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SUMMARY RECORD OF THE 6th MEETING OF THE PLATFORM FOR TAX GOOD GOVERNANCE

held in Brussels on 2 March 2015

1. OPENING

- 1.1. The meeting was chaired by Director-General Mr Zourek in the morning and Director Valère Moutarlier in the afternoon.

2. ADOPTION OF THE AGENDA

- 2.1. The Chair explained that one of the aims assigned to the Platform was to assist the Commission in setting up its report on the implementation of the two Recommendations of 6 December 2012. The report was originally due by end of 2015, but will be part of the June 2015 Commission Action plan on a fairer corporation tax in the EU. Therefore, the present meeting will be the only meeting in which the Commission will ask Platform members to provide their input on the proposed conclusions on the application of the two Recommendations. The Chair reminded members that the debate on tax subjects has accelerated tremendously (he gave the examples of the Special Committee on Tax Rulings created in the European Parliament, and the proposal for a Directive on Automatic Exchange of Information on Tax Rulings that should be issued on 18 March 2015). Therefore an intense and comprehensive debate on the Commission Paper will be welcome. The Chair announced the presentation of a case study on Mc Donald's by NGOs under 'any other business'.
- 2.2. Answering a question by a non-MS member, the Chair clarified that majority/minority opinions would not be specifically mentioned in the Commission report (this is done in the Platform's summary records).
- 2.3. The Agenda was adopted at the beginning of the meeting without any further comments from the delegates.

3. SUMMARY RECORD OF THE 19 DECEMBER 2014 PLATFORM MEETING

- 3.1 The draft summary record sent out will be adopted through written procedure. Comments can be submitted by 6 March. The Platform secretariat will then circulate the final version.

4. RECOMMENDATION REGARDING MEASURES INTENDED TO ENCOURAGE THIRD COUNTRIES TO APPLY MINIMUM STANDARDS OF GOOD GOVERNANCE IN TAX MATTERS (AGENDA POINT 2)

The Commission introduces the document. The aim of the discussion is to make sure that under "discussion" the Commission has not overlooked any essential point, and see if some form of consensus can be reached on the proposed conclusions.

4.1 Criteria used (point 2.1 of the discussion paper)

The Commission presents the factual elements, the discussion summary and the proposed conclusions. There were no comments on the factual points and summary of discussions.

On conclusions (point 2.1.3), different views were expressed by non-MS members: CCCTB would resolve a lot of issues; a distinction should be made between countries not able to meet criteria because of their development level and countries not willing to meet these criteria. Amongst MS opinions expressed were: the OECD work is essential, but there is an action to be accomplished within the EU in parallel to the OECD; the main concern of the report ought to be how make the application of the two criteria more consistent.

One non-MS member argued that in the absence of CCCTB, and as long as within the EU MS are allowed to enact laws that create tax competition, the Commission should recognise that some sort of tax competition is acceptable.

On **Transparency and Exchange of Information**: MS views were that the Global Forum is efficient in conducting peer reviews, since MS assessed as non-compliant have quickly reacted and asked for a supplementary review; and that since Automatic Exchange of Information (AEOI) will soon become the new standard, it should be integrated as a criterion. A non-MS member stated that this criterion is difficult to respect for developing countries especially if we look at AEOI.

On **Harmful tax measures**, views expressed by some MS were that since the assessment of Harmful tax measures can be costly for MS, the fact that the Code of Conduct declined to help assess some third country jurisdictions should be reflected in the report; or that this is a very important criterion on which both the EU and the OECD have been working for 15 years. On the cost of assessing Harmful tax measures, a non-MS member opinion is that if MS want to fight tax evasion/avoidance, investments should be made in tax administrations in terms of staffing, training and IT equipment.

