EUROPEAN COMMISSION
DIRECTORATE-GENERAL
TAXATION AND CUSTOMS UNION
Direct Taxation, Tax coordination, Economic Analysis and Evaluation
Company Taxation initiatives

SUMMARY RECORD
OF THE HYBRID MEETING
OF THE PLATFORM FOR
TAX GOOD GOVERNANCE,
AGGRESSIVE TAX PLANNING
& DOUBLE TAXATION

held on
08 DECEMBER 2021,
9H30 – 13H00

at
BERLAYMONT EC Building,
JEAN REY room
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1. WELCOME & INTRODUCTION

The meeting was chaired by Mr Benjamin Angel, Director for Direct Taxation, Tax Coordination, Economic Analysis and Evaluation at the EU Commission Directorate General Taxation & Customs Union.

2. OECD PILLAR TWO REFORM: TOWARDS AN EU IMPLEMENTATION. PRESENTATION BY THE COMMISSION SERVICES (DG TAXUD) FOLLOWED BY Q&A

A Commission representative briefly explained the state of play of Pillar 2 and its background. Pillar 2 will be transposed through domestic legislation in all countries participating in the agreement. The model rules are to be finalised shortly. The Commission will adopt its proposal for a Directive implementing Pillar 2 within the EU on 22 December 1. The main policy goals of Pillar 2 and its functioning were explained.

The Chair opened the floor for questions and clarified that the high complexity of Pillar 2 stems from OECD rules themselves, to be soon transformed by the Commission into EU rules. A business association representative expressed business concerns in this context, against the background of a letter sent directly to the Commissioner for Economy Paolo Gentiloni. It is also crucial to understand more about timeline and stakeholders’ consultation. It was also enquired whether the income inclusion rule (IIR) would apply in purely domestic situations with no involvement of foreign subsidiaries.

The Chair directly addressed these two points. On timeline, the Commission intends to respect the official OECD calendar. In relation to the IIR, the system should kick off in 2023 (one year later for the UTPR). To make this possible, the Directive proposal should be adopted during the first semester of 2022. The French Presidency aims at adopting this Directive still in spring 2022, in order to give EU Member States the necessary time to transpose it in their domestic legal order. Another issue is whether the Directive proposal will also target purely domestic groups. In this instance, views diverge and, before taking an official stance, the Commission will seek advice from its Legal Service.

The EuroDaD representative 2 shared the reservations previously voiced by the business association representative. Although Model Rules are already finalised at OECD level, a public text is still not available for all stakeholders. It was underlined that an undemocratic process at OECD level should not spill over at EU or national level. It is important that this exclusion does not affect the implementation phase either. If this tax package came as non-negotiable, this would affect not only democracy but also national sovereignty. It was enquired what are the implications of the Inclusive Framework agreement vis-à-vis countries that expressed their dissent such as

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2 Following their request, statements by representatives of the European Network on Debt and Development (EuroDaD) are explicitly attributed to EuroDaD.
Kenya, Nigeria, Pakistan and Sri Lanka. It is difficult to understand whether the Inclusive Framework works on the basis of consensus among its members or not. International fora such as the United Nations proved that you can reach remarkable goals if you follow processes that are more transparent and more inclusive than the one undertaken by the OECD. Civil society can improve the quality of the general discussion. It was also highlighted that, among the mentioned 137 countries of the Inclusive Framework agreement, you have UK Overseas Territories or Crown Dependencies that do not constitute States per se. Furthermore, it was asked whether participating States could introduce higher minimum tax rates. The US GILTI rule has shown that countries can introduce minimum effective tax rules on their own, without any previous global agreement. Finally, in countries where you have an official tax rate which is lower than 15% and operates alongside a minimum tax rate of 15% applied to companies with a turnover of 750 000 000 or more, is this scenario compatible with EU competition rules in general?

