

ECOFIN Council - Anti-Tax Avoidance Directive

Rules against tax avoidance practices that directly affect the functioning of the internal market

On May 25, EU finance ministers debated the draft Anti-Tax Avoidance Directive with a view to adopting a general approach. However, a final agreement was not reached during the meeting. Commissioner Moscovici and Jeroen Dijsselbloem reiterated the intention to conclude the file under the Dutch Presidency on the basis of the progress made during the Council meeting.

Dutch Finance Minister Jeroen Dijsselbloem, representing the Netherlands Presidency, opened the debate, emphasising that all share a strong feeling of urgency as there is a lot to be gained in our societies if we successfully fight tax avoidance and tax fraud. There is a strong call for action following the recent scandals. A lot has been established already in cooperating better, including an agreement on DAC 3 and DAC 4, the reform of the Code of Conduct group, and an agreement on the external strategy in fighting tax avoidance. The informal ECOFIN Council in Amsterdam saw a strong pledge to exchange information on ultimate beneficiary ownership, and progress has also been made on fighting VAT fraud. A lot of work has been done on the directive in the working group, he explained, adding that the time has come to have a political debate.

Commissioner Pierre Moscovici congratulated the Presidency on the impressive progress. The Commission sees the Presidency text as a good compromise; however they would have liked to see more ambition on certain points. But the Commission understands that political compromise is necessary, and considers that even with the limited changes the directive will be a major contribution. There is a real need to reach an agreement today. The Commission accepts the compromise and encourages Member States to do the same. There is strong pressure from public opinion. International work is also moving on in the OECD and the G20, the Commissioner highlighted, commenting that the EU should be the driving force in fighting tax evasion, as here it can prove that Europe can do something. Further technical meetings will not improve the text further. All we are doing is translating the OECD work into our own rules. The main questions remaining are political, Moscovici stressed, saying that the differences are not insurmountable. We should be leaving here with a political agreement showing a real commitment, he concluded.

Dijsselbloem explained that a first debate has already been held on the scope of outstanding issues, and invited speakers to focus on the big political issues, such as the added value of the switchover clause, the controlled foreign company (CFC) rules and if it should be intra-EU, in relation to third countries or both, as well as the question of who has to provide the evidence on whether the substance is real. The rate of effective taxation is also an important related question.

The representative of Ireland explained that his country is a strong supporter of the BEPS project and its goals. The issue is very high on the agenda and should be dealt with all expedition. The Directive does not go far enough in hybrid mismatches, in particular in relation to third countries, while that is where a lot of the tax avoidance happens. A lot of OECD considerations on that have not been included in the proposal, he argued. In considering any form of CFC rules, Ireland wants to make sure that the scope does not hinder legitimate investment that could create jobs. Consequently he suggested sticking to the Commission proposal, which is also in line with the ECJ case law. It is also clear that it

can only be applied within the EU. He then argued that the text requires Member States to agree on a minimum effective tax rate, which is a Member State competence and should not be moved to the EU level. He argued that a few more weeks or months would be very helpful to deal with the remaining issues.

The French representative stressed that France fully supports the Presidency compromise and is prepared to make an effort on the less well-suited points. He warned against any more procrastination.

The Italian minister expressed his full support to the initiative, but added that given the speed and the complexity of the issues, some points have to be better looked at. The provisions on hybrids can be further worked out in his view: both intra-EU and in respect to third countries. It is also key that CFC rules are effective and applied in a uniform manner within and outside the EU.

The representative of Bulgaria commented that the compromise needs further adjustment. In particular her country does not support the introduction of CFC rules. They are ready to compromise and support it for third countries or third countries and intra-EU if in the latter case it only applies to wholly artificial arrangements.

The Czech representative welcomed the progress and agreed on the importance of sending a strong message. However, he did not agree that all technical details had been solved. The switchover clause is a useful tool, and the Czech Republic would rather see it stayed in the Directive.

The Hungarian representative said Hungary believes the proposal needs technical level clarification. On CFC rules, Hungary thinks it should only apply to third countries, but as a compromise they could accept it to be applied for wholly artificial arrangements within the EU. Hungary would not like effective corporate taxation to be included, and hybrid mismatches should also be further discussed.

The representative of Luxembourg stressed that the Luxembourg Presidency paved the way on the matter. Luxembourg supports most of what it is in the Directive; however they cannot accept the Presidency proposal on CFCs, as it goes against ECJ case law and provides for a reversal of the burden of proof for the taxpayer. It would result in legal uncertainty, hampering the objectives of the internal market and damaging the competitiveness of the EU. He therefore suggested sticking to the Commission proposal, using the criteria of wholly artificial entities. He cautioned that quality should not be sacrificed for extreme speed.

The German minister said that the longer we discuss the further we are from an agreement, and at the end a compromise will be needed. The initiative to have BEPS on the global level has been very successful, he argued, suggesting that the EU should focus on implementing BEPS. He then commented that he was in favour of the compromise, but there will be no full consensus now. He therefore suggested a political commitment to finalise the general approach in June.

The representative of Spain said her country broadly supports the Directive. However, there are still some issues that need some adjustment, but they are minor issues compared to the complexity.

