



Brussels,
TAXUD/D1/LK/lr (2017)5759702

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

held in Brussels on 18 October 2017

1. OPENING

1.1 The meeting was chaired by Valère Moutarlier, who was replaced by Bert Zuijndorp in the afternoon. 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 The agenda was adopted.

3. DIGITAL ECONOMY – PRESENTATION OF THE COMMISSION COMMUNICATION: "A FAIR AND EFFICIENT TAX SYSTEM IN THE EU FOR THE DIGITAL SINGLE MARKET"

3.1. Challenges and objectives

3.1.1 DG TAXUD had in its September Communication explained why we need to act now on the taxation of the digital economy file. We believe that the appropriate level for solving the issue is the global level, however, in order for the global level to be up to the challenge, the EU level can give a triggering push to solve the deficiencies which exist in the global tax framework because of the digitalisation of the economy and the growth of new business models, which the current concepts for taxation do not really fit. We have segmented the issue presented in three brief documents: Challenges and objectives, Long-term solutions, and Short-term solutions.

3.1.2 An NGO recalled the report of the Commission expert group on taxation of digital economy produced in 2014; the group advised against a special tax on digital firms.

3.1.3 DG TAXUD replied that conclusions of this report do not match any longer the development after ATAD1, ATAD2 were adopted and BEPS implementation has progressed with MLI, thus, although it is valuable food for thought we cannot stick to those conclusions. DG TAXUD then went on to present the first paper, Challenges and Objectives, outlining why this became a topic. The corner stones are always: where to tax, and how much to tax. For brick and mortar firms we have the concepts of PE, the arm's

length principle, and transfer pricing rules. While business models are increasingly digitalised, the digital presence is not reflected in the concepts of the international taxation. This has led to lack of level playing-field. Besides competitiveness, the other main objectives of the work are fairness, integrity of the single market, and sustainability.

3.1.4 An NGO welcomed the focus on the need to ensure fair and effective taxation of the digital economy. But the key component - the level of tax – is missing. Digitalisation affects all business in various degrees; changes in tax rules will not as such result in fair competition; regulatory arbitrage is key.

3.1.5 A business organisation stated that the OECD BEPS report 1 concluded against separation between the “brick and mortar” and the digital economy. Several business organisations stressed that tax-avoidance and tax-planning must be separated from re-allocation of taxing rights. Several business organisations remarked that this issue is about allocation of taxing rights. They asked, while everyone agrees that profit should be taxed where value is created, - but where is value created? If a long-term solution is chosen, it must be on the global level, and a short-term solution should be helpful in achieving the longer-term solution. EU taxes amounting to double taxation would undermine competitiveness. Another business organisation considered it problematic that digital economy entails more pressure on the value chain. Several business organisations stressed that the work of the EU must feed into the work-stream of the OECD. A business organisation opposed short-term solutions due to the heavy implementation burden these would entail.

Several business organisations felt they cannot give an opinion on plans that are not clear enough. What is the problem: Is it BEPS, or firms that don't pay taxes for other reasons? Are digital firms believed to not pay enough taxes in Europe because their business model permits to work from one country, so they pay all the taxes but in their country of origin? Or is it that they do not pay enough taxes, not even in their country of origin? Could the scope of the tax, the threshold, be defined?

For several business organisations, an international solution on OECD level seems hard to reach as changing the international taxation rules will entail a re-distribution of tax revenues among countries, which could be perceived as an unfriendly act by some. Either, the EU can try to change the TP rules, and shift tax revenue from one country to another, or the EU can examine how it can make them work for its own benefit.

3.1.6 A professional association remarked that it is too early to tell the effects of BEPS and ATAD. Technical input is needed to show how income is generated from different models where value is created. They strongly opposed the view that tax avoidance goes hand in hand with taxing rights. They joined the business organisations, asking the MS's to identify the problem.