The Chair pointed out that the democratic aspect of Pillar 2 negotiations is guaranteed by EU Member States themselves via their constitutional requirements. The Working Party in charge of the Model Rules has finalised its work and it is up to the Inclusive Framework to formally endorse it. It is true that not every State actively approved these rules but the Inclusive Framework operates by consensus and not by unanimity. Technically speaking, this serves as a common framework to adopt unilateral measures. In terms of the agreement’s implementation, EU Member States will be legally bound by the Pillar 2 Directive whilst non-EU Member States will not be legally bound to implement the global agreement as this is not an international convention (unlike Pillar 1). On the tax rate impact, there are de facto three possibilities: 1) increase tax rates across the board, 2) have a different tax rate for the situations in scope (as announced by the Republic of Ireland and in line with EU competition rules) and 3) implement a top-up on a case-by-case basis. The EU has no preference here as long as the minimum effective tax rate envisaged by the Model Rules is fully respected.

Another business association representative pointed out that businesses need a uniform implementation of both Pillar 1 and Pillar 2. Pillar 1 and Pillar 2 should be implemented as a single reform package, considering that there are already concerns on the implementation of Pillar 1 vis-à-vis a few EU trading partners (e.g. the US). From an EU perspective, it is important to secure a uniform implementation in order to avoid a competitive disadvantage for EU businesses. Lastly, on competitiveness, the revision of the US GILTI rule in the US poses a risk for the EU and it was asked whether the Secretariat could elaborate further this. On the effective tax rate proposal, the qualifying income is based on accounting rules that only a few master and this might hamper transparency. It was noted that this should not come at the cost of extra administrative costs, on top of current administrative costs such as those of implementing BEPS standards, CbCR, etc.
The Chair clarified that a lot remains unknown in relation to Pillar 1. It was stated that the EU will apply Pillar 1 only if all other main trading partners are fully engaged (e.g. the US). On the publication of effective tax rates, this initiative is scheduled for 2022. Lastly, the Commission asks companies to ensure transparency on their effective tax rates on a “jurisdiction per jurisdiction” basis.

A professional association representative emphasised that the gathered consensus of this historic agreement exists only at political level. Regarding the rules on simplification, it is questionable why the determination of whether a group member is eligible for the de-minimis rules is left for the end of the process in calculating the ETR. A parallel was drawn with CbCR rules. Their simplification rules kicked in late and once the system was already set up. It was asked whether it were to be considered to align IIR, UTPR and STTR and thus allow a democratic process to take place. The current timeline, the absence of simplification and the implementation under 27 different systems can undermine the potential for a balanced and workable system. On equivalence rules, a specific remark was raised. If a UPE in the EU is subject to an acceptable IIR, the top-up tax will apply in the same EU Member State in respect of all low-taxed group members down the participation tiers. The US GILTI rule currently applies a top-up tax to all foreign entities under a US company. Consequently, for a company headquartered in the EU, the US would levy a portion of the top-up tax that otherwise would be charged in the EU. It was added that this part of the GILTI legislation is currently under discussion in the US as part of the national tax reform package. Against this background, it was enquired whether the equivalence rules state that the EU would provide a credit for taxes that are due in the EU but have previously been levied in the US or if other solutions exist.

A Commission representative replied that there is a hope that the revised US tax system will mirror the Pillar 2 key parameters. Assuming that this will be the case, the EU will treat the US rules as equivalent and hence provide credit where credit is due. Some difference might remain also in case of equivalence between the EU and the US rules especially in relation to the level at which they apply. This works in the opposite direction as well. There will be scenarios where, according to the Pillar 2 rules, income will be included under the so-called POPE rule and taxed in the EU whilst the US will also tax, according to the GILTI rule, at the level of the US top company. Under these circumstances, credit should be granted from the US. It would be the other way around where the US tax is due in light of the peculiarities of the US tax system and the EU would include credit under its IIR and UTPR. For the sake of clarity, it was specified that the US GILTI rules (like the IIR as originally designed) only apply to cross-border situations. The US GILTI rules only provide for the top-up of foreign income in a given US group. Theoretically, this means that US domestic income or US domestic constituent entities could remain low-taxed, i.e. taxed at an effective rate below 15%. Under these circumstances, the EU entities of the group
would be subject to the UTPR in respect of top-up corresponding to the US low-taxed subsidiaries, to ensure that there is a minimum effective level of taxation. This was discussed with the US and they understand and accept the rule to the extent that there is low-taxed income in their territory. In this instance, EU Member States or third countries can subject such income to the application of the UTPR. In conclusion, the Pillar 2 Directive will set up the conditions to assess equivalence rules but the final assessment will be made only once the revised GILTI rules will be approved.

