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

**held in Brussels on 16 September 2016**

### **1. OPENING**

1.1. The meeting was chaired by Valère Moutarlier. He updated members on the listing process, the adoption of the ATAD Directive, and on progress at global level with the OECD. The Chair insisted on the importance of the Platform to feed EC work.

### **2. ADOPTION OF THE AGENDA**

2.1. The Chair presented the agenda of the day. One Trade Union raised the issue of confidentiality in the rules of procedures, referred to the ombudsman recommendation and asked for the views of the Commission on this topic. The Chair proposed to discuss this point under AOB. The Chair also mentioned that the Platform Work programme would be circulated to members and published on the Platform webpage. The agenda was adopted.

### **3. FAIR TAXATION - UPDATE AND DISCUSSION ON UPCOMING COMMISSION INITIATIVES**

3.1 The Chair stated that the adoption of the OECD BEPS agenda is a must but is not sufficient for the single market. The Commission will be finalising the Tax Package by tabling 2 proposals by mid-November at the latest. The first proposal concerns the re-launch of the C(C)CTB, as announced in the June 2015 Action Plan. The new proposal will include a mandatory scope and a two-stage approach. The common base will come first, while consolidation would be left for a later stage. There would be a cross-border loss relief mechanism in the meantime. The re-launched C(C)CTB has a two-fold objective: to be a business facilitation tool and a tool against aggressive tax planning (ATP). The second proposal concerns the ATAD 2 Directive; the ATAD adopted in June contained different measures, including measures to address mismatches. The ATAD2 is linked to BEPS Action 2, it has the same scope as the ATAD (CIT payers in the EU) and aims at external mismatches (see **powerpoint on the PF webpage**). It contains measures targeting mismatches between MS, between a MS and a 3<sup>rd</sup> jurisdiction, and imported mismatches (mismatch between 2 third country jurisdictions), as requested by the BEPS recommendation.

3.2 Business organisations expressed the view that the EU needed an effective single market. On C(C)CTB, there were concerns that the threshold might prevent start ups from benefiting from the C(C)CTB and that the 2 stage approach could allow MS to

postpone the consolidation considerably. The 2011 proposal on CCCTB emphasised simplification and the view was that it would be nice if the same applied in the new proposal. On equal treatment between debt and equity, the question was raised whether the proposal would contain an extensive ACE or another type of provision; if this method would reduce tax bases, leading to higher rates. On loss relief, it was stated that it seemed quite restrictive unless consolidation ("3CTB") follows quickly. Doubts were expressed on the agreement of MS on cross border loss relief. It was also stated that hybrids had to be eradicated but that this should be done by MS aligning their own domestic rules rather than by adding another layer of detailed rules. A member warned of the need to be careful on hybrid Permanent Establishment (PE), as mismatches appear because domestic laws differ and not because of tax planning. On imported mismatches, rules are needed but it can be difficult to establish where the hybrid actually is. Moreover, concerns were raised about overlaps between hybrid rules and CFC rules and it was stated that we should not have rules targeting 100% of business to catch the 5% that avoid taxes. A business organisation expressed concerns on differing sensitivity between the US and the EU on tax avoidance issues, and the possible impact of this on EU-US relations.

- 3.3 NGOs expressed the view, that if one of the aims of the CCCTB was to be a tool against ATP, MS should at some point agree on a minimum effective rate of taxation. They suggested that, for companies not qualifying for mandatory C(C)CTB, tax competition between MS might continue, and they asked how 3rd country groups (EFTA countries for instance) would be treated. On equity financing the view was that if we equalize the taxation of equity and debt, this gives a tax break to shareholders. A member enquired whether the proposal would include safeguards such as in the Italian ACE, and what the threshold would be for the mandatory C(C)CTB. On cross-border loss relief, it was suggested that losses would be shifted to MSs with the highest tax levels. Full support was expressed for the ATAD2: if imported hybrids are not targeted, this could create new loopholes. A member asked the extent to which the ATAD2 covered BEPS Action2.
- 3.4 Amongst professional organisations, it was stated that the timing of the 3CTB is essential and should be put in writing. Coordination between ATAD, C(C)CTB and CFC and Art 11 of the Merger Directive should be considered. The complexity of the co-existence of C(C)CTB with existing tax systems for small tax authorities was raised – would a C(C)CTB for all companies not represent an opportunity for simplification? How will non-EU groups be treated? A member suggested that an EU model tax treaty should be considered, given that hybrid mismatches were the result of poor maintenance of MSs' Double Taxation Conventions (DTC) networks.
- 3.5 Trade Unions asked about the scope of ATAD2, and stressed that it was important not to create new loopholes if some categories of CIT tax payers are not covered. Most MS do not have switch over rules, it was pointed out, and a member asked whether there are alternatives?
- 3.6 Academics stressed that consolidation was essential for Transfer Pricing issues and loss relief, the Actions 8 to 10 would be solved in EU with the consolidation ("3CTB").
- 3.7 The Chair replied that the plan of the Commission was determined to have consolidation – which is why it will table the 2 proposals (2CTB and 3CTB) together.