- 3.1.7 A trade unions' organisation suggested that the same principles as have been used in VAT, be used for establishing a tax on the digital economy.
- 3.1.8 An NGO agreed that it is too early to tell the effects of BEPS and ATAD as they are not yet implemented. Several NGOs urged all MS's to implement timely and effectively ATAD directives. The issue of taxing the digital economy is also one of tax avoidance. The issue of taxing right and effective fight against tax fraud, tax avoidance cannot be distinguished. Another NGO feared that short-term priorities might hinder two big taxation dossiers: the draft directive on country-by-country reporting and the CCCTB. They were worried by the proposal of a number of governments and its potential contradictions with state-aid regulations. The objectives in the 'Challenges and Objectives' should include ensuring public income. The NGO claimed that the paragraph on competitiveness implies that tax by definition effects growth negatively, and that we all should get out of that paradigm. Another NGO reminded that while most members support the global, international and long-term solutions, it is important that the international and global debate involves developing countries too.
- 3.1.9 The Academics stressed that the first issue is about allocating the tax base, to what extent the current rules are not able to take into account the digital economy, and to separate that issue from tax avoidance. They also advocated for long-term rather than short-term solutions.
- 3.1.10 DG TAXUD agreed with a lot of what had been said; the global level is the best for addressing the issues. We need to work consistently with the OECD. It is about the right to tax. We are of course not aiming at an international tax war; this was also reiterated by many Member States. Right to tax is a global issue, but also an EU issue. We are trying to set up a structure whereby the right to tax corresponds to the current economy. We encourage members to contribute towards the type of solution the stakeholders would like to see. We need to look at to what extent the EU can make a useful contribution vis-à-vis the OECD, effective from a tactical perspective. In terms of the Country by Country Reporting and the CCCTB directive, as EU, we must take position in the debate on digital economy, but we must also maintain the rhythm on the other very important proposals on the table.
- 3.1.11 A Member State, supported by several other MSs, replied that there indeed is a problem to which a solution needs to be sought, and supported the global solution. However, the Member States cannot wait ad infinitum, was the position of several Member States. The Member State repeated that we are not trying to attack any specific 3rd country or their businesses; on the contrary, the objective is to establish a more level playing-field. Several Member States agreed that EU collectively should feed into the international debate. Several Member States agreed with the business organisations in that the primary issue is allocation of profits, not tax evasion or tax avoidance. Another Member State considered the issue of digital taxation also a matter of fairness.

Another Member State replied to a professional organisation's question - what is the problem here: the international rules of allocation of profits between countries are not broken but there is a problem. If the fundamental problem is that some countries do not enforce their taxing rights, or they do not have any taxes, the most straight forward solution could be to ask these countries of origin to tax their companies in a proper way, which would at least contribute to a more level playing-field.

Another Member State argued that the international tax rules are actually broken, and stressed that the question is not about tax avoidance. The aim of the debate is not to take away the taxing rights from another country. As international taxing rules are built in the way that the company has to be physically present, in the absence of physical presence the country of the market has no taxing right, and thus the current international rules do not fit the current economic development. So, it is a question of dividing the taxing rights. Another Member State considered the Communication a valuable document because of the data on the importance of the rising of the digital economy. Another Member State felt that regional, short-term reaction by the EU may not help achieve the longer-term solutions that address the fundamental issues of taxing rights and the increasing ability of digitalised business to aggressively avoid paying tax on all its profits.

- 3.1.12 A business organisation asked about the issue of raising revenue: what numbers and what business model are we talking about? An estimate is needed on how many billions have not been paid.
- 3.1.13 A professional organisation agreed with a Member State in that some profits are not taxed because some countries do not tax them. Is the COM talking about the profits always having to be taxed, or just about the right to tax? It has nothing to do with tax avoidance; simply a state giving up its powers.
- 3.1.14 A trade union agreed with a business organisation that the problem and its scope need to be better identified, but it disagreed that there would be any doubt of there being a massive issue. The right way to start is to collect into an EU comparative form the data on the scale of the problem. They agreed with Member States who noted that the issue is about the definition of PE. The union favoured the UN as the forum for the work on the international level, but agreed an EU approach is also needed. CCCTB should integrate some of this discussion; examples of other countries should be examined.
- 3.1.15 As regards the issue on the magnitude of the problem, a Member State mentioned a report on the EU tax revenue losses produced by the EP.
- 3.1.16 OECD was satisfied to note that most members support the work done in the OECD. On the issue of long-term solutions OECD mentioned that the task force on the digital economy is working actively on the challenges mentioned, in particular, on value creation. Substantive conclusions will be unveiled in the interim report to be presented to the G20 finance ministers in April 2018. In terms of short-term solutions, there is no consensus yet.

