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## **SUMMARY RECORD OF THE 2<sup>nd</sup> MEETING OF THE PLATFORM FOR TAX GOOD GOVERNANCE**

**held in Brussels on 16 October 2013**

### **1. OPENING**

- 1.1. The meeting was chaired by Director-General Mr Zourek.
- 1.2. The Chair recalled that the members of organisations are not speaking in a personal capacity but as a representative of their organisation. He also reminded everyone that interventions may be quoted in substance but must not be attributed to individual members ("Chatham House Rules").

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

- 2.1. The Agenda was adopted without observation at the beginning of the meeting.

### **3. SUMMARY RECORD OF THE 10 JUNE 2013 PLATFORM MEETING**

- 3.1. The Chair asked for comments. Some members asked whether the "Chatham House Rules"(cf point 1.2) were applied only in the Platform or in other EC expert groups as well. According to them, these rules are not good for transparency of the debates and for accountability towards their members and do not fit the Platform whose members represent their organisation (not individuals). 2 members expressed reservations towards the Chatham house rule. They also expressed concern about an over representation of business amongst platform members and stated that Commissioner Šemeta conceded in a meeting with trade unions that there might be a revision of the composition of the Platform after its first 2 meetings.
- 3.2. The Chair explained that the "Chatham House Rules" had been agreed when adopting the Rules of Procedure in the first meeting to allow for an open debate. The Chair stated it was possible to come back to this decision if the Platform so decided and asked if anyone else was interested. No other member shared the same concern.
- 3.3. On the composition, the Chair explained that the Commission had received many more applications from business than from NGOs and the eligibility criteria had not been met by some trade union applicants. The Chair also reminded that the aim of

the Platform is to receive information from organisations operating across countries. For transparency reasons, the names of the organisations not selected have been published on a reserve list. The Chair stated there will indeed be a review of the composition, but that does not automatically imply a change in composition.

#### **4. RECENT INTERNATIONAL DEVELOPMENTS – BEPS**

- 4.1. The Chair mentioned the OECD Action Plan on Base Erosion and Profit Shifting. The endorsement by the G20 in St Petersburg is an important milestone. It would be interesting to debate on these developments since some BEPS elements are relevant for the Platform work as well.
- 4.2. The Commission mentioned that the OECD agenda is very ambitious with first results already next summer and involving a wide group of countries including all G20. The Commission will assist at promoting coordination at EU level, especially on issues relevant for the EU (e.g. hybrids). Closely related is also the work on developing a global standard on automatic exchange of information. With its recent legislative proposal the Commission aimed to put some elements into Union law that are likely to be introduced at global level. The Commission aims to have it fully adopted by summer 2014.
- 4.3. Concerning the OECD project, a member argued that this process is, in his opinion, pushed by the G20 in which many EU Member States are only represented by the Commission and that, on Country by Country Reporting (CBCR) the outcome should be coherent with our EU rules to avoid the need for businesses to comply with multiple standards. The Chair explained that the Commission coordinates MS views in order to represent EU interests correctly in the G20. The Commission welcomes input from the Platform on these subjects. The OECD will go on with its work with or without the Platform. The Platform has been set up in order to feed the EC with a maximum of information obtained on the basis of a debate and is not a decision-making body. On the question of single global reporting template, the Chair said it was not in a position to reply. The EC is always supporting the decrease of the number of administrative tasks. We want to see where there are opportunities to simplify and welcome Platform member's input.

#### **5. WORK PROGRAM**

- 5.1 The members welcomed the Work Program and made some suggestions. A member said that the Work Program should leave room to discuss the fact that tax avoidance is a unilateral view, and that the Platform should define which tax regime is acceptable and which not. The member gave the example of Mexico, where some EU Member States are listed as tax havens.

Other members would like to debate earlier over the Tax Payer's Code and issues related to transparency/CBCR (debate scheduled for 2015).

- 5.2 For the Chair the first point is closely linked to the agenda of today. On Tax Payer's Code and transparency, the Chair stressed that it was difficult to put everything as a priority on the first meeting, but he agreed to start the debate on these topics at the next meeting in February 2014. The Work Program was agreed by all participants.

