



Brussels,
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SUMMARY RECORD OF THE 5th MEETING OF THE PLATFORM FOR TAX GOOD GOVERNANCE

held in Brussels on 19 December 2014

1. OPENING

- 1.1. The meeting was chaired by Director-General Mr Zourek.
- 1.2. The Chair informed members that 2 meetings should take place before summer break. Subject to meeting room availability, dates should be February/March and May 2015.

2. ADOPTION OF THE AGENDA

- 2.1. A non-MS member asked whether the tax aspects of the Commission Work Program for 2015 would be discussed in the Platform, and what was the Commission's reaction to the 'Lux leaks' issue. With other non-MS members, he referred to a letter by NGOs to the Commissioner, requesting the exclusion of a member organisation's representative and another organisation's alternate on the grounds of an alleged conflict of interests since these two persons are associated with so-called "Big 4" companies involved in the Lux Leaks.
- 2.2. The Chair replied that it would update the Platform on the Commission's priorities under point 2 of the agenda. He explained that the main objective of the Platform for 2015 was to focus on the follow-up of the two recommendations of 2012, and on the report that has to be produced, before considering further issues. On the letter sent by NGOs, the Chair explained that the Commission rules on conflict of interests apply only to experts nominated in their personal capacity, which is not currently the case in the Platform on Tax Good Governance. In the Platform, the representatives and their alternates speak on behalf of the organisation they represent, not on their own behalf, nor on behalf of firms they may be associated to. Moreover, the Commission needs the input of the Platform for its report and the broader the range of opinion expressed the better. The Chair agreed to circulate the NGO's letter and the answer from the Commission with the summary record of this meeting.
- 2.3. A member asked for the timetable of the Commission report¹ on the application of the two Recommendations of 6 December 2012. The Commission explained that

¹ COM(2012) 722 point 9 p7

since the input of the group will be used in policy shaping, the process needed to be speeded up; there won't be any interim report since the priority is to have the Communication² ready before the 2015 summer break.

- 2.4. The Agenda was adopted at the beginning of the meeting without any further comments from the delegates.

3. SUMMARY RECORD OF THE 10 JUNE 2014 PLATFORM MEETING

- 3.1. The summary record had been agreed through written procedure following comments received.

4. BEPS UPDATE (POINT 2 OF THE AGENDA)

- 4.1 The Chair introduced and welcomed the new Director for direct taxation, and updated members on recent developments in direct taxes:

- ✓ The Commission currently intends to propose a directive on automatic exchange of information on trans-border tax rulings between Member states by March 2015.
- ✓ Before the Summer the Commission plans a Communication on a renewed approach for corporate taxation in the Single Market which will include plans for reviving the debate on the CCCTB.

- 4.2 One non-MS member stated that the CCCTB was THE simple solution on transparency and questioned the work on rulings because there is no such thing as a black/white situation in tax area. The Chair confirmed that the Commission had decided to have such a dual approach.

- 4.3 A short update of the OECD BEPS state of play was also provided by Commission: out of the 15 BEPS actions, 7 have already been endorsed by G20 in November 2014. The Chair reminded members that all relevant information on this topic is available on the OECD website (<http://www.oecd.org/ctp/beps.htm>). The Commission Expert Group on Digital Economy issued its report on 28 May 2014 (related to BEPS Action 1), the Code of Conduct group is working on hybrids and on patent box issues, and the provisions on Limitation Of Benefit (LOB) have to be in line with EU rules. The CCCTB discussion is currently focused on BEPS related issues. There is convergence between the agendas of the 3 main EU institutions:

- ✓ Commission: will continue following-up the 2012 action plan and working on tax rulings, having in mind the need to find the right balance between fair tax competition and a necessary convergence to close loopholes in the EU;
- ✓ COUNCIL is very committed thanks to the Italian Presidency;
- ✓ PARLIAMENT: strong willingness to contribute to the debate.

- 4.4 Platform members asked several questions: whether EU would parallel the OECD work on BEPS or feed it up or the definition of a ruling, whether a tax agreement at

² Communication on a renewed approach for corporate taxation in the Single Market in the light of global developments - Initiative 14 Annex I to the Commission Work program 2015

the end of a tax audit could be qualified as a tax ruling. According to a member, the BEPS project will lead to an increase of tax disputes between countries; the CCCTB is the good solution. The question of the involvement of developing countries in the BEPS process was raised, topics like the taxation of extracting industries (very important for many developing countries) is not in the BEPS action plan. It was recalled that OECD was evaluating the cost of tax avoidance, and that the results – expected to be available in 2015 - could usefully be shared in the Platform.

