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SUMMARY RECORD OF THE MEETING OF THE PLATFORM FOR TAX GOOD GOVERNANCE

held in Brussels on 07 December 2016

1. OPENING

- 1.1 In the morning the meeting was chaired by Valère Moutarlier and in the afternoon by Bert Zuijndendorp. The Chair updated members on the latest EU developments in relation to direct taxation, including the outcome of the November ECOFIN. Moreover, the Chair informed about the adoption of the October corporate tax package with legislative proposals for (1) CC(C)TB; (2) hybrid mismatches (ATAD2); and (3) dispute resolution.

2. ADOPTION OF THE AGENDA

- 2.1 The Chair presented the agenda of the day. A business organisation asked for a brief discussion on the pilot project to provide training to civil society in campaigning against tax avoidance and asked to come back on some of the content of the summary record of the September PF meeting. The Chair proposed to discuss both points under AOB. The agenda was adopted.

3. NEW SYSTEM FOR PROCESSING REIMBURSEMENTS (AGM)

- 3.1 The Chair informed the PF that the Commission developed a new online system for preparing and organising meetings. This system will offer an electronic workflow for the invitation and reimbursement process. DG TAXUD expects that the next meeting, which is expected around March 2017, will be processed by AGM.

4. ZEW STUDY – IMPACT OF TAX PLANNING ON FORWARD-LOOKING EFFECTIVE TAX RATES

- 4.1 The Chair introduced recently published ZEW study¹. This study is about the impact of tax planning on forward-looking effective tax rates. DG TAXUD made a presentation about the results of this study.
- 4.2 Following the presentation², a business organisation stated that, despite the relevance of this type of analysis, it is based on strong assumptions including the assumption that

¹ ZEW Study: https://ec.europa.eu/taxation_customs/sites/taxation/files/taxation_paper_64.pdf

² Presentation available on the Platform webpage.

one can undertake incremental investment and divide it in various parts although a lot of investments are not of that nature. Another assumption is the pre-tax required rate of return ("P"); the higher "P" you choose, the more important the statutory corporate tax rate will be. Therefore results could basically be driven by assuming a different "P". In addition it was stated that the effective average tax as used in the Devereux-Griffith model was the average of different levels of profitability. One could question the extra added value from this average. Finally the same business organisation draws attention on IP investment and patent boxes. While patent boxes would seem acceptable in Europe, provided there is real substance and real economic activity, the study indicates that those types of regimes are probably very harmful for the internal market.

4.3 Academics highlighted another assumption which is the assumed rate of WHT (3%) on dividends distributed by a company to its US parent for the hypothetical EU average country in the study. This was contrasted with 60% of US companies' net income for 2013 arising in just three countries (IRE, LUX, NLD), all with 0% WHT on dividends, interest and royalties.

4.4 DG TAXUD replied that it is in the nature of studies to be based on assumptions, including the possibility of incremental investment. Nevertheless, there is very valuable information that comes out of this study. With regard to the assumption on the risk-free interest rate and inflation DG TAXUD referred to another recently published study containing a sensitivity analysis on the impact of a change in these assumptions. In general, the pre-tax return does not have a great impact on the cost of capital results. It is rather the tax base rules that are important for the cost of capital results.

4.5 The Chair concluded that modelling is a simplification of reality and stated it is interesting that the agenda developed over the last two years is in line with the kind of difficulties that have been identified. With regard to patent boxes, the Chair understands there are different points of view as regards the effectivity of this instrument but referred to the common approach agreed by the Ministers of Finance, which is the implementation of the nexus approach as defined by the OECD.

