EUROPEAN COMMISSION
DIRECTORATE-
GENERAL
TAXATION AND
CUSTOMS UNION
Direct Taxation, Tax coordination, Economic Analysis and Evaluation
Company Taxation initiatives

SUMMARY RECORD OF THE MEETING OF THE PLATFORM FOR TAX GOOD GOVERNANCE, AGGRESSIVE TAX PLANNING & DOUBLE TAXATION

held on

11 October 2023,
14H00 – 18H00

at
Berlaymont Building - Robert Schuman Room

1. Welcome and introduction

The meeting was chaired by Mr Benjamin Angel, Director for Direct Taxation, Tax Coordination, Economic Analysis and Evaluation, at the EU Commission Directorate General Taxation and Customs Union.

The agenda comprised the presentation and an exchange of views on the package of proposals adopted on 12 September 2023:

- Head Office Tax (HOT) system for micro, small and medium sized enterprises;
- Transfer Pricing Directive; and
- Business in Europe: Framework for Income Taxation (BEFIT).

All three proposals were presented in the Council on 29 September, and this meeting was the opportunity for members of the Platform to share their preliminary comments.

2. Council Directive establishing a Head Office Tax (HOT) system for micro, small and medium sized enterprises, and amending Directive 2011/16/EU

The Commission presented the main elements of the Head Office Tax (HOT) system proposal - intended to simplify tax rules for SMEs in the internal market, and briefly illustrated key aspects and figures of the impact assessment report. After its general presentation at the end of September, a more detailed discussion in the Council is planned for November, but it is expected that the more substantive negotiation on the proposal will start under the Belgian Presidency.

During the Q&A, a representative from a business association underlined the attractiveness of the proposed rules and argued that the scope should be broadened. They indicated that they would urge Member States to agree the rules and called for focus on the significant benefits for businesses rather than on a possible loss of revenue, taking into account that the tax revenue in question constitutes a very small part of the total tax revenue. In their view, the proposal is important in order to remove barriers to the EU's Internal Market and thereby provide better growth conditions for SMEs covered by the proposal. It should thus also be seen as part of strengthening the EU conditions for SMEs in a global perspective and must be expected to lead to increased tax revenue in the long term. The representative of a business association added that this represents the foundation for the future's larger companies headquartered in the EU. This view was supported by a speaker from a professional association, who stated that the proposal would help SMEs that wish to test other markets. A business association representative also stressed the importance of competitiveness in Europe.

A representative from a Member State delegation spoke to welcome the proposal but noted that its efficiency will ultimately depend on different parameters in its design. To better understand the novelty of the proposal in collecting tax on behalf of another Member State, the representative asked for examples of similar regimes in the direct or indirect tax areas.

In response, a Commission representative informed that the principle behind the HOT system is not entirely new, as it already exists in the VAT area, as well as in a number of bilateral tax treaties (e.g. a bilateral treaty between Germany and Switzerland on cross border workers foresees a withholding tax that could be collected by one or the other and then transferred

accordingly). Furthermore, the exchange of information via the Directive on Administrative Cooperation (DAC) provides the necessary infrastructure to make such a regime in direct taxation operating cross-border.

A speaker from a professional association stated that tax considerations form an important part of any decision taken by SMEs with regard to doing cross-border business and that the administrative burden is also an issue. Moreover, he noted that the proposed Directive would require considerable additional cooperation among Member States to be effective, e.g. joint audits. In his view, this could be facilitated by establishing a permanent agency for this purpose, which would be led by the Commission.

The Commission clarified that there is no intention to create such an agency, yet emphasised the recent progress in the area of joint audits under the DAC 7 Directive. The Commission stated that SMEs present a lower burden for tax administrations.

3. Council Directive on Transfer Pricing

In introducing the proposal, a Commission representative noted that the main purpose is to improve tax certainty and not to change the current Transfer Pricing norms. There will be 4,000 tax dispute procedures by 2030 – on average, about half fail, and each takes approximately 3 years to be completed. This indicates a need for greater coordination within the EU in this area.