The representative of Cyprus warned against deviations from BEPS. A number of specific issues remain in his view, and hence he supported the German suggestion.

Mr Dijsselbloem commented that his conviction is that the remaining issues cannot be solved on a technical level. Stripping the package from all issues that might hurt anyone will never solve anything.

The UK representative said that they are committed to fighting tax avoidance, which is why they put the issue on the G20 agenda. The UK would like to see European leadership and would like to see a deal today, which is consistent with BEPS. We need to make sure that the hybrid rules replicate the OECD work, and that they are applied to third countries in the same areas as in the BEPS report. A clear commitment and an unambiguous timetable is needed. Finally, he warned that quick progress on interest limitation must not hinder infrastructural investment, he argued.

The Maltese representative supported the presidency on the recommendations on tax treaty abuse and emphasised the third country dimension of the work. We should not inhibit any freedom to invest in the EEA by legitimate companies, he argued, supporting the “wholly artificial” criteria. CFC rules should stick to the original Commission proposal, which is also the solution that best respects primary law.

The representative of Romania supported the adoption of the directive as soon as possible. On the interest limitation rule, Romania supports the compromise proposal but can be flexible as regards the date. On CFC rules, they would prefer the application only in relation to third parties. They also support maintaining the switchover clause, and on hybrid mismatches they agree with the compromise.

The representative of Sweden stressed that we need to finance education, infrastructure, welfare systems, etc, so we need a level playing field between multinationals and SMEs. Sweden can support almost all parts of the directives and is in favour of adopting it today. It is only regarding the switchover rules that they have concerns because of a lack of an impact assessment.

The representative of Poland said that they would like to reach an agreement today, and therefore suggested to turn the switchover clause into a recommendation and not a rule.

The Latvian representative argued that fair play should not be enforced by reducing competitiveness. In this respect, she regretted the lack of an impact assessment. Latvia can accept two of the non-OECD elements: GAR and exit taxation, but would be cautious to accept the switchover clause, as they have concerns about the minimum effective taxation as such. Regarding the CFC rules, Latvia would accept limiting the scope of the application.

The representative of Denmark said his country supports the Presidency proposal, but would prefer to keep the stronger version of the CFC rule. On the switchover clause, Denmark prefers the Presidency proposal.

The Austrian representative welcomed the Commission proposal, but expressed serious problems with the interest limitation rule, as Austria sees it as tailor-made for big countries. Many exemptions have made the proposal unsuited for reducing tax avoidance, he argued. Austria does not want to replace their working rules by not working ones. Therefore he suggested that Member States be allowed to take national measures to meet the goal of the legislation.

The Finnish representative said her country would stick to the proposal regarding the CFC rule to be applied intra-EU, and would also like to keep the switchover clause, but they can support compromise on that.

The representative of Belgium said to be very mindful of the international context and concerned to go beyond of what is internationally agreed, especially as the US and other countries have shown the intention to do less than what was agreed. On interest limitation, he appreciated the effort to exclude SMEs. However, Belgium remains concerned about the mandatory application of the fixed rule and the proposed timing. Regarding CFC, Belgium prefers an intra-EU limitation to “wholly artificial arrangements”. It also involved a minimum tax rates, which remains a national competence.

The representative of Estonia said his country does not think the switchover clause should be part of the directive, and argued that the CFC rule should only apply to wholly artificial arrangements.

The representative of Croatia explained that Croatia would prefer the switchover clause to remain in the text as it is. Regarding hybrid mismatches they would prefer to keep it a simple and clean version.

The Greek minister commented that if every EU country reorganises production, everybody gains, but if you compete on tax, it is a zero sum game. Given that, he warned against too much flexibility. Greece would also support the categorical approach rather than the transitional one, and would not limit the CFC clause to wholly artificial arrangements, because the problem is much wider than that. They also would like the switchover clause to remain a part of the directive, and they would prefer the grandfathering clause on interest limitation to be modified. However, he explained that the government is willing to compromise.

The Portuguese representative said they are able to agree to the current version of the compromise. However, they consider that CFC rules must be applied within the EU, and that the switchover clause should remain mandatory.

The representative of Lithuania explained that they can agree to the Presidency compromise on the CFC rule and the switchover clause. However, he suggested paying attention to the Austrian suggestion on interest limitation.

The Slovak representative expressed full support to the Presidency compromise.

Commissioner Moscovici said that the discussion brought support to the Presidency compromise, and the remaining issues can be addressed. He then commented on the Presidency text, saying it is fully in line with the case law of the Court. He believed a solution

can be found to bring together the concerns of those that want to apply CFC inside the EU and those who want to apply it outside. Regarding effective taxation, he clarified that it is certainly not the Commission's intention to give rise to a minimum effective tax rate and it is not what the text says. The proposal only gives rise to effective taxation, and is only related to relative and not absolute rates. Setting tax rates remains the absolute competence of Member States, but non-taxation has to be avoided. The third issue that seems to be remaining is hybrids. He believed that the switchover clause is an essential part of ensuring effective taxation. He believed that an agreement was not far.