5. CLARIFICATION ON CONFLICT OF INTEREST RULES – RULES OF PROCEDURE

5.1 Following up the discussion of the September PF meeting, the Chair re-opened the discussion on the rules of procedure since no consensus had been reached so far. On the issue of the Chatham House rule, DG TAXUD is of the opinion that the work of the PF has been enriching for everyone, the discussions in the PF gave a significant and useful input into developing our common agenda. Therefore, the Commission suggests continuing with this approach. Concerning the recommendations made by the European Ombudsman with regard to transparency, the minutes of the September PF meeting include more details to reflect the position of the different categories of members (MS, Business, Trade Unions, Professional organisation, NGO and Academics). This preserves our capacity to openly discuss and fulfils our duty to share the substance and elements of our discussion with a wider public. On the rules on conflict of interests, DG TAXUD circulated a document in which it concludes that a conflict of interest is relevant only to experts appointed in a personal capacity. Since the PF members have not been appointed in a personal capacity but all represent a national public authority or an organisation, DG TAXUD concludes that it is not necessary to change the rules on conflict of interests.

- 5.2 A business organisation expressed its confusion about the underlying reason for discussing these issues. An NGO stated that the reason for the discussion on the Chatham House Rule was not to identify a specific organisation but to understand what is the interest expressed in the PF. However it considers the minutes of the September PF meeting are a good compromise.
- 5.3 The Chair concluded that the conflict of interest is not an issue in the specific case of the Platform. Since the work program was already stabilized during the previous meeting and the PF has a common understanding of how the minutes of the meeting should be drafted, the PF agreed on all procedural aspects of the new Platform.

6. UPDATE ON THE COMMON EU-LIST

- 6.1 The Chair provided the PF with an update on the EU listing process. In November, the ECOFIN agreed on the criteria the EU would ask third countries to comply with in terms of transparency, fair taxation and commitment to the BEPS process at global level. The Chair thanked the Slovak presidency for this significant achievement.

With regard to tax transparency, the criteria are very much aligned with the OECD/Global Forum criteria. The Council has chosen the "two out of three" approach, meaning that jurisdictions will have to comply with at least two out of three following transparency criteria: (1) commitment to CRS in terms of automatic exchange of information; (2) largely or fully compliant rating by the OECD in terms of exchange of information on request and (3) ratification of the Multilateral Convention on Mutual Administrative Assistance (or equivalent bilateral agreements with all MS). As from June 2019, the requirement will be to fulfil all three criteria. The Council also identified the need to have criteria related to beneficial ownership in the future.

On fair taxation MS agreed to apply 2 criteria: (1) the criteria of the Code of Conduct on business taxation; (2) a second criteria ensuring that a jurisdiction does not facilitate offshore structures or arrangements aimed at attracting profits which do not reflect real economic activity in the jurisdiction. There also was a debate around the level of taxation. The EU Finance Ministers have chosen it should not be taken as a criterion. However the ECOFIN asked the Code of Conduct Group to evaluate whether zero/almost zero/ no taxation might be taken as a possible indicator for assessing whether a jurisdiction facilitates offshore structures without real economic activity. Moreover there are criteria based on the acceptance of the BEPS standards by third countries.

The Chair welcomed the very close cooperation with the OECD and the GF. The outcome of the Global Forum peer review and the BEPS Inclusive Framework will form a strong basis for the EU analysis. The Council also defined a way forward and fixed a deadline by the end of January to start this screening process with a set of third country jurisdictions with which the screening process should be launched.

- 6.2 An NGO expressed its mixed feelings on the criteria set by the Council. It welcomed the fact that the Council followed the advice of the Commission to go beyond transparency. However, with regard to the zero rate, the NGO expressed their interest

in the difficulties that are involved in this approach. Referring to Oxfam's report³ where more indicators were taken into account, it explained that the report is not only a way to identify jurisdictions leading the race to the bottom but it also acknowledges there is a problem. The leading role of the EU in this race to the bottom was stressed.

