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**MEETING DOCUMENT**

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From: Presidency

To: Delegations

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Subject: Presidency steering note (transfer pricing)

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# STEERING NOTE FOR THE WPTQ OF 9 OCTOBER 2024

## BACKGROUND

Member States acknowledged the need to develop common solutions to transfer pricing issues consistent with the OECD framework. For that purpose, Member States broadly supported the establishment of an EU transfer pricing platform (Platform) which could be mandated to develop technical practical solutions as well as to improve the functioning of the dispute resolution mechanisms. In order to ensure an effective outcome in line with the above stated goals of the Platform and to overcome the shortcomings of the previous Joint Transfer Pricing Forum (JTPF) a Platform with the below listed characteristics is envisaged.

The overall objective of this Presidency steering note is to refine the scope of the discussion at the WPTQ on the key building blocks of the future EU transfer pricing platform, should Member States decide to establish it.

The intention is to identify the most efficient, practically viable and soundest (including legally) way forward, as a response to the clear interest expressed by the Member States in moving forward to co-ordinate practical issues related to domestic matters (of national competence) in the area of transfer pricing.

<p>1.</p>	<p><b>Article 296 TFEU</b></p> <p><b>Withdrawal of CION legislative proposal</b></p> <p><b>Preparatory work on the acts that define the process and substance (constitutive elements) of the Platform</b></p>	<p>In case the Council would have to adopt or approve its act (for example, for a political commitment, including the peer review of measures in the area of transfer pricing and/or constituting the Platform (“Council part” thereof), a pre-requisite for such action is the necessity for the Commission to withdraw its legislative proposal for the Council Directive on Transfer Pricing (Art 296 para. 3: “<i>When considering draft legislative acts, the European Parliament and the Council shall refrain from adopting acts not provided for by the relevant legislative procedure in the area in question.</i>”)</p> <p>Nevertheless, Article 296 does not forbid the creation of a co-ordinating group by the Commission.</p> <p><b>The Presidency suggests focusing the discussion on ascertaining the policy/wishes of the Member States concerning the possible structure and mandate of the Platform.</b></p>
<p>2.</p>	<p><b>Governance</b></p>	<p>It was articulated that Member States wish to exercise control over the work of the Platform. In order to create such a group, the Platform should operate on the basis of consensus on the output of the group (or groups in case a separate group will be created at Council level).</p> <p><b>Based on the previous discussions, Member States seem to wish to effectively and continuously retain control on the work of the Platform. Against this background, the final political endorsement of the outputs, including the peer review of measures in the area of transfer pricing, would always be made only at the Council (2nd level), so that political control of the Member States over the area of transfer pricing would be assured.</b></p> <p><i>In case the Platform is created solely by the Commission, design and amendment of the “constitutional” rules of the Platform remains fully at the discretion of the Commission. In practice, this means that it would be up to the Commission to set up the Platform, to decide on its governance, rules of procedure, arrangements applicable to the Chair (elected or appointed, affiliation (MS, CION or a third party),</i></p>

		<p><i>duration of the term, etc.). This would also mean that the Commission would have full discretion to amend such “constitutional” rules in the future.</i></p> <p><b>A Council act would be required to establish the Council part of the Platform or, at least, set out the key parameters thereof (for example – taking the case of the COCG as the basis for further inspiration). The Council could adopt such an act only after the legislative proposal by the Commission is withdrawn.</b></p>
3.	<b>Structure</b>	<p><b>The proposed <i>two-layer</i> Platform could be structured as follows:</b></p> <p><b>1. Technical level (working title: Transfer Pricing Group)</b></p> <p><b>The Commission would establish a co-ordinating group</b> by a Commission decision. The <b>main task</b> of the technical group would be <b>delivering pragmatic, technical solutions</b> to practical transfer pricing issues in the EU.</p> <p><b>The participants of the technical level would consist of</b></p> <ul style="list-style-type: none"> <li>- representative from each Member State</li> <li>- representatives of the Commission</li> <li>- a number of representatives (10 to 18) from the private (and academic) sector selected with a call of interest</li> <li>- observers from the OECD.</li> </ul> <p>All members of the Transfer Pricing Group would be responsible for most of the technical work and the draft text of deliverables of the group. The secretariat services and premises for meetings would be</p>

provided by the Commission. The Transfer Pricing Group would also hold closed sessions (Member States only) to discuss specific transfer pricing issues (for example policy issues, or sensitive topics like dispute resolution) and ensure consensus is reached on the deliverables.

The agreed outputs of the Commission co-ordinating group would be transmitted to the Council (2<sup>nd</sup> level) for further consideration and political endorsement.