A representative from Oxfam also expressed concerns on stakeholders’ engagement and timeline. A few recommendations were provided. First: it remains unclear whether a prohibition clause targeting all EU Member States will be included in order not to go beyond a certain tax rate or threshold. In Spain, the Government plans to introduce in 2022 a minimum tax rate of 15% to companies with a turnover exceeding EUR 20 000 000. Will Spain or other EU Member States be allowed to go further will this be excluded? Second: in line with EU law, the inclusion of domestic entities (i.e. entities in the same MS as the parent entity) is welcome but this must guarantee a coherent approach between foreign and domestic affiliates. Third: linked to the substance carve out, it was asked whether patent boxes or R&D incentives are included in the tax base. Fourth (and last): it was enquired whether the Commission is planning to push EU Member States to modify their tax treaties with low-income countries in case where the effective tax rate is lower than 9%, in order to effectively promote the STTR.

A Member State representative echoed the concerns previously raised on the link between Pillar 1 and Pillar 2 and the tight timeline. Since the beginning, both Pillars were conceived as a two-part solution that should holistically address interests of both source and residence jurisdictions.

A business association representative raised again the issue of simplification. If GloBE rules are put in place as well, will it be possible to remove other anti-abuse measures? On the publication of the ETR, the link between CbCR and ETR at EU level remains unclear. The publication of the ETR per country is considered the core part of the CbCR and it is not clear why the ETR publication should be added on top of an existing anti-abuse rule like CbCR.

On the interaction with existing anti-abuse rules, a Commission representative specified that the GloBE rules as such do not provide for replacing existing anti-abuse rules with the GloBE agreement, but do take CFC charges into account as covered taxes. The scope of Pillar 2 concerns multinational groups with a turnover exceeding EUR 750 000 000.

Another Commission representative provided further details on the publication of the effective tax rate (ETR) and what is currently achieved via the CbCR. The CbCR represents the results of financial accounts, which reflect the financial accounting system in which a specific group

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3 Following their request, statements by representatives of Oxfam are explicitly attributed to Oxfam.
prepares its financial statements. Yet, not all groups consolidate their financial accounts based on the same system. On the other hand, the ETR provides more accurate results, as the financial accounts are adjusted to taxation in line with a common set of rules. On patent boxes & generally preferential tax regimes, these regimes are all taken into account in terms of calculation of the ETR. The rules provide for a tax adjustment whereby the numerator of the fraction (Covered Taxes) is reduced. This increases the chances that a company falls below the effective tax rate of 15%. Finally, on the question of whether EU Member States can apply or not stricter rules, the OECD has not officially labelled the GloBE rules as the “minimum standard” but rather the “common approach”. Nonetheless, if a jurisdiction wishes to lower the threshold, they can probably go ahead but not beyond the remit of their own tax territory. If not, these jurisdictions can tax higher the UPE found in their own territory but it stops there. Hence, the economic effect reverberates on the whole group. It remains difficult to use the system in a way that departs from the OECD original design. The Spanish system that has dropped the threshold to EUR 20 000 000 is different from the OECD rules as it is based on the Spanish corporate income tax basis of these groups. In this case, the ETR calculation remains to be seen.

3. WHAT LESSONS TO DRAW FROM THE PANDORA PAPERS? ROUND TABLE WITH VARIOUS STAKEHOLDERS

The Chair introduced the Platform members that accepted to share their views on the effects of the so-called “Pandora papers” in the EU. The Chair gave the floor to the first organisation and reminded their role in strengthening ethical standards applicable to tax advisers in the EU.