The Commission presented the objectives and general provisions of the Transfer Pricing proposal in more detail. It lays down rules for a common approach to transfer pricing, aiming to increase tax certainty and reduce occurrences of double taxation as well as double non-taxation. Overall, the proposal is aligned with the OECD Transfer Pricing Guidelines.

First reactions from intervening stakeholders were supportive. Several business representatives and speakers from professional associations appreciated the careful alignment with the OECD Transfer Pricing Guidelines and enquired how this will be ensured in the future steps. A speaker from a professional association noted that given that transfer pricing can be subject to different interpretations, the pricing of intra-group transactions will remain sensitive to litigation, even if the rules are harmonised. He also indicated that Transfer Pricing could not coexist with a formulary apportionment rule. Representatives from other professional associations wondered how to avoid differences in interpretation among Member States, in particular over more granular definitions (e.g. associated enterprises), what would be the interaction with the Pillar Two rules and which would be the available options for dispute resolution.

In response, a Commission representative clarified that the purpose of this Directive is to establish a common approach to transfer pricing in the Union. For example, on the associated enterprises, the suggested definition is taken from DAC6. However, on more granular aspects, the interpretation will remain with national tax administrations.

As for resolving tax disputes, the Mutual Agreement Procedures (MAP) will remain the primary tool. Article 6 on corresponding adjustments simply aims to ensure that Member States operate adequate mechanisms to perform corresponding adjustments in a swift manner. Moreover, in the EU, there is also a Directive on Tax Dispute Resolution Mechanisms.

When it comes to the evolution of the OECD Transfer Pricing Guidelines, the Commission reassured that it follows closely the relevant workstreams at the OECD and is aware of possible upcoming changes. In this way, the amended guidelines will be considered as the new binding

reference framework if these changes have been agreed by all Member States.

A speaker from a professional association inquired about the policy rationale behind proposing a Directive on Transfer Pricing Directive when BEFIT puts forward a formulary apportionment for profit allocation. He reiterated that a central agency, led by the Commission, could improve the implementation of the proposed Transfer Pricing Directive.

A speaker from the Commission explained that the proposed transfer pricing rules provide for a common approach based on the arm's length principle. A generalised formulary apportionment was not the objective at this stage. Instead, the BEFIT proposal (explained later in more detail) creates a comfort zone in pricing intra-group transactions and a ‘traffic light system’ facilitating the risk assessment for transactions with related parties outside the BEFIT Group.

A speaker from a professional association expressed interest in engaging with the Commission in more technical discussions. A representative from a business association called for more ambition, arguing that the proposal would be more effective if it also included harmonised standards for transfer pricing documentation.

A Commission representative informed that in-depth discussions on the content of future Council implementing acts, which require unanimity, will take place in a technical committee, where Member States, in close association with experts from the private sector, will collectively decide on the interpretation of the OECD Transfer Pricing Guidelines. More consistency should be introduced progressively, and a structural coordination among Member States is an important step in this direction.

4. Council Directive on Business in Europe: Framework for Income Taxation (BEFIT)

Several speakers from the Commission gave a detailed presentation of the ‘Business in Europe: Framework for Income Taxation’ (BEFIT) proposal, covering general provisions, the common rules for computing the tax base, the aggregation and allocation rules, a simplified approach to transfer pricing compliance, the administration of the system, as well as brief remarks on the impact assessment report. They clarified that this complex and comprehensive proposal will be discussed in the Council as of the beginning of 2024. This will give time to Member States and businesses to prepare for the application of Pillar Two rules, starting on 1 January 2024.