## **2. Political level (working title: Council Group)**

**The structure of the political level could be based on the existing framework in the Council or on a new Council group that may resemble the structure of the Code of Conduct Group (“COCG”).** The Council Group would have the competence to review more in depth and eventually amend the conclusions of the Commission co-ordinating group for possible endorsement/political commitment.

### **The political level of the Platform should comprise of:**

- representative from each Member State
- representatives of the Commission

The documents received by the Council Group would follow the usual preparatory track to decide whether to endorse the conclusions at political level. The outputs tied to political commitment, would then be transmitted to COREPER and Ministerial level for endorsement. This will ensure that the final policy decision is taken by Member States.

4.	<b>Chair</b>	<p><b>The Chair of the Transfer Pricing Group</b> and the <b>Chair of the Council Group (in case of a new Council Group)</b> would be elected by and from the representatives of the Member States with simple majority for a two-year period, which would ensure the continuity of the work taking place at both levels and also ensure Member States' control over the discussions. The chairs should have the relevant degree of expertise in the area of transfer pricing.</p>
5.	<b>Objective</b>	<p><b>The objective for the Transfer Pricing Group (created by the Commission) could be the following:</b></p> <ul style="list-style-type: none"> <li>• provide a platform where business and national tax administration experts can discuss transfer pricing problems which may constitute obstacles to cross-border business activities within the European Union,</li> <li>• develop practical solutions, compatible with the OECD Transfer Pricing Guidelines, to problems posed by transfer pricing practices in the EU,</li> <li>• develop practical solutions, compatible with the OECD Authorized Approach, to problems posed by profit attribution to permanent establishments in the EU,</li> <li>• develop pragmatic solutions to improve the practical functioning of the Dispute Resolution mechanisms</li> <li>• forward its outputs to the Council for approval.</li> </ul> <p><b>The objective for the Council Group could be the following:</b></p> <ul style="list-style-type: none"> <li>• determine the areas of transfer pricing and challenges of the Member States which should be discussed by the Co-ordinating Group in order to find pragmatic solutions,</li> </ul>

		<ul style="list-style-type: none"> <li>• determine and adopt the 2 years work programme of the Co-ordinating Group which describes the specific topics to be addressed,</li> <li>• review, discuss and amend the reports of the Transfer Pricing Group and assess whether to propose to the Council to endorse them for political commitment and, as appropriate,</li> <li>• decide whether a peer review should be conducted for a specific report, conduct the peer reviews process where agreed.</li> </ul>
6.	<b>Voting rights</b>	<p>Based on the previous discussions, Member States wish to preserve the “consensus” or “unanimity” voting regime on the matters of substance. As such, voting right of the below listed matters would look like as follows:</p> <ol style="list-style-type: none"> <li><b>1. Work programme</b> The Working plan would be developed and accepted for a fixed period of time <b>by consensus at the level of the Council Group.</b></li> <li><b>2. Output on the technical level</b> Once the work is done on a specific topic and a document is formulated, <b>only representatives of the Member States in the Transfer Pricing Group</b> would have the right to vote and decide on whether the formulated document should be accepted and forwarded to the Council Group. The decision should be made <b>by consensus.</b></li> <li><b>3. Political commitment</b> Political commitment on any output would not be automatic. Member States would decide on the political endorsement <b>at the level of the Council Group by consensus on a case-by-case basis.</b> The outputs</li> </ol>

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		<p>...tied to political commitment, would then be transmitted to COREPER and Ministerial level for endorsement.</p> <p><b>4. Peer review</b></p> <p>Once there is an agreement on political commitment on an agreed outcome, Member States could decide on whether they wish to agree on a peer review process, or not. Voting would take place <b>at the level of the Council Group</b> and the decision should be made <b>by consensus</b>. Later, the subsequent approval of the Council (ministers) is also needed.</p>
7.	<p><b>Political commitment to implement/adhere to the results of the Platform: the mechanism, triggering the mechanism</b></p>	<p>To maximise effectiveness of the outcomes and to comply with the above-mentioned objectives, <b>the documents</b> (which would include recommendations) developed and agreed by the Transfer Pricing Group and endorsed by the Council <b>could be underpinned by a political commitment</b> of the Member States to implement and follow them in their administrative practices. As such, <b>the political commitment would not be legally binding</b> and it would call on the Member States to do their utmost to implement the agreed recommendations of the Platform in the way that fits best in their domestic legal framework whilst ensuring that taxpayers are able to unilaterally rely on them with a view to increase tax certainty. This could take various forms, such as inserting a reference to the adopted recommendation endorsed by the Council in national (secondary) legislation or reflecting them in domestic guidance for taxpayers or published instructions to the tax administration etc.</p> <p><b>Political commitment on the agreed outcomes would not be automatic, it would be decided on a case-by-case basis</b> by the Member States at the Council. Political commitment would be given only after an output of the Platform is finalised, no ex-ante political commitment should be given. The political commitment would not automatically trigger a peer review.</p>