3.2. Short-term solutions

3.2.2 DG TAXUD presented the document on Short-term solutions, clarifying first certain differences between the long-term vs. short-term solutions. DG TAXUD went on to discuss the question of thresholds: Which companies should be covered? How should the administrative burden be minimised? One way to solve the question of access to information would be the means provided by DAC and Country-by-Country Reporting between tax administrations. Access to information would be one threshold. The 2nd question is a threshold on the minimum activity in the EU. There are three levies, possible to analyse, the 1st one being a simple levy on revenues generated from certain types of activities and services. The 2nd option would be a solution closer to the current approach for the taxation of company profits, which should be credited against corporate income taxes paid or company taxes paid in another MS. Such an equalisation tax with a crediting can only be applied within the EU MS's. The 3rd one is a short-term option; a WHT on payments for digital transactions.

DG TAXUD asked members to focus on whether an intermediary solution is needed while waiting for a long-term solution, and if so, what would be the best option?

3.2.3. A professionals' association suggested using VAT instead of an equalisation tax. They would not recommend a short-term but rather a long-term solution, considering the many positive trends in the CCCTB that could be used in the long term.

3.2.4 A business association felt that the questions raise new questions. It's hard to determine the scope of such a levy that is only meant to raise the effective tax rate to an acceptable level, if there is a lack of understanding of how these companies work. How is the digital presence determined? The association suggested that, as the OECD report giving insight into how business models work will be published in April, this should be incorporated into the OECD work.

3.2.5 A professionals' association supported the business organisation's suggestion on waiting until April.

3.2.6 DG TAXUD objected to the idea of postponing the work until April, reminding that OECD solutions will not just happen, someone has to prepare those solutions, and that EU Member States are also members of the OECD.

3.2.7 A business association admitted that the members have to feed into the answers, but they must understand what the business models are, to come up with sensible answers.

3.2.8 A professionals' association remarked that only Member States are members of the OECD, the rest of the Platform members are not.

- 3.2.9 OECD discussed the concern of many members about the risk that a short-term solution would not disappear when the long-term solutions are agreed on. In the work on business models, OECD has heavily involved businesses, and has done and will continue to do consultations.
- 3.2.10 Replying to a professionals' association's question on the use of VAT instead of an equalisation tax, DG TAXUD replied that VAT had not been among the preferred options due to earlier negative experience with a transitory regime.
- 3.2.11 An academic association deemed that as regards the alternatives, we should focus on what is the purpose of the short-term vs. the long-term, and if the focus of the long-term is more to have a fair allocation of the tax base, one should consider not to have those kind of rules in the short-term solution.
- 3.2.12 A business association saw in the equalisation tax a fundamental problem that it's not meant to be profit-based, so it is outside the system we traditionally know. Looking just at one territory doesn't work as it doesn't create a level playing-field. Another business association mentioned two risks of a turn-over tax: it will be taxed on fixed charges, not on the turnover itself; and, where is it applied? Will there be two types of excises on EU level, one for the traditional level and one on the digital level?
- 3.2.13 DG TAXUD replied that there could be two types of excise levies.
- 3.2.14 A Member State agreed with the business members, pointing out problems in the equalisation tax: it is an infringement of the WTO rules, or it could be, if combined with the credit for corporate taxation, seen as an infringement of the treaties. The Member State suggested that the Commission do an analysis before proceeding.
- 3.2.15 A professionals' association joined the previous speakers, objecting to an equalisation tax, because it would be passed on to the customers and would not be feasible. In regards to with-holding tax on digital transactions, what is referred to by 'certain payments' and 'non-resident providers'?
- 3.2.16 An NGO thinks that an equalisation tax based on turnover seems to be rather similar to proposals for profit splits, as discussed by OECD in Action 10. The key issues are, what rules are used to identify digital companies and what would be the appeal process. In the OECD BEPS action profit-split proposal nature of services, but also turnover were suggested as the allocation keys. The structure of the tax would have (re-)distributional implications between countries.
- 3.2.17 A Member State assured that everything is always feasible but in the end, it is always the customer that pays the tax, although maybe not directly. If you go for short term solutions, you risk never going for a long-term solution. Short-term solutions are being asked by a lot of countries, but this should not be at the expense of the long-term solutions. Mid/Long-term solutions naturally will take over from short-term solutions once they've fully matured.