#### **6. REMAINING CASES OF DOUBLE TAXATION - ARBITRATION**

- 6.1 The Chair gave a short introduction.
- 6.2 The Commission explained that it had for some time been looking at Double Taxation issues. One aspect identified, is the (lack of) coherence between Double Tax Conventions (DTC). The OECD has recognised the problem and revised its own model treaty in accordance. The OECD has also proposed arbitration. DTC need bilateral agreement, but very little progress has been made on arbitration. The BEPS work risks putting even more pressure on DTCs. How far should we go in trying to solve these issues? Arbitration is a possibility, but only 12 DTC between our MS provide arbitration clauses. We have the Arbitration Convention on Transfer Pricing, could we have the same kind of arrangement for DTC? The Commission reminded at the meeting that it is difficult to reach an agreement on binding legislation in Direct Taxation matters. The Chair asked the members what would be the right way to solve DTC issues between alternatives ranging from doing nothing to a binding legislation on arbitration.
- 6.3 One member stated that the fact that there are few cases leading to Mutual Agreement Procedures (MAP) does not mean double taxation is not a real problem. Permanent establishment, tax credits, interest deductibility limitations, allocation of common costs are but a few examples, and with BEPS the problem will be growing even more. This issue must not lead to a debate between business and NGOs, but to a lively debate with MS. There is an arbitration clause between Germany and Austria. That has never been used but is a strong incentive for MS to reach agreement. Arbitration is rarely used, because MS do not want to transfer their authority over Direct Tax to another body. Some non- MS members argued in favour of an arbitration mechanism; it was also suggested that this could be an opportunity to review DTC with developing countries. Several MS argued that that re-negotiating DTC would be burdensome. One non-MS member stressed re-negotiating would be particularly burdensome and costly for developing countries.
- 6.4 Another member stated that actions 14 and 15 in OECD action plan (in the context of the BEPS project) had a focus group to improve the mutual agreement procedure and reach an agreement on an arbitration clause. These actions which have a deadline set in September 2015 (action 14), and December 2015 (action 15) should be discussed by the Platform and the EU should actively participate in this focus group to ensure a wider application than just in the EU. Several participants considered it wiser to discuss this matter at OECD level where a global solution can be found. On the contrary, several other participants held that this being dealt with at OECD level does not mean we should not seek a quicker solution at EU level, also because EU context and the single market have their own peculiarities requiring specific action. Organisations were generally in favour of an EU solution through legislation, while MS generally preferred an OECD solution. Several MS, though, mentioned that they were in favour of arbitration and had already included art 25§5 of the OECD model (arbitration clause) in their own DTC. It was mentioned that actions 14 and 15 of the BEPS action plan refer to anti-abuse measures and an arbitration clause ("baseball arbitration"). Other MS mentioned the burdensome procedure to renegotiate tax treaties.
- 6.5 Some members noted that quantitatively, the majority of the disputes in DTC are in fact related to Transfer Pricing for which arbitration rules already exist. The disputes not related to Transfer Pricing are relevant but are generally solved

quickly and do not justify an arbitration clause. One member proposed to provide data on disputes in DTC (examples of double taxation).

- 6.6 One member raised the issue that since DTCs are negotiated at MS level, a binding arbitration clause would in fact mean that EU legislation supersedes treaties negotiated at MS level.
- 6.7 The Commission reminded that in the Public consultation, the remedies presently foreseen in DTC were deemed costly, cumbersome and time consuming. If arbitration is considered as an answer, is there a model of arbitration the Platform would consider as good? Who would be part of the arbitration system? Who would bear the cost? Would MS admit this arbitration? And is Double Taxation a problem serious enough that we need an appropriate solution inside the EU prior to a global one?
- 6.8 It was mentioned that in existing arbitration procedures, companies often tend to accept the answer received even if not satisfactory because the procedures are long, and very often, the person who had initiated the procedure is gone, or the cost is deemed too high. According to another member, the statistics on OECD website show that the number of cases has increased but the average duration of the procedures has decreased.
- 6.9 Some members questioned the fact that the Platform discussed issues such as Double Taxation that were not directly related to Good Governance and Double non Taxation. In response, the Chair read article 3 of the Commission Decision creating the platform, in which Double Taxation is explicitly mentioned.
- 6.10 The Chair invited all members to submit written comments, data and statistics on the occurrence of double taxation and arbitration.

