



Brussels, July 2012
TAXUD D1 D(2012)

Taxud D1/

Doc: JTPF/015/2012/EN

SUMMARY RECORD OF THE THIRTY FOURTH MEETING OF THE EU JOINT TRANSFER PRICING FORUM

held in Brussels on 7 June 2012

1. ADOPTION OF THE AGENDA

The agenda (doc JTPF/009/2012/EN) was adopted by consensus.

2. DOCUMENTS ADOPTED UNDER WRITTEN PROCEDURE

The Chair reminded members that the summary record of the meeting of 8 March 2012 (doc JTPF/007/2012/EN) had been adopted under written procedure.

3. INFORMATION BY THE COMMISSION ON CURRENT ONGOING ISSUES

Thomas Neale provided information on the state of play of the following topics:

- He reminded the JTPF members of the need to adopt the report on CCAs at this meeting, in order to allow the Commission to issue a communication and submit it to the Council before the end of 2012.
- The technical work around the proposal for a Council Directive on a Common Consolidated Corporate Tax Base (CCCTB) is progressing and all chapters related to a single company tax base have been discussed. DK Presidency has released a document including its suggested amendments which is available on the Council website:
http://register.consilium.europa.eu/servlet/driver?page=Result&lang=EN&typ=Advanced&cmsid=639&ff_COTE_DOCUMENT=8790%2F12&ff_COTE_DOSSIER_INST=&ff_TITRE=&ff_FT_TEXT=&ff_SOUS_COTE_MATIERE=&dd_DATE_DOCUMENT=&document_date_single_comparator=&document_date_single_date=&document_date_from_date=&document_date_to_date=&dd_DATE

[REUNION=&meeting_date_single_comparator=&meeting_date_single_date=&meeting_date_from_date=&meeting_date_to_date=&fc=REGAISEN&srm=25&md=100&ssf=DATE_DOCUMENT+DESC](#). The next EU Presidency (CY) is expected to deal with consolidation and the sharing mechanism.

- Following last year's public consultation on double taxation, the Commission has published a public consultation on double non taxation. It is available on the Commission website:

http://ec.europa.eu/taxation_customs/common/consultations/tax/2012_double_non_taxation_en.htm.

Nearly 30 comments have been received. Although the deadline for comments has already expired, further comments will still be accepted. A summary of the comments received will be published within the next 2-3 weeks. The Commission plans to issue a communication on tax havens and aggressive tax planning by the end of this year. A meeting with EU tax administrations and stakeholders to discuss this is planned for 17 July.

- The list of the independent persons of standing eligible to become a member of the Advisory Commission is now published in the Council website. The link will be forwarded to JTPF Members shortly after this meeting.

4. COST CONTRIBUTION ARRANGEMENTS

The Chair introduced the document for discussion (JTPF/008/REV1/2012/EN) and stated that the objective was to arrive at an agreed text at the meeting. Comments received had been incorporated to the document and explained in boxes.

The Chair went through the document paragraph by paragraph commenting on the proposals and, after the various interventions, confirming agreement on each paragraph. The final version of the document reflects the agreement achieved by the group and confirmed by the Chair on each of the points.

The Chair concluded and the Forum confirmed that the report had been agreed subject to the final wording/reservations of/on paragraph 36.

The Chair suggested that as regards the treatment of tax incentives and government subsidies the report should recommend that these should be deducted from costs, i.e. these benefits should be shared between all the participants of the CCA. The following drafting of paragraph 36 was proposed:

"36. A related issue is the treatment of tax incentives and government subsidies. "Whether and if so to what extent these savings should be taken into account in measuring the value of a participant's contribution depends upon whether independent enterprises would have done so in comparable circumstances" (8.17 OECD Guidelines). Given the type of CCAs addressed in this document, it is recommended that costs passed to the CCA should only include costs effectively spent, from which tax incentives and government subsidies have been deducted, provided that such treatment achieves an arm's length outcome.

Ten Member States made a reservation on the third sentence, some stressing that they needed to consult back internally. It was agreed that the Secretariat would circulate the proposed wording for confirmation by 22 June (cob) whether this third sentence could be accepted or not. Based on the responses received the Report will be finalised either with a footnote noting the reservations or the final sentence will be deleted¹.

It is planned that the report on CCAs on services not creating IP will together with the report on Small and Medium Enterprises and Transfer Pricing be incorporated into a Communication to the Council and European Parliament.

