a view to ensuring the continued equivalence of the savings agreements?

FR congratulated the Presidency on its commitment to make progress on this file. It however doubted that a compromise was feasible on this basis. FR saw no need for external conditionality. The Directive is not new. We are only plugging loopholes in the current directive, which has become a laughing stock for operators. We have to set an example without subordinating our work to progress achieved by others. This is why external conditionality has been dismissed by the overwhelming majority of MS. As far as the end of the transitional period is concerned, FR stressed that in June 2009 the Council agreed in its conclusions that there should be no change to the conditions laid down in the directive. FR also stressed that if we cannot agree on the extension of the scope, the US can use this against us when implementing FATCA.

DE referred to giving the Commission a mandate for the negotiations with third countries and underlined that this presupposes an agreement on the text of the Directive. DE stressed that based on the experience of its ongoing bilateral negotiations with CH it should not be difficult to reach agreement on a possible extension of the savings taxation agreements. Like FR, DE was of the opinion that a decision on the Directive should not depend on whether third countries want to join or not. Within the internal market it is important to extend the scope in order to curb tax fraud and evasion. DE suggested that extending the scope should not significantly affect the level playing field.

UK confirmed that the HU Presidency's pragmatic approach offers a way forward, but that we should also be aware of the risks of this approach mentioned by FR and DE. UK referred to the strong majority views on external conditionality and the end of the transitional period. UK stressed that we should trust the Commission not to come out with a mandate which does not respect the wishes of MS. We shouldn't be dictated by other countries but we need to know how they react to the text of amending proposal.

IT agreed with FR but stressed that for IT the discussion on the text is still open. IT congratulated the Commission on issuing the questionnaire. IT stressed that we should wait for the results of this due diligence exercise since the problems with the EUSD do not only require enlarging the scope but could also involve adding anti-avoidance rules. IT agreed with FR that we cannot accept a situation where other countries dictate EU legislation.

SE endorsed what the UK said. It is a practical way to break the deadlock. The time is right to start negotiations now and it needs to be done on the basis of latest compromise text.

ES questioned the need for external conditionality, but agreed that technical discussions on the text of the proposal have been completed and that the text can be used for negotiations with the third countries.

DK shared concerns of FR . Even if we start the negotiations with the third countries now, their outcome should not determine the scope of the directive. We need a commitment to this directive now – adoption should not be dependent on the outcome of these discussions.

AT tended to support the Presidency approach: they can agree to the proposed changes if the third countries agree to apply the same measures. The approach based on external conditionality proved its value in the past.

LU recalled the December 2008 Council conclusions under the FR Presidency where it was unanimously decided that there should be equivalent or the same measure provided by the third countries and territories. Its position on external conditionality hasn't changed; external conditionality is a *sine qua non*. . LU referred to the statement made by LU Minister in the ECOFIN Council of 15 February on the importance of maintaining a level playing field for the competitiveness of EU financial markets. LU also referred to the proliferation of discussions on withholding tax (referring to bilateral negotiations between UK/DE and CH).

LU could not agree to separating the discussion on the scope of the Directive from the other elements of the package. Time is not right for such a discussion. LU did not have a mandate to engage in technical discussions on the text and could not agree to 'freezing' the text of the proposal. COM can continue its exploratory discussions but should not engage in formal negotiations at this stage.

The **Commission** stressed that it had already had informal discussions and that it did not see any scope for further informal discussions. The third countries are prepared to discuss amendments to the existing agreements, but it is difficult to discuss on the basis of a text which may dramatically change. Such an approach can also be challenged from negotiation strategy point of view. Our position would be undermined if the third countries knew that there is an external conditionality requirement and they may well influence the final shape of EU legislation. We have to differentiate between equivalence and conditionality in this respect.

(ii) does the current text of the amendments providing for the extended scope of the Savings tax directive contain all the necessary elements so that it could be considered as agreed in order to allow the Commission to conduct the negotiations on its basis?

UK, SE, RO, DE, IE, GR agreed that the text constitutes a balanced compromise and can be used as a basis for negotiations with third countries.

DK enquired what exactly is meant by 'freezing'.

