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PLATFORM FOR TAX GOOD GOVERNANCE

**Discussion paper on criteria applied by EU Member States to
establish lists of non-cooperative jurisdictions**

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The purpose of this paper is to follow-up the discussions held at the Platform meetings of 16 October 2013, 6 February 2014 and 10 June 2014 on the Recommendation regarding measures intended to encourage third countries to apply minimum standards of good governance in tax matters.

It proposes an overview of the current state of play of black/white listing processes inside the EU.

The agreed work program provides that *'the Platform will discuss and suggest a mechanism or process to ensure consistency in the establishment and monitoring of the black lists. Where appropriate, the Platform can suggest follow-up or complementary steps to the current Recommendation, both regulatory and organisational, with a view to contributing to its essential goal: global promotion of the EU standards of good governance in tax matters'*.

During the Platform last meeting held on 10 June 2014, it was agreed that the Platform secretariat would prepare, on the basis of the questionnaire, a comparison across Member States (MS) on criteria applied and measures triggered.

1. SUMMARY OF REPLIES AND ANALYSIS

1.1. Criteria used

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.

1.1.1. Criteria provided for by the Recommendation

- Compliance with transparency and exchange of information standards¹: 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 14 MS use it for blacklisting purposes² and only one MS (DE) uses it as sole criterion for blacklisting purposes.
- Absence of harmful tax measures³: 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.

1.1.2. Additional or different criteria

- Tax level: 8 MS (BE, BG, EL, FI, LT, LV, PT, SI) report using the level of taxation for blacklisting purposes⁴. 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 rates threshold varies from

¹ Type of criterion recommended in Com REC C(2012) 8805 point 3a

² 4 MS have no blacklists (CY, CZ, IE, SE)

³ Type of criterion recommended in Com REC C(2012) 8805 point 3b

⁴ 3 other MS (CY, HU, SE) refer to the level of taxation for other purposes than blacklisting.

4%⁵ (BG) to 14.7%⁶ (FI); it is expressed either as a fixed percentage or by reference to the tax rate of the MS concerned.

- Other criteria: existence of a double tax convention, an exchange of information agreement or a convention on mutual assistance (11 MS: BG, EE, EL, ES, FI, FR, HR, LV, PL, SI, 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 or for other purposes.

1.2. Lists

Out of 28 replies received, 16 MS have a (black/white) listing system, 12 MS having no list at all.

1.2.1. 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 14 MS (BE, BG, DE, EE, EL, ES, FR, HR, IT, LT, LV, PL, PT, UK)) 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.

The FR list is closely (but not strictly) correlated to the Global Forum's ratings.

The UK black list mentions 15 countries that have not been blacklisted by any other MS: Algeria, Brazil, Cameroun, Cap Green, Colombia, Cuba, El Salvador, Gabon, Iran, Iraq, Kyrgystan, Micronesia, Nicaragua Peru, Syria.

- 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.

⁵ 40% of BG corporate tax rate (10%)= 4%

⁶ 3/5 of FI corporate tax rate (24.5%)= 14.7%

- 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.

1.2.2. *Public availability of lists*

The 16 MS having lists have indicated they were publicly available and have provided links to the websites.

1.2.3. *Updating the lists.*

The process for updating the list requires legislative action for 1 MS (BG), and for the 15 others is made by regulation, ministerial or administrative decision.

Very few MS have a periodical review of the list, which takes place each year (EL, FR) or every 2 year (BE). The other 15 MS review their lists on an ad hoc basis.

However, the Commission services have identified the following updating issues:

- Very few MS have updated the designation of the former Netherlands Antilles (also named the Dutch Antilles). These are still blacklisted as such by 8 MS although they have been dissolved on 10 October 2010. The former constituents of the Dutch Antilles are still member of the Kingdom of the Netherlands as separate entities under the name of Curaçao, Sint Maarten and the Caribbean Netherlands (Bonaire, Sint Eustatius & Saba which have become direct parts of the Netherlands as special municipalities). Only the UK has updated its list accordingly by blacklisting these 3 former constituents. LV and PL blacklist both Curacao and Sint Maarten but not the Caribbean Netherlands;
- The periodic review of one MS (BE) on a 2-years basis has not taken place so far since the adoption of the list in 2010;
- 2 MS (FR, HU) have explicitly mentioned the resources issues implicated by a constant update of the lists. In particular, HU (which does not operate any blacklisting system in 2014) mentions the '*unreasonably high burden on the public administration*' of keeping up-to-date the blacklist it had until 2013. In the same way, FR states that the '*harmful tax practices*' test "*requires a thorough knowledge of all harmful tax measures by countries (including the favourable features, including temporary) and thus could lead to enrol a large number of jurisdictions*".

- Blacklisted Member States

5 MS (BG, CY, IE, LU, MT) have been blacklisted by other MS. LU and CY are listed once by the same country (ES), once by 2 different countries (IT and EL respectively); MT, IE and BG once (by ES for MT, by EL for the 2 others). However it does not seem that these MS were blacklisted on the basis of the criterion provided by the Recommendation.

1.2.4. White lists

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

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).

UK has a list (category 1) which can be considered as a white list, publicly available, for the application of penalties. Where the jurisdiction shares information automatically with the UK (for example under the Directive on the Taxation of Savings), the country is listed as category 1 and eligible to the corresponding penalty regime, meaning the rate is the same as that for domestic non-compliance (penalty ranging from 0%-100% of the tax lost).