An NGO asked what categories of countries will be screened, whether these countries are linked to the Scoreboard and whether this information will be released at some point. An NGO stressed the importance of assessing the Swiss corporate tax system after the reform following the dialogue with the EU. Business organisations referred to press-reports following the ECOFIN meeting in which it is concluded that there is a significant risk that major trading partners of the EU such as the US/ China would be affected by the list and asked the Chair to comment on this. They also underlined the limited risk of a race to the bottom. The likelihood of rates going down to zero is about zero. Reference was made to a recent study undertaken in the UK which concluded that large undertakings continue to see the need in funding public services. While headline rate comes down, the tax system actually becomes more complex in order to get some of that money back. Academics expressed their concern that there is a possibility that the effective tax rate would not be a criterion for exclusion.

- 6.3 The Global Forum Secretariat welcomed the fact that the Commission uses their work and reports as input for the EU screening and listing. However, the Global Forum expressed its concerns on the developing countries which are not always in the position to comply with the standards for automatic exchange of information. In January/ February the Commission and the Global Forum will meet to talk about the practicalities of the listing process.
- 6.4 The Chair referred to the race to the bottom issue which was studied by the Commission and reflected in the staff working document accompanying the June 2015 Action Plan. This is a highly relevant issue we may have to look at in the Platform in the future. Regarding the listing process, the Chair explained that the Code of Conduct has been tasked by the Ministers to identify the relevant jurisdictions to be screened. In addition, until the end of January next year the Code of Conduct will be working on the practical modalities as well as the scope of application of criterion 1.3 and 2.2. How to take account of the special status of the developing countries is still an open issue. Moreover, the countermeasures are another element the Code of Conduct Group needs to look at.
- 6.5 With regard to the next steps in the listing process, the Slovak Presidency explained that at the beginning of next year letters will be sent to jurisdictions that will be screened. These letters will be carefully drafted and the process will be explained to ensure the dialogue will be conducted in a very transparent way. The Presidency stressed that the Code of Conduct main group is the leading body in the process.
- 6.6 A business organisation commented on the Chair saying that the EU is acting as a common body towards the outside world. In their view, there are 28 competing MS which try to optimize the investment in each country. Therefore, the EU is divided tax wise.

³ OXFAM: Tax Battles – The dangerous Global Race to the Bottom on Corporate Tax

6.7 The Chair pointed out that while the EU deals with 28 MS which are sovereign in designing and setting up their direct tax system for some year now there is a very clear commitment to work together to stabilizing global standards and promoting them.

7. INITIATIVE ON INTRODUCING EFFECTIVE DISINCENTIVES FOR ADVISERS, PROMOTERS AND ENABLERS OF AGGRESSIVE TAX PLANNING SCHEMES RESULTING IN TAX AVOIDANCE OR EVASION

7.1 The Chair introduced the following item on the agenda: the implementation in the EU of BEPS Action 12 about the disclosure obligation on intermediaries to strengthen the fight against aggressive tax planning schemes. DG TAXUD started with the first step of policy shaping, which is the launch of a public consultation on 10 November. Today's objective is to encourage PF members to answer and market the public consultation which should result in the widest possible participation.

7.2 Professional organisations stated the consultation would attract more participants if it was available in languages other than English. Moreover it was stressed that any envisaged sanction or administrative penalty needs to be limited to those involved in illegal activity, i.e. tax fraud. The ultimate responsibility needs to rest with the taxpayer not the tax advisor. If the Commission considers the introduction of mandatory disclosure rules which go beyond the measures proposed under Action 12, principles of subsidiarity should be taken into account. There are already rules in place in the EU law for effective cross-border exchange of information on tax evasion or avoidance schemes under the Directive on Administrative Cooperation. Country-specific issues and regulatory aspects of the tax advisory profession need to be taken into account and the right of non-disclosure and confidentiality need to be respected in any future proposal. Sensitive commercial information should not be made public and privacy should be guaranteed. The taxpayer is better positioned to report than the tax advisor which is bound with professional secrecy. Another point made was that generic and specific hallmarks must be sufficiently clear to avoid any uncertainty; nothing in the contemplated measures should discourage tax advisors from offering timely and accurate tax advice to clients. Moreover, any disclosure obligation should take into account the right against self-incrimination and should include exemption for tax advisers similar to the one of Article 34(2) of the Anti-Money Laundering Directive. Secret-reporting obligations should be avoided, considering that such rules could undermine the relationship of trust and potentially discourage taxpayers from seeking tax advice. The professional organisation concluded by highlighting the key role of the tax advisors in Europe and their contribution to the rule of law and the EU-wide ambitions of creating the most dynamic and innovative market in the world.