## **7. RECOMMENDATION REGARDING MEASURES INTENDED TO ENCOURAGE THIRD COUNTRIES TO APPLY MINIMUM STANDARDS OF GOOD GOVERNANCE IN TAX MATTERS.**

- 7.1 The Chair stated that one of the main reasons for setting up this Platform was to monitor the application of the two Recommendations of 6 December 2012. A growing interest in the public led to this Recommendation which was generally well received. This is not a binding tool for the MS. The Council conclusions of 22 May 2013 confirmed Member States interest to promote the EU good governance principles towards third countries.
- 7.2 The Commission mentioned that this Recommendation is a reaction to a clear request for action from the Council. The goal is twofold: the EU has to speak with one voice towards third countries and it should promote standards already accepted within the EU towards third countries. Given the sensitivities about any binding instrument, the Commission has chosen a Recommendation. It is not a crusade against business, it is about tax havens and companies which use them. It promotes EU good practices on two points:
  - Transparency and Exchange Of Information;
  - Harmful Tax Practices.

The Commission recommends MS to assess third countries' commitment to complying with these minimum standards of good governance in tax matters. The

document distributed raises a series of questions on the Recommendation and how it can be applied:

1. Questions concerning the criteria (questions 1 to 3);
  2. Questions concerning EU internal vs. external standards (questions 4 to 5);
  3. Questions aiming at improving consistency (questions 6 to 10).
- 7.3 Some members raised the question of the definition of "Aggressive Tax Planning" and of "Tax Havens". If a jurisdiction introduced arrangements to make it more attractive through tax incentives, the company reorganisation aimed at using these new arrangements might be considered as Aggressive Tax Planning by another country. Work has to be done inside the EU: is tax competition acceptable, what is Aggressive Tax Planning? Also, for some countries, their tax system is their only competitive advantage. There are different approaches inside the EU and it would be helpful to get an agreement on common criteria. One participant wondered whether the fact that a regime is not challenged under the Code of Conduct means it is acceptable for all MS. Some members strongly advocated raising the bar towards automatic exchange of information. It was mentioned that cuts in Tax Administrations staffing may hamper efficient ways to collect or use information. Some members made a point about building on progress and encouraging jurisdictions to exchange information automatically before considering any use of sanctions to ensure the broadest range of jurisdictions come on board.
- 7.4 The Chair explained that the Recommendation was addressed to MS to ensure a common position inside EU towards third countries. The term "Aggressive Tax Planning" is used to have a terminology to discuss and reach agreement at political level. Once there is political agreement, we can turn to regulatory and be more precise. Staffing of Tax Administrations is part of the European Semester, but is out of the scope of the Platform
- 7.5 Several members warmly supported the Recommendation and decisive action against Tax Havens arguing that such action should be binding for MS (Directive/European Semester) and that sanctions should target users of "tax havens" rather than "tax havens" themselves. Users of "tax havens" should not be supported with public money and should not be awarded public contracts. The Platform should also look at MS who could be considered as "tax havens" themselves.
- 7.6 Several members supported a single EU blacklist which would be more efficient than national ones. As several MS already have a blacklist, their experience could be used to manage this single blacklist. The Chair replied that we do not envisage a single EU blacklist because there is strong refusal against such a list. The Commission wants to coordinate the assessments made by the MS to ensure consistency. The Code of Conduct gives very precise criteria, but it is a minimum standard. If there is a regime not deemed harmful by the Code, it does not mean that some MS might not consider it harmful. Applying the Code criteria might be difficult for some third countries. Aid must be given to those who need it.
- 7.7 It was stated that the criterion of exchange of information was a systemic criterion that is relatively easy to identify. On the contrary, harmful tax practices are often "hidden" inside a tax system and much more difficult to detect. It was also stated that as long as the Recommendation only asks for a minimum requirement, there is no reason to give an incentive on jurisdictions to comply with it. One member also

raised the question of very low tax rates: where is the limit between what is acceptable or not? And about the ring fencing criteria, one member raised the question if all the country would be considered as a Tax Haven in situations where only a region applies the harmful practice.

- 7.8 The Chair concluded that the debate has given sufficient food for thoughts. The Commission will consider all contributions and come back to the Platform with suggestions for further work.

## **8. CONCLUSIONS**

- 8.1 The Chair thanked all members for this constructive session. For the next meeting the Recommendation on Aggressive Tax Planning will be tabled, including a clarification on various terms and expressions. Also, the Tax Payer's Code and transparency (CBCR) will be tabled for initial discussion. The Chair once again invited members to submit written comments and input, especially on Arbitration concerning quantified data on the consequences for business of double taxation. The next meeting has provisionally been scheduled for 6 February 2014.