Several representatives from business and professional associations welcomed the aims of simplification and harmonisation in the BEFIT proposal but raised concerns on how much of it will be delivered in practice. In particular, they pronounced a number of reservations in relation to the following aspects: i) lack of actual simplification; ii) (negative) impact on the competitiveness of the Single Market; iii) increase in the number of tax return filings; iv) additional adjustments to the tax base at the level of Member States (e.g., in case of losses incurred before entering into the BEFIT system, research & development incentives, tax credits); v) the acceptance of both the International Financial Reporting Standards (IFRS) and national Generally Accepted Accounting Principles (GAAP) to reconcile the financial accounts, instead of only one standard (the IFRS).

Additional clarifications were requested on the calculation of the estimated reduction in compliance costs (specified at 65% in the impact assessment), the transitional period, and the

allocation of the BEFIT tax base.

Other speakers from a business association stressed the need to ensure competitiveness for the EU businesses, as an even more important overarching objective than simply reducing compliance burden for MNEs.In particular, one representative stressed that business is concerned that the adoption of new EU tax rules will lead to legal ambiguity for years, given the likelihood that EU Member States will interpret and apply these rules differently. Furthermore, the representative noted that implementing these new, common tax regulations for MNEs will necessitate substantial and costly alterations to IT systems. They argued this to be the reason that any changes to the existing tax framework should prioritise significantly enhancing the competitiveness of both Europe and its businesses. If EU countries are not prepared to embrace genuinely harmonised and competitive regulations, it might be more beneficial to focus on making the current rules work better in practice, they concluded.

A representative of a professional association, supported by another speaker from an academic association, inquired about the feasibility of formulary apportionment. He also commented on the proposed administration framework and wondered about the functioning of BEFIT Teams.

A representative from an academic association questioned the benefits of BEFIT, noting that MS are unlikely to say that they do not need their own domestic rules any longer. Regarding the benefit of cross-border loss relief, for instance, this representative questioned whether aggregation is a prerequisite and recalled a past proposal for cross-border loss relief that the Commission made in the early 1990s and subsequently, repealed.

A Commission representative provided clarifications as follows:

- Alignment of BEFIT with Pillar Two: the mandatory scope of BEFIT will apply to the same groups as those in scope of Pillar Two and provide them with one single, simplified set of rules to calculate their tax base across the EU. The main difference between them is that BEFIT is a corporate tax system, while Pillar Two is a review tax, which applies after the corporate tax liability has been due, to ensure a minimum effective tax rate. Taking this into consideration, the base for computation cannot be exactly the same.
- Filing obligations: the increased costs of one additional information tax return will be outweighed by the benefits untapped through increased harmonisation and a possible cross-border relief of losses.
- Financial accounts must follow accounting standards accepted under EU law, i.e., national Generally Accepted Accounting Principles (GAAP) of a Member State or the International Financial Reporting Standards (IFRS), including IFRS as inserted in the relevant EU Regulation.
- Aggregation or consolidation has the benefit of automatically giving cross-border loss relief, without additional complexity for tax administrations and businesses.
- Member States are allowed to make adjustments, upwards or downwards, on items not covered by the scope of the Directive, for example to take into account existing incentives, such as for R&D or specific industries.
- There will be a BEFIT Team for each BEFIT group. A BEFIT Team will be composed of representatives from the tax administrations of the Member States where a BEFIT group maintains a taxable presence. The BEFIT Team will be entitled to take a collective decision

on the corresponding BEFIT information return. This administration set-up will provide a mechanism not only for improving cooperation among Member States but also for bringing ex-ante tax certainty to businesses on certain aspects of the tax base.

- A 7-year transition period is necessary to give Member States time to gauge the impact of the application of Pillar Two on their tax bases. Moreover, this additional time will allow to gather better quality data from country-by-country reporting. This data can then be used to find the right design for a factor-based formula that would provide more simplification, in particular by eliminating the requirement for consistency with the arm's length principle for intra-group transactions. The decision on whether to introduce formulary apportionment will be re-assessed based on the results.

5. Any Other Business

The next Platform meeting is planned for the second week of December (exact date and agenda still to be defined).