

15/05/2018-TAX3 HEARING ON

"Fight against harmful tax practices within the European Union and abroad"

REPLIES TO QUESTIONS SENT AND RAISED

1. Could the Commission explain what its exact role was during the process of establishing the EU blacklist on tax havens?

Did the Commission play any role in the latest days, especially on the final decision to remove third country jurisdictions from the EU list of non-cooperative jurisdictions (to the grey list)?

The Commission put forward the idea to establish an EU list of non-cooperative jurisdictions (the EU list) in the January 2016 Communication on an External Strategy for Effective Taxation (COM(2016) 24 final). Member States endorsed the idea and decided that it would be a Council-led exercise. They proceeded then with the preparatory work, in particular the choice of jurisdictions to be screened and the listing criteria.

Throughout the listing process the Commission has provided support and technical assistance that helped lead to the Council's adoption of the first EU list on 5 December 2017.

More precisely, the Commission supported the Member States on the following aspects:

- The Commission prepared the Scoreboard that Member States used to select the 92 jurisdictions to be screened. This Scoreboard was based on objective criteria and publicly available data.
- The assessment of the selected jurisdictions was done by panels of Member State experts. The Commission contributed to the technical work of these panels and engaged in discussions with the jurisdictions together with the Chair of the Code of Conduct Group. The final assessments were endorsed by the Member States in the Code of Conduct Group.
- The Commission was responsible for analysing any commitments that the jurisdictions made to address the EU concerns related to their tax systems. The Commission shared its opinion on these commitments with the Code of Conduct Group, which then decided whether or not the commitments were acceptable.

The decision on whether to place a jurisdiction in Annex I or Annex II of the Council Conclusions was taken by the Member States, based on the commitment letters received from the jurisdictions. These letters are now being published on the Council website.

The Commission is now conducting the technical dialogue with the jurisdictions that have made commitments (which were temporarily placed in the Annex II of the list) to ensure that these commitments are effectively implemented within the set deadlines (by the end of this year or by the end of 2019 in the case of developing countries). The final decision on those jurisdictions will be taken by the Member States.

2. Why has the mention of "no or close-to-zero corporate tax rate" been withdrawn during the ECOFIN/Code of Conduct Group discussions as a criteria for definition of tax havens?

This issue has not been withdrawn from discussions. The EU listing exercise does address jurisdictions that apply no or close-to-zero corporate tax rates. The Commission used "zero/no tax" as an indicator in its Scoreboard in September 2016, to help Member States decide which jurisdictions to prioritise for screening.

In February 2017, the Council agreed that "zero/no tax" should be an indicator to trigger an assessment of a jurisdiction under criterion 2.2. This criterion states that *"the jurisdiction should not facilitate offshore structures aimed at attracting profits which do not reflect real economic activity in the jurisdiction"*. In practice, this means that "zero/no tax" jurisdictions have been screened to see if the absence of taxation is coupled with a lack of any economic link or real economic activity, thus unfairly attracting profits in the jurisdictions concerned.

As a result of the listing process, a number of zero tax jurisdictions have now committed to respond to EU concerns in relation to this criterion.

3. In its response to the PANA final recommendations report (especially §52 calling on the Commission to initiate a comprehensive evaluation of the 19 years of work of the Code of Conduct Group on Business Taxation, focusing on the results achieved in the prevention of cross-border harmful corporate tax regimes, in the form of a public report), the Commission mentioned that "The Commission services are currently preparing a report on the activities of the Code of Conduct Group in accordance with letter N of the Code. In addition, the Commission is considering a study to evaluate the development of tax competition in general and the effects of existing soft law measures on tax competition." Could you please provide an update on these initiatives?

The Commission is currently working on both of these ongoing projects.

As regards the Implementation Report on the activities of the Code of Conduct Group (provided for under paragraph N of the Code of Conduct), the Commission aims to present this in the course of 2018. The aim of the report is to provide an impetus and structure for discussions on the reform on the Code of Conduct Group.

Regarding the evaluation study on tax competition, the Commission has already launched work on this, which will continue throughout 2018. The results of the study will feed a comprehensive evaluation of key EU policies and instruments to regulate tax competition and aggressive tax planning. The Commission intends to assess the past performance of those key EU policies and instruments and also explore new, improved solutions for the future, which are adapted to new developments within the EU and globally. The evaluation will also include public and targeted consultations, to gather as wide feedback as possible. The aim is to provide an evidence base for possible future policy initiatives and stimulate discussions between Member States and amongst other stakeholders in this area.

The Commission is ready to present both documents to the European Parliament once they have been published.

