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

held in Brussels on 15 June 2017

1. OPENING

1.1 The meeting was chaired by Valère Moutarlier, Director DG TAXUD. The Chair updated members on the latest EU developments in relation to direct taxation.

2. ADOPTION OF THE AGENDA

2.1 The Chair presented the agenda of the day.

2.2 Under AOB, a member wanted to add a discussion on the methodology supporting a paper presented at the last meeting by a NGO. Since this discussion would require the authors of the study to be involved, the Chair proposed that this member circulate his comments to the group, and the discussion will take place at the next meeting.

2.3 The agenda was adopted.

3. UPDATE ON THE EXTERNAL STRATEGY

a. Relations with developing countries

3.1 DG TAXUD introduced the Discussion paper "Toolbox spill-over effects of EU tax policies on developing countries"¹. The paper reflects the External Strategy² suggestion that Member States should apply a balanced approach to negotiating bilateral tax treaties with low-income countries, taking into account their particular situation.

3.2 DG DEVCO updated the members on its work regarding domestic revenue mobilisation and capacity building of tax administrations in developing countries. A meeting in Berlin on 14 June between the Commission, MS and developing countries,

¹ Doc: Platform/26/2017/EN Follow-up of the Communication on the External Strategy: Toolbox spill-over effects of EU tax policies on developing countries available on the Platform webpage

² COM(2016)24 of 28.1.2016

was an opportunity to hear developing countries priorities and explore South-South cooperation. Their expectations are very often to have a tax administration that simply works. That will generally require revisiting their taxation system. As a follow up to the Addis Ababa initiative, the Commission developed its "Collect More Spend Better" strategy, to serve as a framework for dialogues with EU partners. Development actions are undertaken by the Commission at global, national and regional levels. At global level DEVCO participates in the Platform for Collaboration on Tax and contributes to three IMF instruments: TADAD (assessment of tax administrations), Fiduciary Fund (medium term income strategy) and an instrument on extractive industry. At regional level the Commission works in concert with regional organisations and organises regional seminars. At national level, the EU policy is based on budget support which aims to help partners establish macro economically stable public financing and efficient tax administrations. At global and national level, civil society organisations have a role to play. They provide us with both information and knowledge and are fundamental in our efforts to establish transparency. There is a clear connection between healthy public tax administrations and efforts to establish transparency.

3.3 NGOs very much welcomed the toolkit proposed by TAXUD as a good step forward for the External Strategy. However, in their view, the scope should be wider than Double Tax Conventions/Agreements (DTCs) and should include issues such as patent boxes and conduit companies. An NGO informed the members it will soon publish a report on spill-over effects, with a wider scope. NGOs considered withholding taxes (WHT) as a critical tax feature for developing countries. Another NGO saw the toolbox as a rather weak tool. It considered the availability of public data (in particular through public CBCR) as a critical aspect in relation to the implementation of transfer pricing rules, given the lack of resources and expertise in developing countries tax administrations. According to the same member, digitalisation might also be an issue for developing countries; a failed IT system might lead to chaos and high costs. We should therefore reflect on how to help developing countries to introduce effective IT systems in their administrations. The same member went on to say that the OECD Tax Auditors Without Frontiers is a good initiative and South-South approaches should be encouraged. In addition, EU trade agreements should be used to support good tax governance principles. We should also support civic space in developing countries to push on decision makers. Another NGO recalled that two Member States (MS) made a study on spill over effects and asked if other MSs were planning to undertake a similar analysis. Concerning dispute resolution, an NGO stated that developing countries usually do not welcome this type of clause because they cannot rely on the same technical skills as developed countries. Developing domestic resources mobilisation is key. Capacity building is highly relevant but might be useless if there are structural weaknesses.

3.4 A business organisation stated that, despite the relevance of preparing a toolbox to help MS in their treaty negotiations with developing countries, the present document does not reflect recent evolutions, including the Multilateral Instrument (BEPS). In addition, it highlighted that if more taxes are paid in source countries (developing countries), less will be paid in residence countries (developed countries). A business organisation stated that the toolbox cannot be more prescriptive as it relates to Member States' policies towards developing countries.