<p>8. <b>Peer review: the mechanism, triggering the mechanism</b></p>	<p>To ensure an effective implementation of the recommendations of the Platform which have been endorsed by the Council, a <b>peer-review mechanism should be put in place</b>. Such a peer review would be designed as a collaborative and constructive process which would involve to a large extent Member States' experts and could also provide an opportunity to share expert knowledge and identify best practices.</p> <p><b>However</b>, even though the peer review mechanism would generally be in place, <b>the peer-review could not be automatically triggered</b>. The mechanism for a peer-review could <b>only be activated by a separate agreement</b>.</p> <p>The peer review could be organised as a desk-based process based on self-assessment, questionnaires and publicly available information whose core output will come in the form of a short report. The report should provide an overview of the domestic implementation of the recommendations issued by the Platform and might contain recommendations for further improvement where necessary. The review and drafting of the report should be done by representatives of the Member States with the support of the Commission services and the final report should be endorsed by the Council.</p> <p>It would have similarities to the COCG peer review, which foresees the <b>“broad consensus” concept</b>, non-existent under the WPTQ mandate.</p> <p>The peer review would focus on whether the national laws, guidelines are in accordance with the documents of the Platform.</p> <p>The Council Group could assess whether the Member States indeed comply with the peer reviewed document. The report on these assessments would be forwarded to the Council for deliberation. The report would include the final assessments of the compliance with the peer reviewed document. Final</p>
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		<p>report, as approved by the Council, would be made public in accordance with relevant rules. The “sanction” of a non-compliance would be the publication of this fact.</p> <p>For further detailed rules the Platform could develop the Terms of Reference and the assessment methodology including an appropriate timeline for the peer review process.</p>
<p><b>9.</b></p>	<p><b>Secretariat</b></p> <p><b>Venue</b></p> <p><b>Mission expenses</b></p>	<p><b>Venue</b> of meetings (premises managed by CION or GSC) emanates from the decision on the secretariat (CION or GSC), i.e. it should be “tied” to the institution entrusted with the secretariat services of the Platform.</p> <p>The same principle would apply to the <b>mission expenses</b>. An alternative pathway to “mix” the venue/secretariat is likely to result in an unnecessary administrative complication.</p> <p><b>It would seem logical, with a view to a compromise on these matters, that the acts establishing the future Platform are designed drawing inspiration from the rules that currently govern the operations of the COCG, with the necessary practical adaptations serving the specifics of the Platform.</b></p>

<p><b>10. Mandate of the Platform (substance): the first step.</b></p>	<p>As transfer pricing issues are a rather delicate area of national tax policy, the Presidency suggests, as the way forward, that Member State agree on a number of specific and defined issues on which the Platform could work once (and if) it is constituted. These well-defined issues could constitute the <b>initial mandate of the Platform</b>. Decision on the scope of the mandate would be part of the constituting documents of the Platform. After a few (e. g. three to five) years of operation, the initial scope of the Platform's mandate could be revised and, if necessary and MS so agree, extended.</p> <p>The areas covered by the initial mandate could be, for example:</p> <p><u>Substantive issues</u></p> <ul style="list-style-type: none"><li>• financial transactions;</li><li>• transfer of intangibles asset or rights in intangible assets between associated enterprises, including hard-to-value intangibles;</li><li>• routine functional profiles (CM, TM, LRD, etc.) and attributable arm's length returns.</li></ul> <p><u>Audit</u></p> <ul style="list-style-type: none"><li>• risk assessment in TP</li><li>• IT and AI solutions for TP,</li><li>• unilateral adjustments,</li><li>• best practices in auditing controlled transactions (including Head Office and PE)</li></ul> <p><u>Administration</u></p> <ul style="list-style-type: none"><li>• harmonization and simplification of transfer pricing documentation,</li></ul>
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- Amount B implementation
- Multilateral/bilateral APAs, sector APAs,
- Practicalities regarding mutual agreement procedures.

To be noted, this mandate would also cover a set of pre-defined limits (parameters). For example, the rule that this work can't result in establishment of an alternative system to that of OECD Guidelines on TP. Moreover, the rule of supremacy of the OECD Guidelines over the deliverables of the Platform could be built in as well.

**Should MS agree to this way forward, it would seem useful to initiate a more detailed discussion in the future on defining the substance (the scope) of the mandate of the Platform.**

### QUESTIONS FOR DISCUSSION:

1. Do Member States agree with the observations set out in this Presidency note?
2. Do Member States support the principle that a Council Group would be responsible for determining the areas to be discussed, the work programme, and play a preparatory role concerning a possible decision on political commitment / peer review?
3. Do Member States support the political commitment and peer review not to be automatic, but to be decided on a case-by-case basis?