- 3.2.18 A business organisation responded to this Member State that there is a 3rd reason why short-term solutions could stay longer: revenue created. This is not taxing where value is created but where turnover takes place, and this does not abide by the principles of EU and OECD since years. Another risk is that other countries might regard this as a good idea, and start doing the same but extended to other services and thus reducing taxable income for Member States.
- 3.2.19 A trade union enquired on the equalisation tax: is 'creditable' same as reimbursable? In that case, nothing needs to be paid.
- 3.2.20 A MS commented in relation to short-term measures the question 'who will bear the burden': if the design of a short-term measure is focused on turnover, transactions or services, and that's the immediate point of taxation, this makes the burden likely to end up on the consumers. The MS then replied the question "if the tax is creditable, would the companies not end up paying no tax at all", by claiming that they would not, as there will be no tax on profits against which to credit the proxy tax on turnover services or transactions. However, it is a challenge to identify a proxy and try and make that proxy as close an approximation of a tax on profits as possible. There are significant 3rd countries currently considering significant changes, which may go considerably wider beyond the digital economy. What we start in relation to digital economy, is likely to go wider, and it might be better to not hinder the achievement of long term solutions by expedient interim measures. The MS would like to avoid regional unilateralism, also within EU.
- 3.2.21 DG TAXUD concluded by saying that the discussion here today goes very much in the same direction with the reflections of the Commission, and in assessing the possible short-term solutions, the COM takes into account various angles like the economic incidence of the tax; the potential reactions by other regions of the world; legal feasibility; compatibility with articulation of DTT:s; political feasibility; risk of implementing short-term solutions that may become longer-term solutions; enforcement cost, and by examining the various dimensions, the COM should end up with the best option.

DG TAXUD replied to the question "who is paying the burden": even if the big companies increase their prices, this will still improve the competitive situation. Portraying the situation with a concrete example, it was showed that there is value created, which with physical presence would trigger a taxable profit. CFC rules would not help if the owner is not an EU company. Interest limitation would not help. I.e., we do not have a taxpayer. The long term solution would be to create a level playing field. The short term would be to realise this is the type of transaction that is escaping the rules today. At this point we have to look how we can identify the firms that should be within the scope of the equalisation tax, i.e. those who escape the normal corporate income taxation due to lack of physical presence. So it's a proxy.

We would need to have a threshold expressing the foot-print of users in the tax territory. The equalisation levy or a turnover tax attempts to bring a right of tax to the MS until a real long-term solution is found.

3.3 Long-term solutions

3.3.1 DG TAXUD presented the document on Long-term solutions. Our long-term solution is based on a set of solutions for all firms, transparent entities, corporate tax payers who do business in the digital economy. As the starting point, we have to look at taxing rights: Art. 5, definition of PE in the Model Tax Convention should be adjusted. Regarding the attribution of profits it should be examined how much the TP guidelines must be adjusted to come to a long-term solution. The benefit of the long-term solution which is linked to the existing framework would be the possibilities of dispute resolution. We would have the certainty of being in the framework of the Double Taxation Conventions.

Now for the solution at EU level, the most obvious option is the CCCTB. A 2nd round of discussions of the re-launch of the CCCTB is needed on the technical side of the CCCTB, to enlarge the current factors by the topics intangibles, digital income. We would tackle the problem of a lack of physical presence in the CCCTB system. However, as long as it is not a global solution, the challenge would remain - that there may be digital presence within EU of a non-EU resident company, and whether this could be tackled also by one of the short-term solutions.

3.3.2 A business organisation estimated that what was described is what has to be done. The long-term solution described means that each company will have PE's springing up everywhere they are active, i.e. a new administrative challenge. To solve the problem of profit allocation, one needs to look at the current TP rules and figure out a system which doesn't end up in endless double taxation or tax disputes. Tax revenue will shift from one country to another, and there are technical issues. It would be useful to learn more where the Commission's thinking is; as it is probably further advanced than is reflected in this paper.