The CFE President commended on the efforts of investigative journalists in pursuing evidence in the public interest. First, CFE equally condemns tax evasion in all forms, regardless of jurisdictions or actors involved in this criminal activity. Pandora Papers sadly show that this type of activities still exist as well as does tax avoidance, despite having been targeted by many EU initiatives (e.g. ATAD 1, ATAD 2, DAC revisions). The work of the Global Forum alongside the EU (i.e. the EU NCJ List for tax purposes) has been instrumental in addressing some of these issues. It is worth keeping in mind that Pandora Papers showed large elements of abuse of power, corruption, organized crime, illicit money flow and tax evasion. This represents the so-called “black zone”. In spite of the best possible regulations, CFE underlined that a so-called “grey zone” will continue to exist (e.g. mismatches) due to the nature of legal systems. In October 2021, CFE was pleased to present its role in tax professional standards via its discussion paper “Professional Judgment in Tax Planning - An Ethics Quality Bar for All Tax Advisers”, in order

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4 Due to the lengthy and detailed discussion on the Pillar 2 fist item, the Chair advanced this agenda item originally meant as the third & last item of this Platform meeting.
to promote an appropriate balance between rights and obligations of all taxpayers. Trust in the work of tax advisers can help maintain proportionality in the business regulation, tax transparency or reporting. Professional judgment cannot be replaced by regulation, legislation or digitalization. Ethics and professional judgment play an important role in limiting this “grey zone”.

The Tax Justice Network representative 5 provided a presentation on transparency of beneficial ownership. In the framework of EU laws, a beneficial ownership registration is triggered by several factors. For instance, if it is incorporated, created or governed by the laws of an EU country. Nonetheless, this regulation has gaps that can be exploited. On trusts’ arrangements, there is a loophole almost by definition. On this specific topic, the first recommendation would be to split the ownership between the settlor and the beneficiary. In detail, assets are considered property of the settlor up and until distribution to the beneficiary. Another issue is the use of thresholds under EU legislation, which allows bypassing stricter rules such as the one that obliges the registration of all parties under trusts’ arrangements. Combining companies’ and trusts’ arrangements allow the circumvention of these stricter rules. It was recommended to avoid the use of thresholds. On home grown loopholes, the EU should check how EU Member States facilitate this disconnection in relation to beneficial ownership. On exceptionalism across EU allies (e.g. the US/the UK), a two-fold recommendation was provided. First, to assess all jurisdictions objectively and transparently, according to the risks they effectively create. The TJN’s Financial Secrecy Index is a good example. Second, to impose qualitative barriers to hold any property or investment in the EU. In alternative, the EU could introduce these barriers in the realm of public procurement, to address conflicts of interests. On enablers, it was recommended that law firms and TSCPs disclose clients who set up offshore structures in the EU, possibly by integrating this dimension in the DAC. Lastly, EU institutions were urged to align better the concepts of legality and legitimacy.

The representative from Oxfam integrated the previous presentation with additional recommendations in the area of (i) the EU NCJ List for tax purposes, (ii) shell entities and (iii) individual harmful tax regimes. EuroDaD and Tax Justice Network stated that they also share this set of recommendations.

In relation to the reform of the EU NCJ List for tax purposes, it was highlighted that the EU NCJ List – Annex I blocks less than 2% of the world’s corporate tax abuse enablers (source: TJN). In relation to the countries involved in the Pandora Papers, there are 11 secrecy jurisdictions. Among them, in relation to the EU NCJ List for tax purposes, only one is currently black listed (i.e. Panama) while only one is currently grey listed (i.e. Seychelles). Three recommendations

5 Following their request, statements by representatives of the Tax Justice Network (TJN) are explicitly attributed to TJN.
were identified. First, to include transparency in beneficial ownership as an EU list criterion. If this criterion had been in place, the EU would have already blacklisted several jurisdictions involved in the Pandora Papers. Second, to reassess the automatic exchange of information and its criteria. The country standing out in the Pandora Papers as an enabler of tax avoidance is the US. The EU has never blacklisted the US, even though they have never committed to the common reporting standards for exchange of information. Third, to better assess the lack of substantial economic presence and activity of multinationals. It was suggested to reform the definition of substantial economic presence (e.g., BVI: 2/3 of shell companies mentioned in the papers are located in this jurisdiction) and couple this with the recommendation on shell companies.