- 4.5 The Commission answered to these questions as follows. The OECD and the EU are working in close relation and many MS are present in the BEPS discussions. On some topics, the EU is in advance and the OECD benefits from our work; in other cases the OECD is further advanced. Consistency and EU law compatibility needs to be ensured. The Global Standard on Automatic Exchange of Information has been included in EU law. On exchange of information on rulings for instance, EU is in advance as compared to the OECD because the EU is a political body of 28 MS having its own needs. For the EU a protective and defensive agenda is not sufficient, we need an integrating agenda in order to develop our internal market and preserve the four fundamental freedoms. The CCCTB is a good example of this approach. Concerning developing countries, DG International Cooperation and Development is closely associated to the EU work on tax matters and the OECD has involved developing countries in discussions (14 developing countries volunteered), notably through the Task Force on tax and development. On the definition of a tax ruling, the Chair indicated that this would be discussed during the preparation of the Directive.

5. ORAL REPORT BY THE CHAIR TO THE MEMBERS ON THE REPLY OF THE CODE OF CONDUCT GROUP (POINT 3 OF THE AGENDA)

- 5.1. The Chair informed members that in response to the letter he wrote to the Chair of the Code of Conduct Group, the Group finally decided on its meeting on 22 October that, due to its current workload, it would not be able to extend its work on third countries as suggested by the Platform.

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

- 6.1. The Commission introduced the discussion on Recommendation C(2012)8805. It explained that their analysis shows a consistency problem : if MS using the same criteria have different lists, this shows that the way the criteria are applied is also an issue. There are issues on transparency and updating of the lists. Members were asked to share their experience of the efficiency of a blacklist approach.
- 6.2. On **criteria**, different views were expressed: **transparency and exchange of information** (TEOI) is the clearest criterion for a blacklist; this criterion is more transparent than other criteria deemed to be more judgmental; a MS insisted on the need for a positive, encouraging approach building on TEOI to ensure jurisdictions are transparent; another member added that in a TEOI approach attention must also be paid to developing countries, since the absence of a Double Taxation Convention should not lead automatically to the blacklisting of this jurisdiction. A MS explained that the assessment of **harmful tax measures** is very onerous in terms of workload, especially for a small MS, while for another member it is an important criterion but a general stance is needed on criteria. **On the tax level**, it

was mentioned that the nominal tax rate does not always reflect what tax payers really pay, a high nominal tax rate does not necessarily mean a high tax level, because if the tax base is narrow the tax level could be lower than with a lower nominal tax rate associated to a broad tax base, we should therefore work both on the tax base and the tax level. There is agreement in the Code of Conduct Group not to look at standard tax rates for EU MS, so it should not be considered as a valid criterion 3rd countries either. Attention should be focused on effective tax rates, which is the new approach in the OECD. On the **assessment of countries against the criteria**, several members mentioned the cost of operating blacklists, especially for small countries, and suggested it would be helpful if objective information was available somewhere, like the Global Forum evaluation for transparency criterion for instance. The Commission discussion paper based on replies received from MS was in this respect a useful piece of work.

- 6.3. On the usefulness of blacklisting processes, it was stated that some blacklisted jurisdictions had offered to discuss a tax agreement in order to be removed from the blacklist; experience shows that blacklisting can be efficient if it combines publicity and sanctions; a non-MS member stressed that concerning the harmful tax competition criterion, no MS said it is a bad criterion, only that it was difficult to apply in practice, this is why the Platform should recommend to provide resource to assess this criterion. The Commission explained that a jurisdiction blacklisted by some MS (Mauritius) had asked the Commission to assess its tax regimes in order to consider possibility of removing the harmful features
- 6.4. There was no objection to the Commission proposal to compare the various lists from MS and to publish a consolidated version on the Platform website . MS were asked to send proposed amendments to the present version of the listings by 15 January 2015. Some members insisted on the need to put in place a strong procedure to ensure that, should a MS update its blacklist, the Commission would be informed in due time. The Chair also invited any MS who would update its list to inform the others so that they could decide if they wanted to follow suite.
- 6.5. The Commission concluded that:
 - The transparency and exchange of information criterion is obviously a good one;
 - The harmful tax competition criterion is useful, and it is used by the Code of Conduct group in the discussions with Switzerland and Lichtenstein, but it requires resources to be assessed.
 - The practicability of the tax level criterion which is used by 8 MS needs to be further reflected upon.
 - On differences in assessments between MS for the same criterion, further reflection is required to find out ways to improve.
 - On transparency of lists, after final comments from MS, the Commission will publish a consolidated list.
 - The Chair asked MS to inform other MS of updates of their blacklists.

- Further work of the Platform could be linked to the Commission strategy for 2015.

7. RECOMMENDATION ON AGGRESSIVE TAX PLANNING

- 7.1. The Chair introduced the follow-up of the questionnaire on MS GAARs (Commission Recommendation on Aggressive Tax Planning). It also underlined the positive evolution at EU level with the recent adoption of the anti-abuse rule in the Parent-Subsidiary directive that should be followed soon by the adoption of the anti-abuse rule in the interests and royalties' directive.

