EUI/WU Global Governance Tax Programme

The Lisbon Executive Seminar on "Beneficial Ownership and Trusts: Moving towards greater tax transparency?" (Hosted by University of Lisbon, (IDEFF))

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(I) Framework and objectives

In the framework of the joint programme between the EUI Global Governance Programme and the WU Global Tax Policy Center at the Institute for Austrian and International Tax Law, WU (Vienna University of Economics and Business), on Taxation and Governance (http://globalgovernanceprogramme.eui.eu/), an Executive Seminar took place in Lisbon, on the 3rd of June, 2013, at the Institute for Economic, Fiscal and Tax Law (IDEFF), University of Lisbon, Portugal, on the topic "Beneficial Ownership and Trusts – moving towards greater transparency".

The Executive Seminar was organized immediately after the European Association of Tax Law Professors Conference that took place at the same University, and that allowed us to gather for debate an interesting number of high level participants (see annex for List of Participants).

The Executive Seminar discussed the role that trusts play in cross-border investments and the obstacles that trusts and identification of beneficial ownership may pose to the current international move towards transparency. In its April Communiqué, the G20 referred to the need to examine these issues both in the context of FATF and Tax.

(II) Structure of the Seminar

The Executive Seminar was divided in two panels, the first of which aimed to present and discuss the legal framework of beneficial ownership and trusts and the most controversial aspects involving them; where can trusts be settled and recognized; the identification and reporting obligations of a beneficial owner. In this panel speakers were John Riches (STEP and Consultant, Withers LLP), on "Trusts and the move to tax transparency in the perspective of STEP (Society of Trust and Estate Practitioners)", Lluis Fargas (Vice President Tax Europe for Alcoa), on "Trusts and the move to tax transparency in the perspective of a multinational enterprise" and Gugliemo Maisto (Catholic University Piacenza), on "Money Laundering, Tax Evasion and Trusts".

The second panel analyzed and discussed the tax consequences applicable to trusts (the tax consequences for a settlor when setting-up the trust and a beneficiary receiving a distribution; the reporting obligations for a beneficiary receiving a distribution); the meaning of beneficial ownership related to trusts in bilateral tax treaties (e.g. OECD and CIAT) and in the EU Savings Directive and the EU forthcoming proposals. In this second panel, speakers were Eric Kemmeren (Tilburg University), on "Beneficial Ownership and Trusts in Tax Treaties",

Marjaana Helminen (University of Helsinki), on "Tax liability of beneficiary in a US discretionary trust", Colin Powell (Adviser to the Chief Minister on International Affairs), on "Beneficial ownership and Trusts in cross-border situations from the perspective of Jersey" and Bernardus Zuijdendorp (Head of Unit, European Commission DG Taxation and Customs Union Unit Direct Tax Policy & Cooperation), on "The Savings Directive and Trusts".

III. Policy recommendations emerging from the debate[1]

a) The need to include trusts in the current move to tax transparency and the adequate instruments to achieve that purpose: Registration of trusts vs. the role of trustees

The Lisbon Seminar focused on to what extent the current move to tax transparency is applicable to trusts. It was clear that the fact that trusts are not legally recognized in civil law countries and are unknown to those countries has led to biased attitudes by tax authorities against trusts. At the same time, it was recognized that trusts are opaque and therefore easily misused as vehicles to avoid and evade taxes. It was also highlighted that both business and private entities can use trusts.

Again in the context of the G20 current move to increasing tax transparency, it was discussed whether extending registers to trusts is a proportionate measure taking into account the compliance burden, the need for confidentiality and the fact that

[1] These reflect the views of the organizers and should not be taken to represent those of the participants

private matters are also at stake there are more adequate (i.e. proportionate) measures. If trusts were to be registered, there would be issues on the reliability of the data and on the ability in certain jurisdictions to keep the registry up-to-date. Some speakers and participants at the Seminar proposed that instead of registering trusts governments should place more emphasis on the role of the trustees. It was not clear however, what would be the tax consequences in case the beneficial owner of the trust was not correctly identified by the trustee.

b) Identification of the beneficial owner

Improving tax transparency requires identification of the beneficial owner. In the Executive Seminar, it was presented and made clear that different legal instruments adopt different beneficial ownership concepts, according to the purposes followed by those instruments: e.g. the anti-money laundering directive, FATCA, the OECD Model Convention (MC), the Savings directive, EITI. It was claimed that there should be a convergence of concepts to the possible extent. It was further discussed that the 2012 OECD MC Commentaries focusing on the beneficial owner tend to favour substance over form and that the source State should play an important role in determining the beneficial ownership (including that of a trust).

c) Compulsory registry of trusts vs. availability of the relevant information on the beneficial ownership to the tax authorities

In order to reach the ultimate purpose of identifying the beneficial owner, some speakers and participants argued that there can be an alternative to the

compulsory registry of trusts as a way of making information to the tax authorities. One proposal is for governments to place new responsibilities on trustees to undertake due diligence and to have access to information on beneficial owners. Such rules could be enforced by professional bodies (e.g. STEP) and a failure to meet them could lead to a person being barred from acting as a trustee. Also consideration could be given to limiting the number of trusts that any trustee could handle. In either case, the increase of cost compliance costs is an inevitable consequence, but the latter option would preserve better the nature of trusts.
It was also proposed that public availability of the information on trusts could be rewarded by a compromise of non applicability of penalties, a solution that is being adopted in some jurisdictions in respect of multinationals and transfer pricing issues. Furthermore, discussion of a recent court's case in a State that does not legally recognize trusts (Finland), made it clear that States where trusts are not legally existent have more difficulties in identifying the beneficial owner of the trust and whether to tax the trust, the trustee or a beneficial owner. It was moreover contended that a distinction between the gifts and the inheritance tax has to be made.

d) The EU Savings Directive

In the framework of the Savings directive, automatic exchange of information is becoming the single regime, and transitional rules allowing for withholding taxes will soon become unnecessary. The role of trusts and trustees becomes clearer in the proposal amending the Savings directive.

It was contended that the Savings directive should be at the forefront of automatic exchange of information and that it would have to be later on coordinated with the mutual assistance Directive, although some felt that as FATCA develops into a

global standard, backed up by effective automatic exchange, it may be feasible to merge the saving directive into this new instrument.