



Brussels,
TAXUD/D1/AC/equ (2016)

SUMMARY RECORD OF THE 9th MEETING OF THE PLATFORM FOR TAX GOOD GOVERNANCE

held in Brussels on 15 March 2016

1. OPENING

- 1.1. The meeting was chaired by Valère Moutarlier. This was the last meeting of the Platform with the current membership. A call for applications has been launched several months ago and the selection process is on-going. The Chair underlined the quality and quantity of work done by the Platform during almost 3 years; it has contributed to the EC tabling solidly grounded proposals.
- 1.2. The Chair congratulated the Dutch Presidency for the political agreement on the amendment to the Directive on Administrative Cooperation relating to Country By Country Reporting (CBCR) between Tax Administrations.

2. ADOPTION OF THE AGENDA

- 2.1. The Chair presented the agenda of the day.
- 2.2. A non-Member State (MS) member proposed to present a document on the Anti-Tax Avoidance Package (ATAP) under agenda point 6 "Any other business". The Chair accepted this point under AOB but considered that no further discussion was needed on this topic, as it is now within the hands of the Council.

3. DISCUSSION ON THE EXTERNAL STRATEGY

- 3.1 The Chair introduced the topic and highlighted the significant impact the Platform (PF) has had on the definition of the External Strategy. He also explained that a first discussion took place in the Council in February and many issues raised in the external strategy have been welcomed by Member States (MS) as relevant points. DG DEVCO will be associated through the "Collect More Spend Better" strategy presented in Addis Ababa. The Chair welcomes that the work will be done in full partnership and transparency with the Council. In this regard, the Council recently concluded that a Code of Conduct sub-group will be dedicated to relations with third countries. The Chair insisted that this does not mean there would be no further input from the PF: it can still contribute to the methodology. On the process of identifying third countries to be prioritised for assessment of their compliance with tax good governance standards (on the basis of a scoreboard of indicators prepared by Commission services), it is up to MS to decide in the Council. In parallel, the interactive map on jurisdictions listed by MS will be updated once a year; in this

regard, the Chair thanks MS for their timely contributions to the January 2016 update.

3.2 The Commission (COM) then outlined the main elements of the External Strategy as well as the follow-up actions to be undertaken, including in which forum such actions should be discussed.

3.3 With regard to updating the tax good governance clauses included in international agreements (such as trade agreements or association agreements), it explained the revised clause should reflect both the changes in global standards of tax good governance over the last 5 years, and the outcome of BEPS. COM will propose texts to the Council before summer break in order to reach an agreement by the end of the year on new texts that will become standard for new agreements. As explained in the External Strategy, it is also necessary to ensure that this clause will present a degree of flexibility to allow for an adaptation to the situation of the third country concerned. The last aspect of the Strategy relates to the update of the Financial Regulation in order to reflect the good governance standards in the management of financial instruments. COM explained that the internal consultation process has already started and that good progress has already been achieved; a Commission proposal will be submitted to the Council and EP by mid-2016. There is strong pressure inside and outside the EU for COM to progress on the external strategy and COM has received a number of favourable reactions from 3rd countries: clarity and consistency make it easier for them to comply with standards. COM also stated that the Platform was in charge of launching reflection on the impact of tax policies and tax treaties on developing countries, and also how we can best promote an inclusive approach for developing countries in international tax good governance. On the listing process, the plan is to replace the national listing processes – and the pan-EU list – with a common EU list through a three-step process, which is clearly outlined in the Strategy; the recent Council conclusions foresee a Code of Conduct sub-group dedicated to work on third countries. COM made it clear that the pan-EU list will remain in place in the meantime, for transparency reasons. The online map has been well-received as a neutral way of presenting this information. The Platform will continue to be the forum through which COM gathers the information on MSs' lists and discuss developments and changes. A non-MS member welcomed the external strategy and appreciated the strong emphasis on developing countries; on lists he expressed the view that we should focus not only on Transparency and Exchange of Information (TEOI), but also on Harmful Tax Measures (HTM) and effective taxation; concerning jurisdictions unwilling to cooperate that will end up on the new EU list, he stressed that the issue of countermeasures is crucial. This member also wondered what is fair tax competition according to MS and the EU. On negotiations with third countries, he also stressed that dialogue might take time depending on the country: developing countries do not have the same priorities and resources as MS. A non-MS member raised the question of the potential review of the Non Cooperative Jurisdictions' strategy of the EIB, as part of section 6 of the External Strategy.