The Chair explained that the Commission paper exposes issues arising after examining MS answers to the questionnaire. It is encouraging to see confirmed that most MS have a GAAR, or are in the process of introducing one. At present, 4 MS currently do not have a GAAR (yet). The Chair further commented that several MS having a GAAR had expressed in their replies some form of concern over the GAAR recommended by the Commission, such as a lack of certainty as to how the GAAR would apply in individual cases and a risk over a difference in interpretation by tax administrations. The Chair invited the Platform to discuss how such concerns could be addressed, for example by agreeing on common guidance.

- 7.2. Several opinions were expressed, namely that the Commission's approach to tackle anti abuse rules should receive full support although it is important to leave some flexibility to MS; that having in mind the need for MS to comply with EU law in their domestic law , the advantage of the EU GAAR was that it took ECJ Law into account; that tax avoidance is harmful to the internal market because it distorts competition; that a GAAR should keep the possibility for the taxpayer to demonstrate the valid reasons of an arrangement; that some guidance is needed on the application of a GAAR. There should be a reflection whether an EU-wide system is required, or if it is sufficient to inspire national legislations. Other issues raised: is a set of several layers of anti-abuse rule compatible with an efficient internal market; tax issues should not damage the internal market, the aim must be clear rules but with enough flexibility to address abuses, find the right balance; if there are anti-abuse rules in CCCTB, Parent Subsidiary directive, interests and royalties and a GAAR on top of that, this could create uncertainty and be difficult to apply. A MS explained that it did not need a GAAR because it had a consistent jurisprudence on anti-avoidance, and that whilst it was not really satisfied with the anti-abuse rule of the Parent-Subsidiary directive, for the sake of legal certainty the anti-abuse rule in the interests and royalties' directive should not differ much. .
- 7.3. On request of one member, 2 MS (FR and ES) explained the functioning of their advisory board on GAAR issues: in FR it is activated in case of disagreement between the tax payer and the Administration, while in ES, it gives an ex ante opinion on whether or not the GAAR should be activated.
- 7.4. The Commission stated that the debate today shows that consistency is an important issue between the different layers of anti-abuse rules in the EU. The objective should be to have a minimum GAAR and level of protection across the 28 MS.
- 7.5. The Commission concluded that:

- The information sent by MS and the exchanges on this topics in the Platform have been really useful.
- MS not intending to amend their GAAR consider their domestic GAAR or equivalent provision that they currently have works well and/or is very similar in effect to the GAAR proposed in the Commission Recommendation.
- Since December 2012, there has been a new major development: the agreement on the Anti-Abuse Rule (AAR) for the Parent-Subsidiary Directive (PSD) which has showed a new convergence in Anti-Abuse Rule matters between MS.
- Therefore, the follow-up of the recommended GAAR has to be seen in the light of the agreement on the PSD AAR and as a minimum level of protection that should be adopted by all MS.
- The question of the several layers of legislation will find a solution: we will have AAR in the PSD and Interest and Royalties Directive plus a common minimum GAAR that will cover cases uncovered by these 2 Directives.

8. DISCUSSION ON THE RUDING PAPER

- 8.1. On specific request from ICC, the Platform secretariat has circulated a paper by Onno Ruding for discussion under any other business. This paper advocates the fact that a wide spread of corporate tax rates and corporate tax basis have no place in an economically highly integrated area such as the EU. The author's view is that, should the adoption of the CCCTB fail because of the unanimity requirement in direct tax matters, a first step should be a CCCTB for a limited number of Member States (minimum 9) in line with the procedure for enhanced cooperation laid down in the TFEU. According to the author, the underlying source of the tax evasion issue is those differences in national tax systems.
- 8.2. During the discussion that followed, several members advocated the need for a CCCTB as in the current proposal, although some of them stated that it should be mandatory (optional under current proposal); CCCTB is an opportunity both for businesses and MS: when a business wants to create a new activity it will often go to a country where he is already present, because it's easier since he knows the system; CCCTB allows a unified CIT base throughout Europe which will help developing business; EU must be strong vis-à-vis external world and not fight amongst MS. On the harmonisation of tax rates, some members advocated the need for tax competition, while others asked for a minimum level of corporate tax (no consensus emerged on tax rates).
- 8.3. The Chair concluded that this was a very interesting debate; we might come back on this during our next meetings.

9. CONCLUSIONS AND NEXT STEPS

- The Chair thanked all members for the constructive session, which gives perspective for future work.

- At the next meeting a suggested presentation by NGOs on a country case study would be welcome.
- MS are invited to submit their remarks on the documents by 15 January 2015. The secretariat will then publish them along with the summary record on the Platform website.

The Platform secretariat will:

- Issue a summary record of the meeting that will be circulated to members and put on the Platform website once approved.
 - Inform members of the dates of the next 2 meetings scheduled before summer break, as soon as the availability of meeting rooms is confirmed.
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