4. As part of the European Semester process, DG TAXUD has published a study highlighting factors of aggressive tax planning. As a result, 7 Member States were reported as having tax features which may facilitate aggressive tax planning. Will this be followed-up on in the Code of Conduct group? Will the Commission propose that Member States report these tax features as part of the standstill procedure?

The Code of Conduct Group has already discussed some of the problems identified in the study that fall within its scope, with varying results. For example, the problem of outbound payments has been discussed for a number of years, but with little result. Patent boxes, on the other hand, have been successfully treated by the Code of Conduct Group. As a result of the coordinated action by the Group, all patent boxes in the EU are now required to have a link with the Research & Development that generates the patents. This limits the possibilities to use these regimes purely for tax planning purposes.

However, other tax features highlighted in the aggressive tax planning report do not fall within the current scope of the Code of Conduct. That is why the Commission supports a multi-pronged approach to tackling aggressive tax planning, drawing on all soft and hard law instruments as appropriate.

Through the European Semester process, the Commission has identified areas where certain Member States should take action themselves on aggressive tax planning. These issues have been addressed to the Member States through the Euro area recommendation on aggressive tax planning, in the Country Reports, and also bilaterally. This will be followed up further in the context of the European Semester.

In addition, the Commission continues to push Member States to progress with key proposals that would address main channels of aggressive tax planning. A large amount of aggressive tax planning involves the use of mismatches between two or more countries' rules. These mismatches may not be result of specific features of a single tax system but are rather caused by their interaction with each other. Therefore the most effective solutions to these problems are coordinated ones, such as the Common Consolidated Corporate Tax Base (CCCTB) proposals¹ and the proposal laying down rules relating to the corporate taxation of a significant digital presence².

5. The European Parliament adopted recommendation 187 (§187) of its PANA recommendations calling on the Commission to use Article 116 TFEU to present a legislative reform of the Code of Conduct Group if the Group failed to reform itself. The Commission responded to this recommendation “Keeping this need for reform in mind, the Commission is not convinced that a legislative proposal for a reform of the Code would constitute an effective solution to this need“. Could you please provide more information as to why the Commission thinks this is not an option to ensure a revised mandate for the Code?

The Code of Conduct was established through a political agreement in Council and ideally the Council itself should reform it.

¹ COM (2016) 685 and COM (2016) 683

² COM (2018) 147

However, the Commission has pushed for some important reforms to the Code of Conduct in recent years, notably in the area of transparency and efficiency. For example, following Commissioner Moscovici's calls for the commitment letters to be public under the EU listing process, the Code of Conduct Group has now started to publish them online. Other recent improvements are that the reports to the Economic and Financial Affairs Council (ECOFIN) on the Code of Conduct Group's work (which are made public) are now longer and more detailed and that the criteria of the Code of Conduct have been clarified, which should bring more certainty to the assessment process.

The Commission continues to very actively push for a substantial reform of the Code of Conduct within the current framework. As already outlined, the Commission will present an Implementation Report on the activities of the Code of Conduct Group to ECOFIN in the coming months, which should help focus political attention on the real need for reform.

In order for the Commission to make a proposal under Article 116 TFEU, a number of conditions would need to be fulfilled first. As stated in the Article, the Commission has to find that a difference between the provisions laid down by law, regulation or administrative action in the Member States is distorting the conditions of competition in the internal market.

6. What criteria and process does the Code of Conduct Group use to assess whether or not a tax regime is harmful?

The Code of Conduct contains five criteria which are used to determine if a tax regime is harmful or not. These were agreed by Member States when they established the Code of Conduct in December 1997.

These criteria for assessing whether measures are harmful are:

- Whether advantages are given only to non-residents or transactions with non-residents;
- Whether advantages are ring-fenced from the domestic market, so that they do not affect the domestic tax base;
- Whether advantages are granted even without real economic activity and substantial economic presence within the Member State offering these advantages;
- Whether the rules for profit determination in respect of activities within a multinational group of companies departs from internationally accepted principles, notably the rules agreed in the Organisation for Economic Cooperation and Development;
- Whether the tax measures lack transparency, including where legal provisions are relaxed at administrative level in a non-transparent way.

Under the Code of Conduct, Member States have committed not to introduce any new harmful tax measure ("standstill") and to amend any measures that run contrary to the principles of the Code ("rollback").

Member States should notify to the Code of Conduct Group any new tax measure or regime which may fall within the scope of the Code of Conduct. The Code of Conduct Group examines the measure to decide whether further assessment is needed and may then ask the Commission to prepare a draft description of the measure, which should be agreed with the Member State in question. On the basis of this description, the Code of Conduct Group can ask the Commission to provide an assessment of the measure. On the basis of the Commission's assessment, the Code of Conduct Group concludes (by unanimity minus the

Member State in question) whether the measure is harmful or not, and reports this to ECOFIN.