3.4 Concerns were expressed over the objectivity of the criteria used to assess third countries. A non-MS member stated that we should make sure that developing countries' aids are not threatened for tax good governance reasons; analysing the impact of EU tax policies on developing countries is a very interesting exercise that should be coordinated by the PF. Another non-MS member stated that the PF is an excellent place to discuss; given the role it has to play in the implementation of

BEPS, the new PF will be critical for the shaping of the EU tax environment in the next decade. A non-MS member stressed that if the new tax good governance clause included in agreements goes beyond exchange of information requirements, it must be designed in order to respect the freedom of establishment and free movement of capital. Another member stated that the introduction of state aid rules in trade agreements should not lead to the introduction of non-tariff barriers and obstacles for trade.

3.5 A MS member welcomed the assistance towards developing countries and is very keen to address concrete mechanisms to progress on this topic; on third country listing, the EU should promote transparency between countries and tax administrations; decisions have to be taken in Council though the PF is an excellent place to discuss; on good governance clause this member welcomes discussion, flexibility is very good but needs to be agreed at Council level; on criteria, it is excellent for the PF to raise issues, but they have to be discussed and agreed in Council. Another MS stated that if transparency is important, it is also important to progress in the on-going discussions on the minimum level of taxation, both in the Code of Conduct criteria and in the Interest and Royalty Directive; on the listing the approach of the external strategy is reasonable, it is important to have common EU criteria towards third countries in order to have a level playing field; it is up to the Council to decide on these matters.

3.6 On the new approach towards listing third countries, the Chair explained that COM has taken PF members' comments into account: we propose to identify countries with whom we want to discuss; the ideal would be not to list any country because we have convinced all targeted jurisdictions to reform their tax system; it is also important to decide on how to converge on common sanctions towards those jurisdictions unwilling to discuss. Concerning the criteria, COM has proposed criteria in the annex to the external strategy; they are already used, either in the OECD Global Forum or in the Code of Conduct. Regarding the tax level, a discussion is currently taking place in the context of both the revision of the Interest and Royalty Directive and in the ATA Directive; on this particular issue diverging points are well known as is the COM position. While the scoreboard of indicators will be prepared by COM, the setting of priorities will be decided in the Council and discussions with selected third countries will be made in total transparency and at a pace adapted to each country. On spillovers of tax policies on developing countries, the PF could help MS to converge towards a common agenda. The Chair proposed to include this particular topic in the agenda of the next PF meeting. On the introduction of state aid rules in trade agreements, this topic has been extensively discussed with colleagues in DG TARDE and DG COMP; if we open a number of rights to our partners through an agreement, it is quite normal to impose minimum requirements in relation to our state aid rules. Finally, on the review of the Non Cooperative Jurisdictions' strategy of the EIB, COM stated that it will come back with further explanation on this issue at a next meeting.

4. IMPROVING DISPUTE RESOLUTION MECHANISMS

4.1 The Commission services introduced the subject with a presentation on COM's preparatory work on the proposal to improve the dispute resolution mechanism, due in the summer (cf presentation to be published on the PF website). Platform members were invited to participate in the public consultation. They were also asked to express

their views on the questions related to double taxation and dispute resolution in the EU. The Chair stated the present system has two major deficiencies, efficiency (a.o. length of the procedure) and limited field of application (Transfer pricing). The Chair invited members to participate and to encourage the public to contribute to the Commission public consultation which runs until 10 May. COM also referred to a questionnaire which has been launched to collect data on the scale and impact of double taxation and direct experience on the current dispute resolution mechanisms. Although this questionnaire is primarily targeted at members of the JTPF, COM is interested to get the views of non-governmental members of the Platform by 31 March. COM stressed the need to receive detailed information: the more data we receive, the better our policy-making will be.

4.2 Several non-MS members expressed support for the public consultation but also concerns about the tight deadline for the targeted consultation,. A non-MS member stated that the MAP procedure could last between 16 and more than 260 months and priority should be given to improve the situation; broadening the scope is very interesting although the major part of dispute cases concern the transfer pricing area. A non-MS member stated that MS should commit to a mandatory arbitration clause;, the main negative points of the current system are the limitation of the tax payer's involvement in the procedure, the lack of transparency and the length of the procedure. According to another non-MS member, it is often found that some jurisdictions try to prevent tax payers to enter into a MAP; another problem is that the EU is a small part of the double taxation problem, and countries outside EU are unlikely to accept any resolution mechanism. It was proposed to give amicable resolution a chance by designing a procedure in which both tax administration and the tax payer meet to try to find a solution. It was also stated that arbitration results should be legally enforceable. A non-MS member insisted that the PF should focus on double non-taxation issues instead of double taxation and added that any amicable dispute resolution mechanism should be completely transparent and public.

4.3 Several MS-members stated this problem has to be addressed because it creates legal uncertainty and obstacles on cross border activities; one of them supports ambitious legislative initiative on dispute resolution consistent with OECD work. A MS member raised the issue of the timeline for the adoption of a Directive; another MS member wants to know more about proportionality and subsidiarity principles in the case of a Directive; an impact assessment is needed as well. It was stated that the dispute resolution mechanism provided for in the EU Convention for transfer pricing issues was the most developed instrument of this type at international level.