7.3 A business organisation asked why avoidance schemes are included without any connotations such as "aggressive" or "undesirable" because avoidance schemes are encouraged by every Parliament in the EU to optimize its investment climate.

7.4 Academics made a couple of comments: (1) when the initiative covers aggressive tax planning structures in international and domestic context, there may be an issue of EU competence when it comes to domestic schemes; (2) concerning the scope of disclosure obligations, it seems the best approach is to cover not only promoters but also users because in some cases we would not be able to force the promoters; (3) it seems that the follow-up by the tax administration departments is crucial; (4) as already acknowledged under Action 12 there is an ambiguity between the schemes

that are to be communicated under this possible legislation and the schemes that are covered under GAAR or PPT rules. As a last point, Academics stressed the relationship with tax payers' rights to legal advice and legal professional privilege. There is case law by the Court of Justice of the EU which should be taken into account. Moreover, the European Court on Human Rights, related to the connection between the obligation to collaborate in respect of tax duties and the right to silence in respect of tax offences and crimes should be taken into account.

7.5 A MS stated that disclosure rules are a crucial element of the package against tax avoidance. The link with the EU (EU-competence) can be found within schemes triggering anti-abuse rules for example in directives. The same MS was of the opinion that the initiative should be presented in a mandatory form. Another MS shared some experience of their disclosure rules for tax avoidance schemes.

7.6 DG TAXUD agreed that not all potentially aggressive schemes would be necessarily illegal; we have to find an appropriate threshold above which schemes should be reported. DG TAXUD will make a cost-benefit analysis and make sure that the benefits outweigh the costs. With regard to the capacity building at tax administration level, this is also a relevant issue for other areas where we are going to exchange a lot of information in the near future. Tax payers' rights and professional secrecy are important issues; DG TAXUD will take account of the experience already available with MS. The consultation is available in English only due to a balancing act in terms of timing.

7.7 The Chair stated that the discussion on the EU-competence is a non-issue at this stage. There are many aspects that are not EU competence but are coordinated between MS themselves. Therefore, EU-competence should not be the starting point. The Chair concluded that the consultation is open until February and stated the Commission will come back to the Platform with the result of the consultation.

8. TAX AND GROWTH: HOW EU AND NATIONAL TAX POLICIES CAN BETTER SUPPORT GROWTH, INNOVATION AND COMPETITIVENESS (FOLLOW UP TO NOVEMBER IMF CONFERENCE)

8.1 The Chair introduced DG TAXUD's presentation which is a follow up to the joint conference of DG TAXUD and IMF on tax and growth which took place on 17 and 18 November 2016.

8.2 The presentation⁴ focused on the link between taxation and investment in R&D and innovation, the target audience of public money, the collaborative economy and the role of IT. DG TAXUD informed PF members that a conference on tax fairness will be held in 2017.

8.3 An NGO asked whether the Commission could already give some information about the conference on tax fairness in 2017, more specifically on the date and the scale of the conference. Following the answer of the Commission that they anticipate the conference to be organised at the end of June 2017, the NGO suggested to include the

⁴ Presentation available on the Platform webpage.

effects on third countries and in particular developing countries in the agenda. A business organisation attended the conference and was surprised to see how little development there has been in the area of taxation in the last decades. Old truths, such as it is better to have a broad base, to have lower tax rates etc., seem to be still valid. The tax policy should not be overestimated for achieving distributional purposes. It may be more important to have a buoyant economy, collect a lot of taxes and to use the spending side of the budget to alleviate the tensions and concerns for those with less means.