Regarding shell companies, even though the Pandora Papers do not mention shell companies in the EU Member States, the Open Lux investigation showed that Luxembourg is currently hosting 55,000 offshore companies with no economic activity. A very recent study undertaken by the Dutch Committee on Conduit Companies has shown that, there were 12,400 letterbox companies in The Netherlands in 2019. According to this study, these companies hold total assets that are equivalent to 5.5 times the size of the Dutch economy. Against this background, it was recommended to have a very precise and comprehensive definition of economic substance, in order to include physical factors, staff, equipment, premises, etc. Another recommendation would be to include non-conventional types of companies (e.g. equity holding, IP), foresee penalties and require transparency for shell companies’ beneficial ownership and information exchanges. A recent report of the EU Tax Observatory was mentioned on harmful individual tax regimes. According to this report, at least 26 preferential individual regimes in the EU countries present aggressive tax features. It was recommended to address tax competition of high-net-worth-individuals across countries through an EC-driven initiative and via an expanded mandate of the Code of Conduct Group as well as the EU List.

The Chair gave the floor to the Slovenian Presidency, in order to gather its views on the Pandora papers. On the legislative side, it was emphasised that at Council level, these leaks helped the work advance. Therefore, the Council managed to adopt a whole number of initiatives that otherwise, would not have been received in the same way. However, this success was not achieved on 7 December 2021 in relation to the mandate of the Code of Conduct. It was yet emphasised that this process is almost at the finishing line and new momentum is needed.

A Member State representative provided remarks on tax transparency and on tax cooperation at administrative level. As specified by the Slovenian Presidency, the legislative framework is

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8 It was clarified that this last recommendation is put forward only by Oxfam and not also by EuroDaD and by TJN too.
mostly there in relation to tax transparency and tax administrative cooperation (e.g. DAC regimes, tax rulings, mandatory rules for intermediaries). Yet, although the rules are mostly there, their implementation is critical. In this regard, IT facilities could play a key role.

The Chair reminded that on 22 December, the Commission will not only table the Pillar 2 proposal for a Directive but also a proposal for shell companies within the EU. As stated during previous interventions, shell companies mentioned in the Pandora Papers were mainly located outside the EU. The Commission has in its pipeline new criteria for beneficial ownership in 2022. Criteria on exchange of information are also in the Commission pipeline, which are essential. Furthermore, domestically DAC6 starts its implementation. Under DAC6, professionals have to declare certain cross-border arrangements, which involve a high risk of tax avoidance. Statistics for the first ten months of 2021 have showed that 32 000 arrangements were declared by professionals. EU Member States need to make good use of this information. IT and algorithms are certainly key here.

A business association representative took the floor again to enquire on the purpose of these rules. They pointed out that the Pandora Papers mainly involve private individuals and not regular companies. Rules should be as focused and as sharp as possible. Compliance is already in place (e.g. DAC6) and should be obtained with a clear target in mind.

A speaker from CFE emphasised that further legislation can open the door to new loopholes and can become a tick-box exercise. An ethical bar could help professionals in aligning legality and legitimacy. Education should reflect these new orientations too. The Chair asked CFE whether the presence or absence of licensing across Member State helps or hinders the implementation of ethical standards for tax advisers. A speaker from CFE replied that this variety of standards and regulation at EU level justifies the creation of an ethical bar. The Chair enquired how it is possible to enforce an ethical bar where there is no possibility to withdraw a licence. The CFE President added that this makes even more urgent the need for the creation of a common field. In relation to real estate in the EU, the TJN representative enquired whether legislation could harmonize ownership and registration’s requirements across the EU. The Chair replied that DG FISMA has launched a survey on the idea of an assets’ registry and emphasised the importance of interconnecting beneficial ownership registers. Ideally, the aim should be to obtain a fully-fledged global agreement promoted by the OECD in this area.