4.4 On the deadline for the targeted consultation, the Commission services made it clear that the timetable was ambitious; nevertheless should someone have issues in meeting the set deadline, he can contact the Commission services and a solution will be found. On cases where access to the MAP was denied, this can be reported in the public consultation.

4.5 The Chair concluded on this point by saying that the OECD has asked COM to help them to be more ambitious on arbitration: 20 countries accounting for 90% of MAP cases are working together on arbitration in the OECD;..In this regard, it is important to share our experience in this area with the OECD. The debate at Global level can in turn feed our reflexion and give us ideas to improve our own EU system. The COM proposal will come together with an impact assessment;the Chair explained it was

still undecided which legal instrument should be used; if we go for a Directive, the ECJ will be the final authority to ensure proper implementation of EU law. The Chair reiterated he was convinced the present system was suboptimal; we have to discuss how to improve it in consultation with MS. Of course, solving the issue inside the Single Market will not solve the issue at the global level. Therefore there will be ongoing discussions with the OECD.

5. STUDY ON STRUCTURES OF AGGRESSIVE TAX PLANNING AND INDICATORS.

- 5.1 The Chair introduced a presentation by the Commission services on a Study on Structures of Aggressive Tax Planning and Indicators that has been published in January 2016 it was conducted using a network of tax experts in the 28 MS;. The study examined some of the most common aggressive tax planning structures¹ used today, and did a country-by-country analysis of the features in MSs' tax systems that may be facilitating such structures. 33 indicators were derived from the model ATP structures. The study concludes that there are large differences across MS; some particularly relevant indicators were identified; the lack of CFC rules is an important facilitator for ATP. Base erosion by means of intra-group financial costs is largely used. Lack of rules to counter mismatches in entities qualification is also particularly relevant (more details in the presentation to be published on the PF website).
- 5.2 Following the presentation, a non-MS member stated that a lot of the issues mentioned in the study will be addressed by BEPS. Another non-MS member asked what is considered to be low taxation.
- 5.3 A MS-member was supportive of the conclusions of the report but did not accept patent boxes to be considered aggressive tax practices, especially after the adoption of the Nexus approach; the rate offered by the preferential tax regimes should be compared with general tax rates in other Member States. It also expressed concerns with the use of passive indicators.
- 5.4 The Chair stated that the study relies on 7 structures most commonly used for ATP. Its added value is to identify in each MS the features which facilitate such ATP structures; the study will allow EU to monitor the convergence of systems to address ATP. . Members were invited to send their suggestions to the secretariat of the PF if they have ideas on how to improve the situation. The Chair said that COM wants to go for CCCTB in order to prevent the situations referred to in the study. On tax rates, the method used is the preferential rate as compared to the general tax rate of the same MS: the rate offered by a specific regime is not compared to the EU average rate; nor is it compared with the general rate of any other MS.

¹ 7 ATP structures were identified:

Offshore loan ATP structure

Hybrid loan ATP structure

Hybrid entity ATP structure

Interest-free loan ATP structure

Patent box ATP structure

Two-tiered IP ATP structure

IP and cost contribution agreement ATP structure

6. CORPORATE SOCIAL RESPONSIBILITY (CSR)

- 6.1 The Chair introduced the topic and explained that CSR is about companies voluntarily committing to adhere to best practice in certain areas – ethically, socially or economically. This commitment ideally becomes part of their corporate culture and can have positive impact for the company’s branding and public image too. So it is a win-win situation. CSR is becoming an increasingly popular topic in discussions on corporate taxation. He also referred to a very interesting report recently published by a consortium of NGOs on how businesses can take ownership themselves for better tax behaviour. Some of these changes have been driven by public pressure – where companies re-adjust their structures to pay more tax in a particular country, once they find themselves in the spotlight. But other companies have been actively integrating taxation into their overall CSR policies for some time – for example, by being full transparent on their tax information in their public accounts. Corporate Social Responsibility cannot replace appropriate legislation and regulation – and this is being covered through the EU’s agenda for corporate tax reform. But good CSR policies can very much complement this agenda, by ensuring that companies and policy makers are pulling together, rather than against each other, on the issue of fairer taxation.
- 6.2. The introduction by the Chair was followed by two presentations on this topic, the first one by DG GROW and the second by Professor Grau, professor of tax law at the University of Madrid and adviser to the UN. DG GROW gave an overview of the Commission's CSR Strategy and explained the Commission’s plans to revise it before the end of the year. COM is presently assessing and reviewing the former 2011 EU CSR strategy. Tax behaviour could be an important area of the upcoming new EU CSR strategy. Corporate Social Responsibility is generally defined as the responsibility of companies for their impacts on society. It is also defined as the contribution of companies to the wider goals of sustainable development in all areas (economic, social, environmental, ethical,...). CSR is a multidimensional process that all responsible companies have to integrate in their core strategy and all their operations in close cooperation with all their stakeholders, internal (employees, shareholders) and external (suppliers, NGOs, public authorities...). COM published a strategy on CSR in 2011; Most of the actions at COM level have been put in place, while 22 MS have put in place a CSR strategy, only 7 of them have developed and implemented national action plans on business and human rights. . Presently, out of large companies less than 1,000 EU companies are behaving in a "responsible way" in the sense of the 2011 strategy. COM is trying to identify which measures could facilitate a scaling up in this field; CSR is good for both society and for business itself.
- 6.3 Professor Grau spoke about the increasing focus of taxation in CSR internationally. CSR is a dynamic concept. There are several toolkits to implement CSR and companies may make a selective application of these tools, take for instance reporting only or seek a certification. She also covered how taxation and CSR policies can be mutually reinforcing i.e. CSR can be used to spread good tax practices, while taxation can promote other areas of CSR such as environmental standards. (more details in the presentation to be published on the PF website)
- 6.4 Several non-MS members expressed the view that CSR and mandatory rules are two complementary approaches; rules are necessary and cannot be replaced by CSR, but