8.4 DG TAXUD commented that the agenda is much broader than just looking at investment as the Commission also looks at fairness. When looking at the fairness dimension of the tax system, the Commission also takes into account the other side of the coin, which is efficiency. Regarding the comment of tax policy being just one instrument, DG TAXUD explained that they are looking to what extent this instrument can be used in the context of more investment and to what extent it can be used in the context of a fair society. The conference is broadcasted and can be found on the website of the European Commission. DG TAXUD is also preparing three short movies that should summarize some of the policy messages.

8.5 The Chair thanked the PF members for the discussion on this subject and encouraged all members to have a look at the conference.

9. ANY OTHER BUSINESS

9.1 Pilot project - Training for Civil Society

9.1.1 The Chair gave a brief update on what happened with the pilot project since the discussion on this topic at the June PF meeting. In November, DG TAXUD sent an email to all PF members informing them that the call for applications had been launched. This Pilot project has been requested by the European Parliament and the Parliament allocated funds for it in the 2016 budget. The project aims to increase the knowledge and understanding of selected civil society organisations on corporate tax issues and to encourage them to contribute to the wider EU agenda for fair taxation. The training will be given by IBFD which will provide the selected civil society organisations with a factual overview of the issues related to corporate taxation and corporate tax avoidance in the EU and internationally. The trainings will be held in Brussels and will take place from February to June next year. To conclude on this work, towards the summer of next year, there will be a conference on fair taxation. All organisations that are non-profit and EU-based can take part in the pilot project. At the moment the Commission has received around 70 applications representing a broad range of applicants.

9.1.2 A business organisation stressed that the course description does not expect participants to have any knowledge of tax. Looking at the program, the business organisation expressed its doubts whether all those topics can be discussed in a training of 1.5 day, considering the participants' limited background in the tax area. In addition, the business organisation missed the fundamental issue in the program, the reasoning why we are where we are today. Moreover, the registration form is headed "training for civil society on tax avoidance". However, tax avoidance is a broad term which also includes acceptable tax planning. Therefore the business organisation does

not consider this name as an appropriate one. Academics asked what are the estimated costs for the entire program.

9.1.3 The Chair thanked the PF members for the useful suggestions. The project takes into account that the participants do not have any background in the tax area and will give participants sufficient information to understand the different issues at stake. With regard to the funding, the Parliament gave the Commission € 500.000 for this pilot project. This budget is split between the 10 trainings (including the travel and overnight expenses of the participants) and the conference on tax fairness. Moreover, it seems that the Parliament will give the Commission another € 500.000 as part of the 2017 budget to build further upon this initiative. The Chair promised to send the final program to the PF members.

9.2. *Summary record September Platform meeting*

9.2.1 A business organisation referred to the discussion captured under point 3.6 of the summary record. At the previous PF meeting both academics and business had a discussion on consolidation not being part of the current draft directive. The business organisation understands the Commission's view on CCTB (first phase) is that national consolidation rules should apply in the absence of consolidation in the proposed directive. However Academics and Business organisations stressed if that would be the correct line of arguing, all other differences between the current directive and the current local rules will be copied as well and there will be no common corporate tax base. An NGO referred to a recently published report of the independent commission for the reform of international corporate taxation (ICRICT) called "Four ways to tackle international tax competition" which contains relevant information on the issue discussed here.

9.2.2 The Chair stressed that the proposal states quite clearly that MS will be bound to the extent that issues are dealt with in the proposal. Therefore as far as issues are not part of the proposal, MS would in principle remain free to continue to apply their current domestic rules. A separate issue is whether it is practically feasible to combine the features of a common base with domestic group relief rules. This will certainly become part of the discussions with the MS. Anyway, the ultimate objective continues to be a CCCTB, which would resolve the problem of consolidation at a much broader level; therefore this should be seen as a transitional issue.

10. CONCLUSIONS

The Chair thanked all members for the constructive discussions.

The next PF meeting will take place next year (probably in March).

A summary record of the Platform meeting will be circulated to members and made available on the Platform website once approved.