5. MONITORING

The Chair recalled that monitoring is considered an essential part of the JTPF's work program. The Forum monitors on a yearly basis the cases under the Arbitration Convention (AC) and the APAs inside the EU. Concerning the 2011 questionnaires, all Member States had replied.

As the statistics distributed for this meeting are only preliminary MS have the possibility to reconcile their figures bilaterally. Updated data should be sent to the Secretariat by 22 June. The Secretariat will then publish the final version of the 2011 AC and APA statistics.

The Chair further stated that the 10 years anniversary of the JTPF may provide a good opportunity for a broader review of the Forum's achievements and an evaluation in view of considering future actions and improvements. After the last review of the Code of Conduct on the Arbitration Convention, there may be room for further improvement which could result in a third revision of this work. Future work could also concern the APA Guidelines and the EU TP Documentation.

PSM stressed that monitoring of AC cases may reveal areas where further work may be needed. From PSM's point of view transfer pricing cases still take too long and double taxation is in many cases accepted by taxpayers to avoid lengthy and costly procedures. The Chair of the TA Members was also in favour of a monitoring exercise. One TA Member stated that transparency on the side of the taxpayer may improve the situation - opting for the EU TPD would be an important step.

At the next meeting, Members will discuss and decide on the improvement of the current AC Statistics. The Chair of the TA Members referred to the still on-going discussion about how to improve/change the future AC statistics. If bilateral reporting was to

¹ Only one MS withdrew its reservation and some MS made further alternative suggestions. Given this outcome, the final version of the CCA report includes the previous drafting of paragraph 36 (retained as paragraph 38 in the final version), to which all MS agreed and which reads as follows:

"38. A related issue is the treatment of tax incentives and government subsidies which is addressed in 8.17 of the OECD Guidelines. The key question is whether costs passed to the CCA should only include costs effectively spent from which tax incentives and government subsidies have been deducted. *"Whether and if so to what extent these savings should be taken into account in measuring the value of a participant's contribution depends upon whether independent enterprises would have done so in comparable circumstances"*."

remain, at least the instructions should be simple and clear, in particular concerning the starting point.

The Secretariat reported about its meeting with a representative from the OECD who is in charge of the OECD statistics. It seems that the OECD regards their statistics more as a compilation of data that is provided by the countries. They are rather flexible with respect to the data OECD countries report. The OECD suggested that it would be possible for MS to report with respect to the cases they have within the EU the figures they report to the JTPF as long as this is indicated in a footnote. One TA stated that it would be helpful if the OECD could communicate this formally in their guidance for preparing their statistics.

The Chair invited Members to send to the Secretariat by 15 July on a voluntary basis any suggestion/proposal for further improvement on monitoring. On the basis of Members' contributions, the Secretariat will work with the Bureau to present concrete proposals on content and calendar for monitoring actions at the next meeting.

CIRCA BC PRESENTATION

The JTPF was informed by the Commission services about future changes to the Commission's information tool CIRCA and its migration to CIRCA BC. The presentation will be sent to Members by email after the meeting.

6. RISK ASSESSMENT

The Chair recalled that after the presentations by PSM, the Netherlands, the UK and Austria, the topic had not been discussed at previous meetings due to time constraints. The discussion paper for this meeting (JTPF/011/2012/EN) was prepared by the Secretariat in order to summarize the main topics addressed in the presentations and to give an overview on the work that has been undertaken or is currently undertaken at other organisations such as e.g. the OECD. The purpose of the discussion would therefore be an exchange of views on the status quo and about what further work may be undertaken with respect to this topic of the JTPF's work program.

PSM regarded it as important to explore the opportunities risk based approaches may provide to TAs and business for reducing the ever increasing burden transfer pricing creates for all stakeholders. TAs concluded that there is a general interest in work on risk assessment in a way of exchanging experiences between TAs. However, this would not necessarily be shared with PSM. It was recognised that a lot of work is already undertaken and therefore a duplication of what is already available should be avoided. A JTPF project may therefore start with the abstract but should then get concrete and explore on the basis of the tools that already are available at EU level, e.g. the EU TPD and the Directive on Exchange of Information.