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A speaker from the Commission provided a presentation based on the discussion paper shared with all Platform Member prior to the meeting.

A speaker from Oxfam focused on how Pandora Papers showed the relevance of a correct use of the blacklist and of the grey list and provided a set of ten recommendations. 1) To apply the same or even higher standards and visibility to EU countries compared to third countries. 2) To apply the same standards and visibility in the EU as outside the EU. 3) To expand the definition of harmful tax regimes. 4) To include zero or low level of taxation as a standalone criterion and not just an indicator. 5) To speed up the inclusion of a criterion on beneficial ownership (B.O.) transparency. 6) To include economic analysis to identify harmful tax regimes. 7) To assess better the lack of real economic activity of multinationals in a country as a red flag indicator of corporate tax avoidance. 8) To assess carefully all corporate tax regimes that can result in harmful tax competition. 9) Not to blacklist countries for failing to endorse the global OECD standards. 10) To make the Code of Conduct Group’s work more transparent and inclusive.

The Chair clarified that work on beneficial ownership or shell companies is ongoing. A Commission representative specified that the existence of higher standards for EU countries are the starting point of the EU listing process. The Commission does not ask third countries to do more than what is asked to EU Member States. On the contrary, enhanced standards applied in the EU are not promoted outside the EU. In case of EU Member States, the EU has different means in order to enforce compliance with the rules. Standards between EU Member States and third countries are similar although differences persist in terms of enforcement. On the definition of harmful tax regimes, the focus on the cross-border dimension is justified by potential distortions on the internal market of the EU. On zero tax jurisdiction as a standalone criterion, the Commission sees a link with Pillar 2. On FDI flows and their impact on the size of a given economy, the Commission acknowledges this issue but it remains problematic to establish a link in this field. On patent boxes, some work was undertaken in the past (e.g. modified nexus approach) but its focus was not on the economic impact but the tax benefits as a successful tool to promote R&D instead. From the Commission side, mixed views remain on the merits of patent boxes. All EU Member States with patent boxes have been assessed and this work is complete. On input legitimacy of the Code of Conduct work, the Commission shares these concerns and, under the 2020 Tax Action Plan, this was included as an area for improvement.

The EuroDaD representative specified that, in the area of access to documents, opacity remains.
On blacklisting, what is the meaning of cooperation on international tax matters? It was highlighted that, during the Inclusive Framework process, four developing countries (e.g. Kenya and Nigeria) stated their opposition to the outcome and this was adopted anyway. A third of the world countries were not involved as they decided not to join a process where rules have been pre-adopted. With the BEPS 2 process, the outcome is heavily skewed towards home countries of MNEs that happen to be OECD countries. It is not cooperative to control global standards’ settings. The existing issues cannot be resolved by blacklisting jurisdictions that do not follow standards, which were set via an unfair process. EuroDaD key recommendation remains not to blacklist least developed countries or countries that have nothing to do with international tax dodging. On patent boxes, EU Member States intervened in the OECD process and stopped the attempt to get rid of them. Patent boxes exemplify how standards allow some harmful tax practices to exist. Cooperation does not equal to influence on standards. Lastly, it was enquired whether the 2022 assessments under the European Semester will analyse aggressive or potentially aggressive tax practices in the EU.

A Commission representative specified that the Commission judges the international process differently. It was confirmed that the least developed countries are out of scope of the EU List. The Commission thus tailors its approach to developing countries, in comparison to more developed countries, except where developing countries are also financial centers. A few developing countries act as financial centers to the detriment of other developing countries. On European Semester, this tool was absorbed under the RRF but, in 2022, it will resume again.

5. ANY OTHER BUSINESS

The Commission representative confirmed that four meetings are expected to take place in 2022. Provisional dates are scheduled for 3 March (N.B. rescheduled in the meantime on 01 March) and for June (date TBC). The remaining two meetings will likely take place in September and December. The Commission thanked again all members for their active contributions and participation and encouraged them to accordingly bring forward new ideas in the future.