The 2 stage approach is a way to re-initiate discussions amongst MS. The consolidation part of the C(C)CTB was not in the public consultation because it is not a new element. The Chair made it clear that there was no intention to harmonise CIT rates inside EU. He understands the appetite of PF members for more detail, but some aspects are still under discussion (threshold for mandatory CCCTB, R&D incentives, debt bias correcting measures). CCCTB will be closely aligned with ATAD2.

3.8 The EC further explained that R&D incentives in the C(C)CTB will not be limited to large groups, and start-ups will have access to them as well. Start-ups will be defined in a manner that will not allow MNEs to set up a new subsidiary qualifying as a start-up. Once a company qualifies/opt for the C(C)CTB, national rules (IP Box regimes, tonnage tax etc) cease to apply. For those companies below the threshold that do not opt for the C(C)CTB, existing regimes will remain in force provided they are aligned with rules at global level. The cross border loss relief is a temporary solution linked to 2CTB; we will make sure it cannot be abused. The C(C)CTB will be available to all companies operating in the EU that are subject to CIT. Accounting rules are not affected by the proposal, therefore national accounting rules will stay in force under the C(C)CTB.

3.9 On the ATAD2, the Commission explained that the intention was not to add an additional layer, but to align hybrid mismatches rules with OECD work. MS expressed a clear wish for EC to take action. It will cover the same structure as the OECD on hybrid mismatches but mismatches with no hybrid (covered by the OECD) will not be covered by ATAD2. PE mismatches will be carefully looked at. Switch over rules were not included in ATAD, and there is no alternative in ATAD2.

#### **4. DISPUTE RESOLUTION MECHANISM**

4.1 The Chair stated that the Commission had been working for years on dispute resolution mechanisms. There is a system in place, but it requires improvements. This topic is the subject of BEPS Action 14 and the EC Action Plan 2015 foresees new initiative on this matter. The EC explained that weaknesses identified in the present system are the access to procedures, in particular to the MAP; the lack of detailed provisions on the time frame; the lack of binding result and the fact that the tax payer is kept out of the process. A public consultation was launched in the first half of 2016 with three options:

- a) Soft law;
- b) Legislative approach building on the current system;
- c) Fundamental review

The vast majority of the 90 replies received were in favour of an appropriate mechanism to be put in place at EU level because it is seen as an important factor to attract investors. All this information will be made available on a public webpage. A slight preference appears in favour of legislative action; in this context the EC has chosen a legislative approach enhancing the existing mechanism by broadening the scope of the present Arbitration Convention (presently limited to transfer pricing) with an obligation of result. The Chair expressed concerns that the EU had received no more than 27 concrete examples. In political terms, the dispute resolution balances the CIT reform by meeting the legitimate right of taxpayers to see double taxation issues resolved within a reasonable timeframe.

4.2 Professional organisations stated they were not in a position to answer on concrete examples especially given the short deadline; it was up to taxpayers to answer. They support the idea of a requirement to have a result. A Directive is deemed the most effective tool to address the issue.

4.3 NGOs expressed the views that a resolution mechanism should be transparent and accountable; a global system would be desirable.

4.4 On concrete examples. Business organisations expressed concerns on the confidentiality of data provided to the EC since it concerns individual cases. There is presently no rule that guarantees that this type of data would remain confidential if transmitted to the EC. A Directive on dispute resolution is much welcome. It has to be able to adapt to evolutions at global level. PE definition should follow OECD guidelines. Transparency towards tax payers is positive, but will transparency be extended to allowing the presence of the tax payer during the discussions?

4.5 The OECD observer stated that Action 14 was on minimum standard on improving dispute resolution. A number of countries (85) representing 90% of cases of dispute have already accepted a mandatory arbitrary mechanism and the goal is to reach 100 jurisdictions. The implementation will require amendments to DTC and a new legal base for the MAP. The multilateral instrument (BEPS Action 15) is currently under negotiation to implement these changes.

4.6 The Chair replied that the aim is to go beyond the current limits of the arbitration convention. We will enlarge the scope, impose a time limit and the obligation to reach an agreed outcome. We will not develop a parallel set of rules on TP or PE. At global level, the OECD is working on a global dispute resolution mechanism in parallel. The EC said that the proposal would contain transparency measures towards the taxpayer, who will have to be informed regularly on the state of play of the procedure. The Chair clarified that the way transparency towards tax payers will be assured would not be defined in the proposal, but this might be discussed during the negotiations with MS.