The Permanent Establishment (PE) issue has been dealt with in BEPS Action 7. On Transfer Pricing, we might complicate operations if we deviate from the current

guidelines. On technical services, if they are taxed, it might entail less transfer of technology to developing countries. Another organisation stated that taxing technical services would introduce a new principle of taxation, the 'payer's principle', in addition to the existing source and residence principles.

The same business organisation explained that the toolbox does not include dispute resolution, despite the Commission's very good work with its Directive proposal. Accordingly, the toolbox should include guidelines on a dispute resolution mechanism.

3.5 A professional organisation stressed that the toolbox is the appropriate instrument, offering the required flexibility to reflect MS sovereignty in this area. A pan EU study on existing DTCs and their impact on developing countries might be useful. The coherence between BEPS actions 5 and 6 guidance and the toolbox should be ensured. Including dispute resolution would also be relevant. Capacity building should focus on change management, tool investments, how to address BEPS and ATAD.

3.6 Academics considered a toolbox is an appropriate instrument and highlighted that the IMF recommends that developing countries should not sign DTCs without being aware of their effects. In this context, a toolbox can be useful for them as well. The measures proposed in the toolbox seem adequate and easy to administer. Reacting to some comments, academics reminded that DTCs do not increase WHT, they allocate taxing rights. Therefore, they can permit non taxation at source and can also allow switch over and CFC rules by capital exporting countries, which is consistent with the spirit of BEPS. Finally, academics expressed the view that transparency of tax legislation is one of the tools to improve investments in developing countries.

3.7 A MS stressed that resources are limited. MS have to do arbitration and focus on some issues, one of them being capacity building. The inspectors without borders programme was mentioned, but also the outflow of qualified people from tax administrations to the private sector, which shows that delivering trainings in developing countries is not sufficient. The toolkit was considered a useful starting point for discussion. Another MS welcomed the toolbox but regretted that it lacks an arbitration part. The same MS was of the view that the toolbox should not focus on DTCs only, as other tax policy issues might be more relevant. We should start by advising developing countries on how to design an efficient tax policy and administration.

In addition, DTCs give certainty which is needed to attract investments. Increasing legal security as a whole is very important in this context; it leads to job creation and increased capacity for development. DTCs must be consistent in order for EU businesses not to be discriminated against businesses of other developed countries with more advantageous DTCs. Things have to be agreed internationally, unilateral measures can be damaging for everyone. A MS reminded that DTC negotiation is a sovereign competence of MSs and asked for clarification on the legal nature of the toolbox (optional - minimal standard – best practice). Another MS made it clear that it does not want the toolbox to be a minimum standard. After their study on spill over effect of DTCs, a MS informed the Platform that it renegotiated 23 DTCs. Since renegotiating a number of DTC represents a significant amount of work, signing the MLI would be an interesting alternative.

Regarding increased WHT, a number of MS stated that it might have the effect of reducing investments in the country.

3.8 On capacity building, DG DEVCO stressed that, in many cases, technical skills exist at local level but they are overwhelmed by day-to-day tasks and do not have spare time to reflect on strategies. To answer the question on the support to civil society, DEVCO explained it promotes actions to support local partners. However, very often in developing countries, associations are not active in tax matters. Coordination groups often exist at local level to coordinate actions of the different actors and avoid overlapping.

3.9 The Chair concluded that we must ensure coherence at global level (a.o. OECD) and amongst ourselves as well since the EU is a major actor in terms of development. We must ensure coherence between our tax and development policies. The Commission will use this discussion as an input for its External Strategy. A lot of work can be done on capacity building, but the toolkit is probably not the appropriate tool for this. We must further reflect on EU-South-South triangulation.