IE and **NL** proposed to finetune the text; IE circulated some drafting suggestions in relation to the provisions onlife insurance products and indicated that it was prepared to drop its suggestion to postpone the reduction of the threshold from 40% to 25% if the other changes were acceptable. NL stressed the need to ensure coherence between the EUSD and the administrative cooperation directive and to ensure that tax administrations would not have to apply two different systems of information exchange. Where a MS provides for automatic exchange of information in respect of life insurance contracts under the directive on administrative cooperation, this should also be able to satisfy the conditions of the EUSD (COM and NL will follow up this issue in bilateral contacts).

LU merely noted that its position had been made abundantly clear.

IT did not agree to freezing the text. We need to wait a few weeks or months for the results of the due diligence exercise and we should discuss the finetuning of the text in line of what has been proposed by IE and NL.

The HU Presidency summarised the discussion stating that the recommendation to freeze the text has been endorsed by most countries..

The HLGW will meet again on 28 April to try and solve remaining technical issues without reopening the main body of the text.

Presidency and the Commission also encouraged MS to provide timely answers to the questionnaire.

LU took note of Presidency conclusions but stated that it did not share them.

UK asked for any technical corrections to be circulated well before the meeting.

FATCA

The **HU Presidency** introduced the topic under discussion. It highlighted that the application of FATCA raises many legal issues and mentioned, in particular, that certain aspects of FATCA may be contrary to Member States' laws and that FATCA provides for severe penalties for non-compliant foreign financial institutions and investors. The Presidency stressed that in order to achieve results in this area a coordinated approach is needed and recalled that MS supported this proposal at the last HLWP.

The **Commission** mentioned that Commissioner Šemeta had a short preliminary discussion on FATCA with the US Treasury, last December, and obtained a positive reaction on his proposal to explore alternative solutions that would build on the synergies between FATCA and the Savings Directive. The Commission also informed the participants of a further informal meeting with the US Treasury that the Commission had on 3 March 2011and explained that the meeting was a valuable occasion to develop a common understanding of how FATCA and the Saving Directive work and that preliminary general conclusions were reached on the similarities/differences between these pieces of legislation. In the light of this, it was agreed to continue working on a comparison between the two systems that could be used as a basis for more formalised discussions aimed at reducing the burden for financial intermediaries. The Commission pointed out that a coordinated EU/US approach could be attractive for the US as it may address data protection issues and might offer the US tax authority a "safe harbour" for the first years of application of FATCA. From the EU's perspective, this could be an opportunity to obtain cooperation from the US. [redacted]

FR welcomed this initiative which reflects the concerns expressed by French intermediaries. It thanked the Commission for the updates given on its preliminary discussions with the US Treasury and noted that they confirm the general impression that France had in bilateral contacts with the US tax authorities (i.e. they are open as they need cooperation from EU Member States and intermediaries to implement FATCA). [redacted] FR added that it is willing to be associatedwith such a dialogue.

UK agreed with France on the need to act quickly. It supported the process proposed by the Commission of comparing FATCA with the Savings Directive [redacted] With respect to data protection issues, the UK asked the Council Legal Service to provide its views on whether an EU/US agreement would be required or whether bilateral tax treaties between the US and the individual Member States could be considered.

ES supported the initiative and stressed the need to act quickly. [redacted]

DE supported the initiative and expressed an interest in being associated with such a dialogue. [redacted]

The Council **Legal Service** noted, in reply to the question raised by the UK, that since data protection is covered by Directive 95/46/EC and that this is consequently a shared EU/Member States competence. [redacted] explained that, while bilateral agreement between the US and the individual Member States are in principle possible, an EU/US agreement would be necessary if the agreement affected the rights of the individuals as protected by the data protection Directive. However the Legal Service offered to provide a more in-depth analysis after having further examined FATCA and the data protection Directive.

[redacted]

LU said that, in principle, it could agree. However it argued that FATCA does not involve only tax issues as it also concerns financial markets. [redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

AOB - CCCTB
The HU Presidency also informed the HLGW that it intends to have a first discussion on the CCCTB Proposal at a meeting of the Council working group on 5 May. The Presidency invited Member States to provide their suggestions/questions.