On **Tax rate/level**: on this particular criterion several comments were expressed by non-MS members, such as: there is discomfort between MS, MS have different tax levels and it should not be allowed that this is challenged; the formulation of the draft conclusion on tax rate/level is weak (*"The Commission services might also suggest to give further consideration, in the light of OECD and EU developments,*

to the relevance of other criteria, such as the level of taxation"); tax level should be viewed with other criteria such as artificiality, absence of substance; one MS stated that given the fact that the 2 criteria of the Recommendation are not consistently applied it appears over ambitious to add a third one that is not applied inside the EU. Other comments were expressed by MS in favour of this criterion: tax level matters at least for certain MS; the tax level is essential, we should focus on the effective taxation of any revenue generated inside EU.

4.2 Lists (point 2.2 of the discussion paper)

The Commission explained that the factual elements that have been slightly amended at the request of UK to make it clear that the UK sees its listing system as different from blacklist/white list systems operated by other MS. No comment on factual elements and summary of discussions.

On conclusions (point 2.2.3. of the discussion paper), different views were expressed by MS: it is a good idea to improve coherence between MS blacklists, but a uniform reply at EU level is essential to fight Tax Havens; one MS said that the terms "monitoring" or "compliance" are not appropriate, corporate taxation is under the responsibility of MS and there should be more clarity on criteria to use these words, another one said that the Commission should assess whether or not black listing systems are compatible with EU law. On Transparency and Exchange of Information, it is not easy to achieve coherence because the assessment is based on the effective exchange of information that is essentially bilateral and hence the assessment can vary from one MS to another; the compliant/non-compliant qualification for the Phase 2 of the Global Forum assessment peer review was deemed not sufficient and even nearly outdated. On Harmful tax measures, it would be interesting to share information between MS and the Commission once a Harmful tax measure has been identified.

The Commission made it clear that it will not monitor and decide in the place of those who are allowed to decide, the Commission simply wants to ensure enhanced transparency and try to make analysis converge. The Commission thinks there is scope to better organise the exchange of analysis between MS. On the term "compliance", the Commission referred to the use of the term in the Recommendation; it must be understood in the same sense in this paper. The Commission also stated that up until now, it did not review if blacklists were compatible with EU law.

4.3 Measures applied towards third countries (point 2.3 of the discussion paper)

The Commission presented the elements of the paper. They were no comment on the factual elements and the summary of discussions.

On conclusions (point 2.3.3. of the discussion paper), a range of comments were made by MS: measures are very important because they explain why a MS has chosen its criteria and the way criteria are applied; some measures might undermine progress on AEOI; effectiveness of measures ought to be reviewed; bullets point 2 and 4 of the conclusions should be redrafted to make them more balanced - measures (as well as criteria and assessment) are a competence of MS; an EU approach would be desirable both for the taxpayers and for the internal market and also because measures applied by 28 MS would be more efficient than different measures operated by individual MS; international relations in tax matters

are also dealt with by means of Double Tax Conventions (DTC) that are, by definition, bilateral. Certain points might be taken on board with one country and not with another one. A non-MS member stressed that the EU standards have to be enforced inside the EU before convincing third countries to apply them.

The Commission explained it is being requested by some MS and many stakeholders for an ambitious "EU BEPS". It is true that DTC are part of MS diplomacy but this does not imply MS should not respect EU principles. The Commission will reflect on how to help MS being more efficient towards third countries. MS want to protect the internal market, this will require a balance between each MS own relationship with third countries and a necessary consistency

5. RECOMMENDATION ON AGGRESSIVE TAX PLANNING (AGENDA POINT 2, CONTINUED)

The Commission introduced the document which is divided in two parts (Limitation to the application of rules intended to avoid double taxation and GAAR).

5.1 Limitation to the application of rules intended to avoid double taxation (point 3.1 of the discussion paper)

The Commission presented the factual elements and the discussion summary. There were no comments.

Different views were expressed by MS: the fact that a MS uses tax credit or the exemption method should be taken into account to determine if a "subject to tax" clause is needed¹; there has been considerable support at relevant OECD workgroups on treaty abuse.