The Chair recalled that the Platform is an expert group advising the Commission; hence it cannot have any impact on MSs sovereignty. However the Commission has the right of initiative on anything that might improve the functioning of the internal market.

b. Links between EU funds and tax good governance

3.10 The January 2016 External Strategy stated that the Commission would include the updated tax good governance standards in the Financial Regulation, to ensure that EU funds are not channelled through non-compliant jurisdictions. The Commission tabled a proposal on this in September 2016. Three other legislative proposals are currently pending, concerning the EU Fund for Strategic Investment, the EIB external lending mandate and the EU Fund for Sustainable Development. They all contain a provision prohibiting the use of jurisdictions listed by the OECD or the EU. These legislative files are currently under discussion in the Council and the European Parliament. The first one should be adopted in the near future, to enter into force in January 2018.

c. Update on the EU list and the good governance clause

3.11 The Chair updated members on the EU list. Since the previous Platform meeting in December, the screening exercise has started and is progressing well in the framework of the Code of Conduct, with the technical support of the Commission. Teams of experts have been set up, comprised of Member State experts and the Commission. They are assessing jurisdictions against the agreed criteria (transparency, fair taxation, adherence to BEPS). This work is done in close coordination with the OECD and the GF Secretariat, to ensure full consistency between the EU screening and the OECD/GF work. Once this technical work is completed, it is expected that the EU list will be adopted by ECOFIN by the end of this year.

3.12 In parallel a discussion is ongoing in Council on possible countermeasures to be applied towards those countries in the final EU list. This discussion should produce concrete results by time of the publication of the list. The work achieved last year in

the Platform was an essential source of information for the Member States – it was actually the starting point for the discussions.

- 3.13 Concerning the tax good governance clause agreed by ECOFIN in May 2008, which should be introduced into all relevant agreements between the EU and third countries or regions, an update is needed. This should reflect the updated good governance standards and the EU's priority actions against tax avoidance, tax evasion and aggressive tax planning, by requiring clear commitments in the context of tax transparency, fair taxation and BEPS. The Chair informed members that good progress has been achieved in the Code of Conduct Group on this issue. The Council should soon reach an agreement on the revised clause which will then be included in all future negotiations between the EU and third country jurisdictions.

d. Presentations by members

- 3.14 A business organisation presented a document entitled "Guidelines for business on engaging with developing countries tax authorities in a fair way" (originally released in September 2013)³. It pointed out that a number of UK businesses have adopted these principles. However, when it comes to evaluating the impact it has on business practices, this is more difficult to assess, due to the difficulty of obtaining feedback from businesses.
- 3.15 An NGO informed the Platform on the upcoming publication of a study on a spill over analysis framework. According to the study, domestic resources mobilisation is crucial and capacity building is not sufficient to strengthen domestic tax collection. There are external drivers to tax avoidance. Provisions in DTCs are highly relevant, but domestic rules may facilitate tax evasion as well. Corporate income tax is very important for developing countries. According to some estimation, tax losses in developing countries might be even higher than the amounts received for development aid. The Addis Ababa initiative stressed the need for policy coherence.

4. TAX CERTAINTY

- 4.1 DG TAXUD presented its study "Tax Uncertainty: Economic Evidence and Policy Responses"⁴. TAXUD reviewed theoretical and empirical papers in the literature.
- 4.2 According to a business organisation, measures had to be taken against tax avoidance, which is in itself distortive. Businesses therefore accepted the BEPS process and ATAD. But it is also important to pay attention to growth. If there is too much uncertainty, investments will decrease. Given that tax is part of the calculation of the expected return on investment, it can kill a deal. A business organisation agreed with the report. Legal certainty, not only at tax level is key. Certainty comes not only from the law, but from the application of laws and their interpretation. It was also stated that tax avoidance is the result of tax competition between jurisdictions.

