



Brussels, November 2013
TAXUD D1

Doc: JTPF/017/2013/EN

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

held in Brussels on 5 November 2013

1. ADOPTION OF THE AGENDA

The Agenda (doc. JTPF/015/REV1/2013/EN) was adopted by consensus.

2. DOCUMENTS ADOPTED UNDER WRITTEN PROCEDURE

The Summary Record of the June 2013 Meeting (doc. JTPF/014/2013/EN) was adopted under written procedure.

3. INFORMATION BY THE COMMISSION ON CURRENT ONGOING ISSUES

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

- Croatia: Croatia joined the EU on 1 July 2013, became a member of the JTPF and will accede to the Arbitration Convention. The Commission Recommendation for a Council decision concerning the accession of Croatia to the AC was discussed in Council on 9 October 2013.
- Future Commission Communication: for technical reasons the planned Communication on the work of the JTPF containing the Reports on secondary adjustments and on risk management has not been launched yet. This is now envisaged for the beginning of 2014 and could include the Report on compensating adjustments.
- Follow-up to the SME report: MS' responses to the SME questionnaire have been published on the JTPF webpage¹.

¹ http://ec.europa.eu/taxation_customs/taxation/company_tax/transfer_pricing/forum/index_en.htm
(see Achievements, item 6: Report on SMEs and Transfer Pricing)

- Status of the initiative on general arbitration in the EU: transfer pricing and areas covered under the Arbitration Convention are excluded from the scope of the future proposal. Preparatory work is ongoing and quantitative data is being collected. If NGMs have quantitative information on non-transfer pricing tax disputes in the EU available, they are invited to share this information with the Commission.
- Action plan to strengthen the fight against tax fraud and tax evasion: the second meeting of the Platform on Tax Good Governance was held on 16 October. At its next meeting in February 2014 the Platform will discuss country-by-country reporting.
- Proposal for a Council Directive on a Common Consolidated Corporate Tax Base (CCCTB): the Irish Presidency has presented a compromise proposal. Technical discussions are underway at the moment and the Lithuanian Presidency might produce another compromise proposal.
- Taxation of the digital economy: A Commission expert group has been established through a Commission Decision and a call for applications for the selection of members has been published on the Commission website. The group (6 members + Chairperson) will look at tax issues in the digital economy from a European perspective and will advise the Commission. The first meeting of the group is planned for December 2013.
- Vacancy in the JTPF: for technical reasons the call for applications for the replacement of Sabine Wahl will need to be published again.

4. COMPENSATING ADJUSTMENTS

The Chair introduced the document for discussion (Revised Draft Report on Compensating Adjustments, JTPF/009/REV1/2013/EN) which takes into account the conclusions reached at the June meeting. The comments received are listed in a separate document (Compilation of comments received on the Draft Report on Compensating Adjustments, JTPF/016/2013/EN). The Chair stressed that the aim of this meeting is to finalise the report or get it as close to finalisation as possible. Members were reminded that the report does not intend to clarify the principles underlying the different approaches in MS, but rather to develop a pragmatic solution for issues arising from the different approaches to compensating adjustments in the EU. The report determines under which conditions compensating adjustments will at minimum be accepted in the EU. Consequently, Member States (MS) with less prescriptive rules would continue to apply these rules. The report should not be understood as an incentive to introduce more prescriptive conditions for the acceptance of compensating adjustments than currently applied.

On the Chair's request the Vice Chairs summarized the discussions held at the respective pre-meetings.

Tax Administrations (TAs) communicated their willingness to find a practical solution despite their different approaches without overburdening business. Subject to some drafting changes MS stated their general agreement with the revised report.

NGMs stressed the importance of finding a solution for the uncertainty which currently exists with respect to compensating adjustments and at the same time underlined the need for simplification and the compliance burden. In order to facilitate an agreement the scope of the paper could be limited to compensating adjustments which are made in the accounts. The majority of cases concern compensating adjustments made in the accounts.

Transparency would further be strengthened when the adjustments are explained in the respective transfer pricing documentation.

As many MS require the adjustment to be reflected in the accounts and those who do not would not prohibit it, the suggestion was accepted. It was agreed to supplement Section 3 on the scope of the report with a statement that the scope of the report is limited to compensating adjustments which are reflected both in the accounts and in the transfer pricing documentation. With respect to the question on how to deal with compensating adjustments for a certain tax year which may have to be implemented after the closure of books, the Forum agreed that the key point is transparency of the adjustments made. Therefore an implementation in the accounts of the following year would not harm as long as the adjustment is made apparent to the respective tax administrations e.g. in the taxpayers' transfer pricing documentation.

The draft report was then discussed section by section.

Section 1:

Section 1 was accepted as drafted.

Section 2:

Given that the report should only apply to compensating adjustments which are reflected in the accounts, the Forum agreed to remove the last two sentences from paragraph 5 and limit it to the definition as taken from the OECD Glossary.

Section 3:

The text in Section 3 will be supplemented with a limitation of the scope to compensating adjustments which are reflected in the accounts and explained in the taxpayers' TP documentation. To avoid misunderstandings with respect to the formulation '*compensating adjustments will be accepted*' in the report, the Forum agreed to add a clarifying statement that the acceptance of compensating adjustments should not be understood as limiting a tax administration's ability to make an adjustment at a later stage (see paragraph 19 of the draft report).