The Commission concluded that a reference to the OECD work can be added in this framework. There is no appetite from MS to follow this part of the Recommendation, but this does not mean that the problem will disappear; other ways of treating this issue will have to be found.

5.2 General Anti Abuse Rule (GAAR) (point 3.2 of the discussion paper)

In the introduction paragraph, one member asked for the first sentence to be modified by the introduction of the word "aggressive" (...powerful means of protection against novel aggressive tax planning schemes...).

Concerning the factual elements (3.2.1), there were drafting suggestions from one MS on the sentence about IE.

Concerning the summary of discussions (3.2.2): in the last line of the second paragraph, another member mentioned that in the sentence "different interpretations by different courts may still occur", the word "courts" should be replaced by "administrations"*[Note from the secretariat: this sentence is a quote from the approved meeting record of 10/6/2013 (point 5.3)]*.

¹ This clause is useful in exemption systems

Concerning the proposed conclusions (3.2.3) a MS stated that comparison between the recommended EU GAAR and domestic GAARs should be avoided. Therefore, on the second bullet point, the part of the sentence "...anti-abuse rules as efficient as the one provided in the Recommendation", should be rephrased in "...anti-abuse rules that meet the objectives of the Commission Recommendation in tackling Aggressive Tax Planning".

Other views were expressed by non-MS members such as: for many Platform members, a single EU GAAR is unlikely and many MS have a lot of AAR with a GAAR on top to capture what has not been caught by the specific AARs; in MS where the domestic GAAR has been existing for a long period, an evaluation should be made: is this GAAR really applied and/or applicable and if not why? Would the EU GAAR be more efficient?

The Commission concluded that MS have already agreed on a common AAR in the Parent-Subsidiary Directive. For the Interest-Royalties Directive, the same kind of approach is being followed.

6. CONCLUSIONS ON THE COMMISSION DISCUSSION PAPER

The Chair concluded that the report will give a description of the content of the Recommendations, of how these Recommendations have been discussed and implemented and make proposals and conclusions. It is also important for the Platform to reflect on its achievements; not everything will find its way in the report. We have to find other ways to reflect on the future design of corporate tax instruments.

7. NGOS PRESENTATION OF THE MC DONALD'S CASE STUDY

A coalition of European and American trade unions joined by an NGO has established a report on Mc Donald's corporate tax structure. This report has been presented to Platform members.

This presentation raised various comments such as: this type of behaviour should be well known from many companies and this is the result of many factors such as companies, tax advisers, tax administrations, legislators, COM that has not been proactive in the past; CCCTB might resolve this kind of situation. NGOs are in favour of a compulsory CCCTB that would not be limited to the tax base but also include the tax rate; for a long time, NGOs have been raising similar issues in developing countries, we now see the same issues inside the EU; the exchange of information on tax rulings should not be limited to tax administrations, it should be public; there are tax rulings for good purposes, but how many SMEs benefit from tax rulings compared to MNEs? EU should not drive businesses away, if a company pays more tax, it distributes less dividend, has less money for wages and/or has to raise its prices; tax matters should not be judged with the morality criterion, because morality varies from one culture to another.

The Chair stated that with the new agreement on Patent Box in the Code of Conduct that will exclude brands from patent boxes², this scheme will not be possible anymore. On the AEOI on tax rulings, the proposal for a Directive on exchange between tax administrations will be issued on 18 March; but Commission

² On the grounds that, under current legislation, a brand cannot be patented.

will go on working on a longer term for more transparency. In a longer term, an integrated system like the CCTB is still desirable. There is a consensus on the fact that the consequences of this type of scheme are no longer acceptable and that the legal rules have to be changed in order to offer a clearer framework to businesses.

8. CONCLUSIONS AND NEXT STEPS

The Chair thanked all members for the constructive session, which gives elements for the Commission future work on its report.

Members are invited to submit any further comment on the Commission discussion paper within 2 weeks. The secretariat will then circulate a redrafted document for written comments under another 2 weeks period.

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.

The next meeting should take place on 8 June 2015.