³ Document available on the Platform webpage

⁴ Working Paper 67/2017 available on the Platform webpage

- 4.3 A professional organisation stressed that a balance is needed between tax certainty and regular reforms to keep pace with evolutions. These amendments cannot be retroactive. There must be trust between business, tax administrations and civil society, and it is important to avoid impression that sweetheart deals are on offer. Laws have to be clear and applied consistently; otherwise it is difficult for taxpayers to be compliant.
- 4.4 A MS stated that legal certainty in general is important. There is tax certainty in a system based on consistently and regularly applied rules that do not change constantly and are not retroactive. Tax rulings are not bad as such, they can give certainty. They are only bad if their outcome is zero or highly reduced taxation.
- 4.5 Academics stated that the BEPS has raised legal uncertainty; its application by tax administrations and courts will be a crucial aspect in restoring certainty.
- 4.6 An NGO wondered if tax certainty was not a way to pause the current drive of tax reforms targeting Aggressive Tax Planning. If tax rulings are good for certainty, they must be publicly disclosed (name of taxpayer and effective tax rate). According to an NGO, the arm's length principle creates much of the current uncertainty, which is why they support CCCTB. Another NGO stated that evidence of the relationship between tax certainty and investment in the tax literature is ambiguous. The Ernst & Young annual survey usually shows tax as the 3rd or 4th driver in terms of investment decision, 7th in the last report (2016). Regarding the claim in the TAXUD report that weakness of institutional framework at domestic and international levels is the main driver of tax uncertainty, the NGO stated that complex financial schemes and opaque corporate structures do not happen by accident. They have been developed by intermediaries. Tax uncertainty is endemic to economic activity: tax payments are uncertain because profits are uncertain and a major source of tax uncertainty is due to changing business models. Binding arbitration is often linked to the doctrine of legitimate expectations. The combination of these 2 concepts has led to disadvantages for Low Developed Countries that seek to reform their tax system.
- 4.7 The Chair pointed out that this study is a starting point, and further analysis might be needed. Tax reforms must not be opposed to tax certainty and the EU maintains an ambitious agenda for tax reforms to tackle Aggressive Tax Planning. If reforms are foreseeable, sustainable and clear, they do not threaten tax certainty. The Chair asked members to send their contributions to the Platform secretariat by July. The Commission will reflect on the input received and come back after summer break.

5. WHISTLE BLOWERS IN THE AREA OF TAXATION

- 5.1 DG JUST is working on a whistle-blower protection project and DG TAXUD is contributing with regard to whistle-blower protection in tax matters. DJ JUST has already launched a first public consultation, for which they received around 6,000 responses. They launched a second consultation targeted to people in business and administrations. With regard to specific issues concerning whistle-blowing in taxation, DG TAXUD has prepared a brief (13 questions) paper⁵ for Platform members. This questionnaire is for all Platform members, organisations and MS, since TAXUD would like to be aware of specific MS rules on whistle-blowers. Deadline for answers is 31 July at the very latest.
- 5.2 An NGO asked how these three consultations will be weighted.
- 5.3 A business organisation stated they supporting whistleblowing protection in tax is legitimate when it comes to tax evasion, but not tax avoidance, which is legal.
- 5.4 Academics said that legislation should provide for protection measures but should not impose any obligation, except for civil servants.
- 5.5 A MS stated that it had provisions protecting whistle-blowers since 2015: obligation to blow the whistle and protection mechanisms.
- 5.6 DG TAXUD replied that there would be no quantitative weighting of the different consultations which target different questions. On whether protection should be offered to whistle-blowers on tax evasion only or on avoidance too, this is the purpose of public consultations i.e. to collect people's views. The answers to the TAXUD questionnaire won't be public, but the list of respondents and a summary of the answers will be published.

6. UPDATE ON PILOT PROJECT - TRAINING FOR CIVIL SOCIETY

- 6.1. Presentation made by DG TAXUD⁶.
- 6.2. A business organisation asked what the objectives of this initiative were, and how its success will be measured.
- 6.3. An NGO expressed concern on the geographic representation of participants, as there were few organisations came from central/eastern Europe. A number of organisations said it was an excellent initiative. A NGO stated that a way to measure its success would be to see if it had helped to increase the number of civil society replies to public consultations both at EU and MS level.
- 6.4. DG TAXUD stated one of the objectives was to create a network. An evaluation form was distributed and the evaluations by participants were positive.

⁵ Document available on the Platform webpage

⁶ Presentation available on the Platform webpage

7. CONCLUSIONS

The Chair thanked all members for the constructive discussions.

The next PF meeting will take place after summer break. The date has not been fixed yet.

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

Circulation: *Mr S. Quest, Mr T. Hemmelgarn, Ms S. Dzhumalieva, Mr M. Sabev, Ms M. Whitehouse, Mr V. Moutarlier, Mr B. Zuidendorp, Ms. Traynor, Circ. Taxud D1; Mr Boublil (CAB), Ms F. Liberatore (SG), Mr. F. Conrad (SG)*