As far as the CCCTB is concerned, how do you deal with 3rd countries as there are no treaties in place?

3.3.3 DG TAXUD replied that, without having an answer on exactly what it will be, it is absolutely necessary to create a threshold. Only the taxing rights that we have in the EU go to the formulary apportionment consolidation if a group company is within the CCCTB scope.

3.3.4 An academic association commented on the last remark by bringing into focus situations where a EU company from one country pays taxes in a 3rd country, but doesn't pay any taxes in EU, as under the formulary apportionment they have a 0 income. Regarding the question on how to measure digital presence, the association suggested a case study, to test it on a number of real firms, as a bench-mark.

- 3.3.5 DG TAXUD considered this an interesting idea, also in a more general context. It could be useful particularly at the stage where the discussions on the content of the CCCTB will be more advanced, and likely also in the discussions on the apportionment key.
- 3.3.6 A business organisation had negative experience of administrating hundreds of PE's, and doubted the usefulness of enlarged concept of PE due to the work-load entailed for a globally operating company, even more so since BEPS action point 7. How do you technically define virtual PE? The other problem is the profit attribution. The two work streams of creating PEs, and attributing profits, do not seem to fit together any more, and the organisation fears that creating a virtual PE would add to this disconnection.
- 3.3.7 DG TAXUD replied that the Commission certainly agrees that the two should go hand in hand. One should with an open mind assess how value is created currently and whether that still fits the current TP practices or not.
- 3.3.8 An NGO expressed their view that if CCCTB is introduced, it will be for all companies, and there is likely to be many difficulties relating to PE and other issues arising from that, not just related to digital firms. As regards the profit allocation, if firms are able to adjust their numbers of employees and perhaps other expenditures to minimize tax that could be an issue in allocating profits.
- 3.3.9 A business association recalled that BEPS Action 1 used the notion 'significant digital presence', asking what 'significant' means. If the COM goes in that direction, considering the number of contracts, there will be a kind of hybrid taxation which is based on consumers more than on profits, so is it clear how to relate it to the existing rules in the double taxation treaties?
- 3.3.10 DG TAXUD replied: We can only confirm. The taxing right only derives from concluded Double Tax Convention so the Art. 5 would need to be extended to ensure that the definition of PE covers the digital presence. Art 7.1 is a general principle; you have also national rules. From this starting point we do not have to find the last, ideal outcome of each possible business model as it is sufficient to find a principle which all can agree on, to ensure proper taxation for a new digital service business model.
- 3.3.11 A trade union pointed out that in business from consumer to consumer (collaborative platforms), it is even more difficult to see what profit is made by these organisations.
- 3.3.12 An academic association urged to think what is the alternative to attempts to measure digital presence; the alternative seems to be a kind of with-holding tax, which seems to be broader and less precise, so it seems a worse alternative.
- 3.3.13 DG TAXUD agreed with both last comments. Today marks the beginning of the discussion with the stakeholders, not the end. Commission is preparing a public consultation in the coming weeks, encouraging all

members to participate. We need to look at these issues urgently, and we prefer an international solution. Our work here is also intended to be in preparation of our contribution into the global discussion. The international discussion does not just happen somewhere else, we want to play our full role in this discussion as we believe we have our interests to defend in the global discussion. This work is also well pursued in the Council.

4. SPILL-OVER EFFECTS OF TAX POLICY MEASURES ON DEVELOPING COUNTRIES

- 4.1.1 DG TAXUD presented the issue that the Platform has discussed before. At the last meeting we presented the idea of the toolbox of principles that Member States could take into account when negotiating with developing countries. Based on very interesting discussion with members and the input after the meeting, we have revised the document.

Three new elements have been introduced. The 1st element is the overall relevance that BEPS action plan has to the issues that can affect the developing countries while negotiating DTA's. Secondly, as BEPS is an on-going process, we are only measuring the first results of the process, and this is even more true for developing countries. In some cases we still have no statistics, but in general, there is a risk that some developing countries may be out of reach of the BEPS process, as some of them are neither members of the inclusive framework on BEPS nor signatory of the MLI to implement BEPS actions.