## **5. UPDATE ON EU LISTING PROCESS**

5.1 The Chair informed Platform Members on the Scoreboard which was published by the Commission on 15 September. In January last year, the Commission suggested to establish the European list of non-cooperating jurisdictions by following three steps.<sup>1</sup> Firstly the Commission would identify internally the third countries that should be prioritized for screening by the EU. As the next step, MS should decide which jurisdictions should be assessed against the EU good governance criteria set by the MS. Secondly the Commission will start a screening and dialogue process with the third countries in question. And thirdly the EU will draw up a list for those jurisdictions that, after the investigation and the dialogue, did not want to cooperate to implement the criteria as defined by the MS.

5.2 The scoreboard published on 15 September is the completion of the first step of the EU-listing process. The scoreboard is an objective analysis of the various

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<sup>1</sup> Communication on an External Strategy for Effective Taxation, 28 January 2016.

jurisdictions throughout the world, apart from the MS, based on two sets of indicators.

The selection indicators prioritise jurisdictions that should be examined from the point of view of their effective economic and financial links with the EU. Next to that, the Commission looked at the governance and political stability, in the sense that a country should be stable enough to attract operators.

The second set of criteria is composed of risk indicators: fiscal transparency, the existence of preferential regimes and the presence of a zero CIT-rate/ no CIT. For the indicator on transparency, the Commission derived the information from the Global Forum work. The information for the preferential regimes and the CIT-rate was derived from both the OECD and the IBFD database. All the regimes reported as a preferential CIT regime were taken into account in the scoreboard. This publicly available information from IBFD was cross-checked with the data the OECD is working on. The risk indicators inform the MS that a preferential regime exists, not whether the regime is harmful. An assessment of those regimes could be part of the second phase of the EU listing process, once MS have decided which jurisdictions to screen and on the basis of which criteria. The Chair stressed that these risk indicators are indicators and not the criteria which will be set by the MS.

The Chair stressed that the Scoreboard was prepared by the Commission based on information that was publically available. It is technical input aimed at helping MS to establish the list of jurisdictions to screen in more detail. The Scoreboard is therefore not a list and will not trigger sanctions. If at the end of next year the EU has its own list, then this list could trigger sanctions.

- 5.3 A Business organisation asked whether the calculations of these data could be distributed to allow academics to check them. They also asked if the scores of the EU MSs can be distributed. NGOs stated that a network of tax treaties can have harmful effects on the countries' tax bases as well, and should be considered. NGOs acknowledged that MS will ultimately decide on how they want to shape this list but it needs to be done in an objective way and should not end up as a purely political exercise where everybody's favourite trading partner escapes the list. This would be unjust and ineffective. A professional organisation and a NGO are both interested in the alignment between the EU work and the OECD work because they would prefer as little daylight as possible between the two high standards that have been created.
- 5.4 The Chair stated that the Commission will make all the data sources available that were used for the scoreboard. As far as MSs are concerned, they are not covered by the list – this is part of an external strategy. MS are already covered by the Code of Conduct as well as EU transparency rules. The Chair clarified that the risk column is very much in line with what the OECD has as a starting point for its own list. The transparency column is based on objective findings, most of them from the OECD. The Commission has been working equally with the OECD on preferential tax regimes. The Chair re-assured the Platform that the Commission and the OECD have been exchanging a lot of information on these risk-indicators.

## **6. PRESENTATION BY OXFAM ON LISTING CRITERIA**

- 6.1 The Chair introduced **Oxfam's presentation**<sup>2</sup> on their research work on criteria that should be taken into account in assessing compliance or non-compliance by third country jurisdictions with good governance criteria.
- 6.2. Following the presentation, business organisations stated that the appearance of a CFC regime was not necessarily the factor that should be looked at to see how a country's system actually works. They said that we could assume that tax havens would not need CFC regimes because they have very low tax rates. Business organisations stated that one of the most effective things may not be criteria as such but some type of peer pressure. The business community's wish is to align countries' rules instead of creating another layer of rules. The business community would like to have a world in which there is certainty and countries should discuss where taxes should be paid.
- 6.3. An NGO stressed that developing countries typically depend a lot more on corporate income tax. According to the IMF assessment, 16% of total revenue on average compared to 8% in OECD countries. So when we have these discussions about tax havens and tax avoidance, we have to bear in mind that the effects of not dealing with these problems are greater for developing countries. There are lot of countries that do not have a broad alternative tax base. They do not have the option of taxing something else more.
- 6.4. Oxfam replied that the overview does not only include corporate tax havens with low CIT rates but it also tax havens which have high rates but still enable corporations to reduce their effective tax rate through incentives. Oxfam will finish their report between November and January and will then be able to share all the details with the Platform. A glossary will be included in this report.
- 6.5 The Chair ended the discussion on this point and thanked Oxfam for their presentation. The presentation will be shared, with all the other documents of the Platform. With Oxfam's agreement, the Commission will make the final report available to Member States in the context of the Code of Conduct Group's discussions on the criteria.