rules can always be circumvented, changing behaviour through CSR might help in that sense; taxation governance should be integrated in CSR. Another non-MS member stated that the JTPF had worked on collaboration between tax administrations and tax payers with positive experiences in the UK and the Netherlands and that it is good to reflect on how to improve mutual trust. It was also stated that if companies have to report on CSR, a matrix has to be developed so that these reports are auditable;. Another non-MS member stated that CSR can never replace good rules; management and business advisors have a role to play in the balance between what is legal and what is perceived to be legitimate.

- 6.5 According to a MS member a legal instrument on CSR might raise constitutional questions because data protection is at stake; this type of text will have to be examined by national high courts; a voluntary commitment would not raise these type of issues. Another MS member stated that their administration had already consulted business on relations with public administrations
- 6.6 According to the Commission services, it seems that the current CSR strategies existing in 22 MS do not include any reference to tax; the future EU strategy will mention the tax issue. Having a good CSR in a company is a matter of enshrining it in the management structure; it must start from the board down to all levels of the structure. The goal of the strategy will be to convince a larger number of companies that it is in the interest of a good business to behave in a responsible way. The updated action plan should be presented by the end of 2016. There are two on-going public consultations, one on sustainable development open until end of March and the other on non-financial information disclosure until mid-April.
- 6.7 The Chair stated that CSR allowed for tax issues to be seen from a wider, societal perspective. What can be done beyond the law? What can be done to complete our approach? He asked whether members were ready to discuss the upcoming EU CSR strategy and promote its practices. If some members already have ideas or experiences to share, they can submit them to the PF secretariat that will ensure distribution to members. On compatibility with other legal requirements, the Chair reminded that COM always ensures that its proposals are fully in line with existing legislation and ECJ case law.

7. ANY OTHER BUSINESS

7.1. A non-MS member had sent a contribution on the ATAP package to the Commission and it was circulated to members before the meeting. (see document on the PF website). This document expressed concerns that the ATAP proposal goes beyond the OECD agreement and, by raising effective corporate tax rates and deviating from international agreements, might put the EU at a competitive disadvantage in attracting global investment. This member was particularly concerned that the Commission has not produced an impact assessment for this proposal. He also referred to a further risk to EU competitiveness relating to the possibility that other major economic regions would not fully implement the BEPS agreement. Another non-MS member stressed coherent and coordinated implementation of anti-tax avoidance measures is essential in the EU Single market despite the presence (according to this member) of major loopholes in the OECD/BEPS project.

7.2. The Chair reiterated that the PF does not discuss proposals which are being discussed in the Council. He nevertheless invited the NL delegate speaking in the name of the Presidency to intervene. The Presidency agrees to a certain extent with some PF members that it is important to move quickly because MS want a coherent EU law compatible BEPS implementation; the quicker the move, the greater the legal certainty. The package contains three issues coming from BEPS and three issues coming from the CCCTB. These issues have already been discussed for a long time in Council with elements coming from the CCCTB, the Code of Conduct Group and the OECD BEPS project. The presidency takes note of business concerns that are well known and understood by MS, but discussion must now take place in the Council; the aim is to reach a political agreement by the May ECOFIN.

8. CONCLUSIONS

The Chair thanked the Presidency for the exemplary work on the ATAP package and all members for the constructive session, which opened up a lot of perspectives for the Platform's future work. The spillover effects on developing countries will be on the agenda of the next Platform meeting in June with the new Platform members.

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