The 2nd element in the revised toolbox is the commitments that Member States have taken at international and EU level to revise in a more developing-countries-friendly way their tax policies, in particular when negotiating DTA's. The 3rd element is two questions that we have included in the document, for consideration of the Member States.

- 4.1.2 An NGO recommended that the toolbox should go beyond the tax treaties to include all aspects. The process should be transparent and inclusive, embracing all the stakeholders. There are also positive spill-overs.
- 4.1.3 DG TAXUD commented on the last point: we do not wish to give the impression that DTA's are a bad thing, on the contrary. It is just that in concluding DTA's one should take into account the specific situation of the developing countries.
- 4.1.4 An NGO suggested that, as Member States have made commitments to address some of the issues regarding tax policies affecting developing countries, it would be useful to see how the anti-abuse clauses are working in practice. The organisation encouraged all Member States to publish every year data on how often the anti-abuse clause in the tax treaty with each developing country has been applied.
- 4.1.5 DG TAXUD considered this an interesting suggestion.
- 4.1.6 A Member State asked the NGO whether it would see it as progress if anti-abuse clauses are applied more often or less often. As the objective for the

anti-abuse clauses also is to avoid that firms implement certain structures, then the anti-abuse provision will not be applied obviously.

- 4.1.7 The NGO replied that if on the one hand you have the information on the FDI positions on interests and dividend flows, and on the other hand you have the info on how often anti-abuse clauses in tax treaties are being applied, together that would give a good picture of the progress made.
- 4.1.8 DG TAXUD asked the OECD to say a few words on how the implementation of the MLI is being monitored in general.
- 4.1.9 OECD replied that it is too early; the MLI is still in the process of being ratified. It is probably in the course of 2018 that working party 1 will start setting up a review process to follow-up and monitor how the MLI is impacting the existing treaties.
- 4.1.10 DG TAXUD commented that, having seen the work that has been done on the transparency by the Global Forum, this should be a powerful tool of following up the commitments that are taken by the Member States.
- 4.1.11 A Member State reminded the NGO, which suggested having a monitoring of the use of the anti-abuse provision, that first the MS's have to ensure that there is a treaty and that the anti-abuse provision is in there.
- 4.1.12 An academic association wondered, regarding the capital gains, whether what is suggested here, intends to enable the source country to tax the share-holder level more extensively than is currently the case.
- 4.1.13 An NGO made a remark concerning the terminology that had been used in the document; it is not so much about granting taxing rights but it is about agreeing on who has the taxing rights.
- 4.1.14 DG TAXUD confirmed that it is indeed about assigning taxing rights rather than granting taxing rights. That being said, the Double Taxation Agreements also play a role in actually enforcing the taxing rights that one has.
- 4.1.15 An NGO pointed out that it should be stressed in the toolbox that the provisions of the tax treaty do not always have to be symmetric, and this can be helpful for the developing countries.
- 4.1.16 DG TAXUD replied to the academic association: The Commission is not suggesting a shift of the tax burden from one activity to another, but recommends to include a wider number of transactions in DTA's that can generate capital gains, i.e., suggesting widening of the tax base. As concerns asymmetries, the Commission is referring to economic asymmetries. DG TAXUD added that there are plenty of examples of asymmetry also in tax treaties between developed countries.

DG TAXUD is going to publish the results of our work, but also wishes to continue the discussion and do more in terms of sharing experiences with MS's. One of the tools at its disposal for this is the Fiscalis program.

5. OUTCOME OF THE STAKEHOLDERS' CONSULTATION ON WHISTLE-BLOWERS IN THE AREA OF TAXATION

- 5.1.1 The last item on today's agenda was an item that the Platform had discussed before, and where the Services of DG TAXUD consulted the Platform to gather input for the work that they are doing in the area of the protection of whistle-blowers. On a previous occasion DG TAXUD reported on the fact that it would be undertaking a targeted consultation on the protection of whistle-blowers in the sphere of taxation and to this effect, circulated a questionnaire to all Platform members at the last meeting. At this meeting, some observations on the outcome of this consultation were presented to the members.
-