Jeroen Dijsselbloem explained that before and during the meeting the Presidency has been working on a new draft on the basis of the comments. He then noted that four big issues are remaining, so now the task is finding a balance not only on those individual issues but the text as a whole. From the Presidency's part, he stressed that he will not leave the room with an agreement that is effectively nothing.

He then made proposals on the individual issues:

- On hybrid mismatches, he said the new draft will deal with the scope issue brought up by the UK. It would also include a commitment to deal with the issue of third countries before the end of the year, as it does not seem possible to deal with such an extensive issue right now;
- Regarding the switchover clause, he noted the diversion of views, and commented that if the whole package is strong enough, it could be accepted that switchover has not so much added value. As part of an overall compromise, it could be decided to take out that part;
- On the effective minimum rates, he claimed to understand the concern, but the text does not set minimum rates. The provisions are needed to have a benchmark under the CFC rule. However, a very clear wording could be used to clarify the intention.
- As regard CFC rule, he commented that only looking outside of the EU would not be a credible deal for him. As part of a package of compromises, he suggested that both intra-EU and third countries are covered. On the substance, he argued that following old court rulings only would leave the CFC rule with very little added value. What is on the table now is still within the legal possibilities. Limiting it only to "wholly artificial arrangements" would exclude a lot of issues with a high BEPS risk. However he could accept that the compromise really goes too far, so he highlighted the need for a compromise. The burden of proof could go to the tax authorities as a part of a compromise on the other hand, he suggested. That would however still require companies to provide the data.

The Chair then proposed a lunch break while the Presidency works on a draft. The discussion was resumed following the break:

Following the break, the Chair informed that ministers decided to try to get the final deal during the **June ECOFIN meeting**. He then highlighted some of the things dealt with in order to narrow down the issues:

- In recital 6, the new draft explains that member states may apply targeted rules against intragroup debt financing;
- In Article 2 certain definitions have been changed;
- The provisions on grandfathering have not been amended at this point;
- There is a derogation for Estonia on exit taxation as they have different measures in

- place that are similar or stricter;
- In Article 12, one extra year has been included to implement the exit taxation provisions;
- There are also three draft statements (two from the Council, one from the Commission) on minimum effective taxation, stressing that the directive is not about setting European tax rates;
- The carve-out for public infrastructure projects have been included in the draft directive, stipulating that third party loans for financing them may be deducted;
- The switchover rules have been put in brackets;
- The reverse burden of proof has been deleted;
- As regards the carve-out rule on CFC, a Council statement has been drafted explaining a way to approach the difference between the stricter approach (in the Presidency draft) and the ECJ one. The Chair also suggested asking the Code of Conduct group to advise on this.

Commissioner Moscovici reiterated the intention to conclude the file still under the Dutch Presidency. This is possible if everyone is committed to reducing the differences. On hybrids, the Commission is ready to examine all possibilities. On the switchover clause, he underlined that for the Commission is still a good measure, but it should not become an obstacle to compromise. He also claimed to be ready to commit to a declaration that the proposal is not an attempt at minimum tax rates. A few more weeks are needed to finalise the text, but we are inches away from an effective agreement, he stressed.

The Maltese representative stressed that they would like an agreement on hybrid mismatches, and are not in agreement with setting new dates.

Mr Dijsselbloem doubted it is possible to add something such a massive set of rules to the proposal in such short time. Outlining the way forward with sufficient commitment is a good solution in his view.

The Irish representative said the text on hybrids was acceptable for Ireland. He welcomed the Commission commitment on minimum effective taxation, but argued that it has no legal standing. Limiting CFC to wholly artificial arrangements seems to be addressed, which is a very important issue. He also argued that an effective tax rate trigger is not necessary for the CFC rule.

The Chair explained that on the issue of substance for the CFC rule, there is quite an important split, which is why they are trying to find a compromise. On the tax trigger, he explained that he had spoken to the OECD on that, who confirmed that such a benchmark is needed for an efficient CFC rule.

The UK representative welcomed the progress made, and said that at first glance the UK's concerns have been addressed, in particular the clear commitment on hybrid mismatches. They have their reservations about deleting the switchover, but agree that it should not be an obstacle. A deal is very close in his view.

The Spanish representative proposed that the day the Directive comes into force should coincide with the cut-off date.

The Luxembourg representative welcomed the changes, in particular regarding the burden of proof. On wholly artificial entities, he understood that the ball is now in the court of the

Code of Conduct group, and asked if they would come up with a definition within the next two weeks. Thirdly, he highlighted that a couple of points in the text go beyond BEPS. It is important to underline in which way we go further, which is also important to present to the outside world.

Dijsselbloem clarified that the intention is not that the Code of Conduct group comes up with a new definition within two weeks. The idea is agreeing to a text and allowing the group to further specify it later on. He then said to be prepared to do the analysis where we go further than BEPS, but for that an outcome that actually goes further is needed.

Pierre Moscovici reiterated that to reach an agreement, work now has to focus on the issues identified and not start from scratch. He then underlined that besides communication, actions are also needed. Regarding the legal basis for statement on effective tax rates, he argued that the statement is about what is *not* in the directive, so clearly there cannot be a legal base for something that is not being done.