## **7. COUNTERMEASURES**

- 7.1 The Chair introduced the next topic on the agenda: the countermeasures linked to the list. The Commission sent MS a questionnaire on their current practices. The outcome of this questionnaire was presented in a discussion paper which was circulated. The Chair opened the floor to have some more thoughts on possible alternative countermeasures.
- 7.2 A Trade union recommended the introduction of countermeasures in public procurement rules (10% in terms of GDP): there is an interesting trend whereby local authorities and governments link access to public contracts to the absence of

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<sup>2</sup> Presentation available on the Platform webpage.

corporate tax avoidance. They support a coordinated approach because if we have a European list, we need a European approach to sanctions.

- 7.3 A business organisation refers to the presidency issues note submitted to the ECOFIN on 10 September. In this note, the Slovak Finance Minister stated that the measures to tackle double non taxation must be combined with efforts to address undue tax uncertainty. Referring to this note, this organisation stated that the EU should make decisions quickly in order to reduce the time of uncertainty.
- 7.4 A professional organisation would like the EU to consider and see whether there could be alignment with what the OECD is doing, looking at what the problems are, clearly identifying, agreeing on the criteria and only then consider countermeasures.
- 7.5 A NGO said it would have liked more assessment on the domestic countermeasures. It would be useful to have assessments of measures that MS found easy and effective to put in place. They said that the OECD says that peer review work is very effective, and yet we are still not rid of tax havens. Therefore they think we might need to take it a bit further and put defensive measures in place in order to protect ourselves. With respect to tax certainty, an NGO stated that if the countermeasures were coordinated amongst MS it would be easier for companies to understand what is in store for them.
- 7.6 The OECD asked what the overall objective of the list was. From its perspective, it's all about achieving a level playing field between EU Member States and third states. The question is how to achieve this objective and whether immediately turning to countermeasures is advisable. The OECD and the Global Forum developed the peer review and monitoring system, which proved to be effective in really achieving change. As a result of the peer review, ideally we don't need a list or countermeasures.
- 7.7 The Chair concluded on this point with two general remarks. First, the Chair understands that peer review is extremely important, but we can learn lessons from on it on the need for transparency. Peer review, together with a listing process and countermeasures, works better than peer review alone. The Chair agreed that the discussion paper is a statistical document and does not say a lot on the qualitative elements of the countermeasures. He said that this might be an element for discussion in the Platform at a later stage. The Chair stated that the PF can send further elements on the discussion paper, as a written contribution, within three weeks. The discussion on the countermeasures will be continued in the PF at a later stage.

## **8. ANY OTHER BUSINESS**

- 8.1 The Chair asked if there was consensus on the updated rules of procedure of the Platform, which were circulated in advance. He explained that the PF needs to be transparent but there also must be some space and scope for having an honest and direct discussion. The current rules already ensure a high standard of transparency, as all the PF documents are on the website and the PF has an extensive detailed record of the discussions, which are also made public. The Chair proposed to stick to the updated document of Rules of Procedures as circulated.

- 8.2 A trade union asked for the note they sent on behalf of the other NGOs and Trade Unions to be circulated in the PF. They underlined that the discussion on the extension of the Rules of Procedure goes beyond the PF, to cover all expert groups. The ombudsman investigated those expert groups and made some recommendations, including a general set of rules that should apply to all expert groups. With regard to this, they would like to see a distinction between business interest and civil society members in the PF minutes. As a last point, they referred to conflicts of interest and asked whether the Platform can adopt a set of rules on this.
- 8.3 A professional organisation said it would prefer a simple approach to the minutes. It is not clear where a professional organisation would fall if the minutes are divided between Business, NGO's and Civil Society. It asked what constitutes a conflict of interest. Business and professional organisations have no problem with the extension of the Rules of Procedure. However, they were concerned that the discussions in the PF were one-sided given the lack of participation of MSs.
- 8.4 The Chair stated that he has seen more cooperation and engagement in previous Platform meetings and that this meeting was not the benchmark. On the Rules of Procedure, the Chair concluded that they are fully in line with our legal environment. He proposed to see to which extent the Commission can further improve the transparency of the minutes, using the minutes of this meeting as a first example. With regard to the conflict of interest questions, the Chair stated that the Commission would prepare and circulate a small paper on boundary conditions in terms of conflict of interest. However, under current Rules of Procedure, PF members are supposed to inform the Chair at the beginning of each meeting whether there is a potential conflict of interest for them in the agenda.

## 9. CONCLUSIONS

The Chair thanked all members for the constructive discussions.

The next PF meeting will take place in December. A small paper on boundary conditions in terms of conflict of interest will be circulated.

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