The UK category 1 list ("white list") mentions some countries that have been blacklisted by several other MS: Alderney (blacklisted by 3 MS), Anguilla (blacklisted by 10 MS), Aruba (blacklisted by 9 MS), Cayman Islands (blacklisted by 11 MS), Guernsey (blacklisted by 7 MS), Isle of Man (blacklisted by 9 MS), Liechtenstein (blacklisted by 12 MS), Montserrat (blacklisted by 11 MS), Sark (blacklisted by 5 MS), or Switzerland (blacklisted by 2 MS). All these countries but 3 (Aruba, Liechtenstein and Switzerland) have some relationship with the UK.

In addition to these 4 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. However this list has not provided so far.

1.3. Measures applied

The most frequent types of measures linked to blacklisting are Non deductibility of costs, CFC rules and Withholding Tax measures. Measure 4.3 (treaty renegotiation) provided for in the Recommendation⁷ is not mentioned in any MS reply, nor any incentives.

1.3.1. Non deductibility of costs

Non deductibility of payments made to persons (natural and/or legal) located in blacklisted countries is applied by 10 MS (BE, BG, DE, EE, EL, FR, IT, PT, SI, SK).

Deductibility is usually accepted if the taxpayer can prove that these payments relate to real and ordinary transactions.

1.3.2. CFC rules

CFC rules result in taxing in the hands of a resident company the profits made by the controlled foreign company established in a blacklisted country. This kind of measure is applied by 8 MS (BG, EE, EL, FI, IT, LT, , PT, SE⁸)

1.3.3. Measures regarding Withholding Tax (WHT)

There are broadly 3 types of measures linked to withholding tax:

- WHT on payments made to blacklisted countries (BG, EE, FR, HR, SK);
- Higher rate of WHT (FR, SK), disallowance of reduced WHT rates and/or of the participation exemption (FR, LT, LV, PT, SI) for operations with a blacklisted country.
- WHT on dividends received from a company resident in a black list State (IT). This WHT is an “advance” of taxation, unless it is proven that there was no delocalization of income to a tax haven.

1.3.4. Other

Some MS apply other types of measures, such as:

- Presumption of tax residence in the MS concerned for natural persons resident of a blacklisted country (IT);
Special documentation requirement for payments made towards blacklisted jurisdictions (FR, PL).;
- Higher taxation of qualified capital gains or revenue items (FR).;
- Various measures related to inheritance tax and sportsmen/artists remunerations (FR)
- Differentiated penalty framework (UK) depending on whether the jurisdiction exchanges information automatically (domestic penalties for non-compliance

⁷ Each Member State having concluded a double taxation convention with a third country not complying with minimum standards as set out in point 3 should, as most appropriate with a view to improve compliance by that third country with these standards, either seek to renegotiate the convention, suspend or terminate the convention

⁸ SE: CFC rules apply to non-white listed countries

ranging 0%-100%), on request (penalties 0%-150%) or insufficiently (penalties 0%-200%).

2. POINTS FOR DISCUSSION

The analysis of MS' replies show the relationship between the methods used and their consequences. Main observations could be that:

- Member States apply a range of criteria in assessing other countries' tax systems, which may raise an issue of relevance of the criteria chosen;
- Member States' assessments under identical or similar criteria vary quite significantly, which may raise an issue of consistency;
- Most Member States' lists are publicly available on their website and some encounter updating difficulties, which may raise issues of transparency;
- Member States' lists cover a broad range of different countries, which may raise issues of targeting/efficiency.

It is proposed to structure the discussion accordingly.

2.1. Member States apply a range of criteria in assessing other countries' tax systems

Questions

- 1. What criteria are the most relevant for assessing third countries' compliance with the principles of good governance in tax matters? Given the importance of removing harmful tax practices within the EU (Code of conduct for business taxation), why don't Member States use this criterion more extensively in relation to third countries?**
- 2. Should any additional and/or EU-specific criteria (automatic exchange...) be taken into consideration? What would be their respective added value?**
- 3. Should other issues (than transparency, exchange of information and fair tax competition) be considered in relation to third countries (such as BEPS related issues...)? What would be the most relevant criteria in such case? For instance, would it make sense to refer more explicitly to the level of taxation in third countries?**

2.2. Member States' assessments under identical or similar criteria vary quite significantly

Questions

- 4. What are the main reasons for these diverging assessments (even on countries assessed by the Global Forum)? What are the difficulties (e.g. resources...) encountered by MS?**
- 5. How could these difficulties be addressed? Do MS consider similar assessments made by other MS? How could MS be assisted in these assessments? How could a consistent assessment of a similar criterion be best ensured by MS?**

2.3. Most MS lists are publicly available on their website but encounter updating issues

Questions

- 6. Are Platform members satisfied with the transparency of these lists? Would there be any added value (for other MS, taxpayers, or third countries) in consolidating such information (e.g. by indicating on the Platform's website the links to MS' lists)?**
- 7. Would Platform members consider useful to consolidate and keep up-to-date also the content of the various lists held by MS?**
- 8. Do Platform members have any views on how often (periodical or ad hoc basis) should lists of individual MS be updated? How could such updates be facilitated?**

2.4. Member States measures and lists cover a broad range of different countries

Questions

- 9. In Platform members' experience, how convincing towards third countries have been so far such measures and listing processes?**
- 10. Do Platform members believe that in some cases third countries could get convinced by some sort of collective action? Should this cover some of the measures currently applied by MS?**