The OECD observer mentioned the OECD's Forum on Tax Administrations Study on "Dealing Effectively with the Challenges of Transfer Pricing". Further the OECD's 2013 Global Forum on Transfer Pricing will be targeted at risk assessment and the Steering Group created for the Global Forum - with the involvement of the OECD's Business and Industry Advisory Committee (BIAC) - is doing work on a background paper addressing

risk features and best practices in risk assessment. It is planned to circulate a first draft of this paper in August.

The Forum agreed that concrete and targeted measures of risk assessment should be evaluated for reducing unnecessary work in business and administrations. In particular the area of documentation was regarded as a promising starting point for such an evaluation. Further it is worth reviewing the EC's 2006 and 2010 Risk Assessment Guides as well as measures of enhanced relationship and concrete guidance already available at MS level (e.g. in the UK).

The Chair concluded that TAs and PSM are willing to further evaluate what can be done in the area of risk assessment. The Forum agreed to create a subgroup to evaluate what concretely could be done and make proposals on how to take the work forward. It was regarded as advantageous if the subgroup could cover a broad range of views, i.e. would have members from PSM (advisors and business) and tax administrations, both MS which have already experience in this area and MS who are more reluctant. The Chair invited JTPF Members to volunteer for participating in the subgroup before June 22nd. The Secretariat mentioned that the size of the subgroup may have to be limited due to organisational/budget reasons and that it cannot guarantee that every volunteer will finally become a member. A meeting of the subgroup should be scheduled for September so that the subgroup can report to the Forum at the October meeting.

7. SECONDARY ADJUSTMENTS

The Chair recalled that this item on the JTPF work program was introduced by a questionnaire to Members. The questionnaire was concluded and, although initially the majority of MS supported limiting the project to a presentation of the status quo, it was agreed at the March meeting that the Secretariat would draft a paper elaborating on suggestions received from some Members and on the Parent Subsidiary Directive (PSD). The Secretariat prepared a document for this meeting (JTPF/010/2012/EN) in order to support the discussion about which direction further work on this topic should take.

TAs concluded that they are generally satisfied with the stock taking exercise already performed. Further they were wondering whether it is worth spending much time on a topic with only limited practical relevance. Therefore TAs preferred to limit further work and to build up on conclusions already reached at other levels as e.g. the OECDs MEMAP.

While PSM agreed that the topic is present in some MS only, it was stressed that cases arising are normally very problematic and that avoidance of double taxation should be ensured. Therefore the JTPF should develop practical solutions and clear recommendations on how to deal with those cases.

The Chair stressed that although not all MS apply secondary adjustments, all MS may be affected by cases if relief is denied for withholding tax applied by another MS.

Applying the Parent Subsidiary Directive (PSD)

Although most MS considered deemed distributions as being covered by the PSD in case the primary adjustment is made between a parent and a subsidiary within the EU (Q1),

some MS expressed their reluctance to deal with questions regarding the interpretation of the PSD within the JTPF. They regard this issue as limited to domestic law and hence going beyond their own mandate and the mandate of the JTPF. The Secretariat will seek clarification on the legal interpretation of the directive in particular related to one MS. The Chair proposed to skip the discussion on Q2 – Q4 as the cases envisaged were considered too specific at this stage of the discussion.

Some Members suggested that only a recommendation that encourages MS to evaluate whether they should abstain from withholding tax on deemed dividends by applying the PSD could be accepted.

Repatriation

With respect to some MS's concerns regarding the section on repatriation, the Chair stressed that this section of the paper is based on what already was agreed at OECD level. The question to be addressed at the JTPF would rather be whether those conclusions should further be developed and eventually result in JTPF recommendations.

While some MS were reluctant with respect to further elaborating on repatriation in general (Q5) and on early repatriation (Q6), others supported further progress on this topic. Regarding repatriation in a MAP (Q7 and Q8) some MS were reluctant to recommendations pre-determining the outcome of a MAP.

Regarding possible recommendations on the treatment of interest (Q9), penalties (Q10) and for addressing the issue in domestic regulations (Q11) Members agreed to further develop those topics.

Way forward

Some MS stressed the limited importance of this topic in practice and the risk that too detailed guidance may reduce the flexibility which until now governed the treatment of secondary adjustments in MAP procedures.

The Secretariat will take these considerations into account when preparing a draft report with concrete recommendations on this topic for the next meeting.

8. ANY OTHER BUSINESS

The next meeting in 2012 is scheduled for 25 October.