Section 4.1:

The drafting suggestions to paragraphs 10 and 13 were accepted. With respect to the issues which may arise when applying an ex-post approach as described in paragraph 11, the Forum agreed that issues of double taxation or double non taxation may also arise when both MS apply an ex-ante approach. To avoid giving the impression that the issues addressed in the report are limited to the issues described in paragraphs 11 and 12, the Forum agreed to redraft the first sentence of paragraph 15 as follows: "*To address these or related practical issues, MS agree on conditions under which taxpayer-initiated compensating adjustments should be accepted **for the tax return***".

Section 4.2:

With respect to the structure of paragraph 16, the Forum accepted the first drafting suggestion and agreed to integrate the first 2 bullet points into the main text of the paragraph, so that only the conditions listed afterwards would appear as bullet points. The Forum agreed that – in line with the general understanding in the TP guidelines and other JTPF documents – the term 'profits' also covers losses.

As the content of footnote 8 was regarded as very important for the understanding of the document, it was decided to move it into the text and to add a clarification that the report does not encourage MS to introduce more conditions for compensating adjustments than currently applied.

It was discussed whether a statement should be added to clarify that compensating adjustments should only be made in cases where the result achieved is outside of what is/was considered as being an arm's length range, in order to bring the result back into the arm's length range, rather than to choose a different point within an arm's length range. The Forum decided that this was already the underlying assumption of the paper and would not require an explicit statement.

As regards the 3rd bullet point in the draft report (1st condition: reasonable efforts to achieve an arm's length outcome) TAs could agree to the text as drafted, but NGMs were concerned that the condition on 'reasonable efforts' could be understood as requiring the taxpayer to make these efforts for each single transaction in a series of transactions. Moreover, they saw a need to clarify what the term '*reasonable efforts*' exactly means. The Forum agreed to address these concerns by clarifying that the condition does not apply to every single transaction in case of series of transactions and by referring to the TP documentation as a hint to the meaning of 'reasonable efforts'. The condition would therefore be drafted as follows:

'Before the relevant transaction or series of transactions, the taxpayer made reasonable efforts to achieve an arm's length outcome. This should normally be described in the transfer pricing documentation of the taxpayer.'

The 4th bullet point (2nd condition: taxpayer's ability to demonstrate the reasons for discrepancies between forecast and result), refers to a requirement which is currently only applicable in a limited number of MS. To reflect this, the condition would be moved down as a last bullet point. In addition, although the first part of this paragraph already stresses that less prescriptive rules continue to apply, the Forum agreed to re-draft this condition along the following lines:

'The taxpayer is able to explain for what reason his forecast did not match the result achieved, when it is required by internal legislation in at least one of the MS involved.'

The conditions on symmetry, consistency and timing (5th, 6th and 7th bullet points in the draft report) were accepted as drafted. Given that the scope of the report would be limited to compensating adjustments reflected in the accounts, the last condition (8th bullet point) would be deleted as redundant.

The Forum agreed to delete paragraph 17 and re-draft paragraph 18 as suggested in the text box. The drafting of paragraph 19 was accepted, but the footnote would be removed.

The Chair concluded that the report is agreed subject to the changes discussed. The Secretariat was asked to reflect the agreed drafting changes in a marked version of the report and to circulate it among Members by the end of November for their approval. Comments could be made on this text, but only on the amended parts. Such comments should be sent to the Secretariat by the end of December. If no comments are received, the amended report would be regarded as adopted. Otherwise, a further revised version would be produced and sent to Members for approval under written procedure.

5. MONITORING

5 (i) EU TPD

The Chair thanked the respondents to the questionnaire on the EU TPD. Draft summaries of responses to the questionnaire (for MS and non-governmental stakeholders) were distributed at the pre-meetings.

On the Chair's request, the Secretariat gave a brief overview of the draft summaries. As the Secretariat intends to orally report on the work of the JTPF on the EU TPD at the

upcoming OECD WP 6 meeting, Members were asked to inform the Secretariat by mid-November about any major concerns they may have with respect to the draft summaries. Other comments/suggestions for improvement of these summaries should be made by the end of December. Afterwards the documents will be shared with the rest of the JTPF and published. They will also inform possible future work of the JTPF on the EU TPD.

5. (ii) Arbitration Convention

The Chair stated the intention to have a first discussion on the issues and suggestions in the revised discussion paper (Revised discussion paper on the improvement of the functioning of the Arbitration Convention, doc. JTPF/011/REV1/2013/EN). It was clarified that the distinction between the two sets of issues in the work plan in Section B should not be understood as an indication that separate documents and conclusions would be produced. Rather, it is envisaged to complete the project with one report which will address all of the items.

On the Chair's request the Vice Chairs summarized the discussions held at the respective pre-meetings.

TAs communicated that they – due to time constraints – were only able to discuss the first 2 items of the document. With respect to item C.7, TAs requested time for an internal discussion before discussing it at the Forum.

NGMs went through all the items and stated that in their view some recommendations could be stronger.

The Group discussed items C.1 to C.4 with the following outcome:

C.1 Flexible interpretation of time limits

It is important to distinguish between the two points made in this section, i.e. the flexible interpretation of the time limits and informing taxpayers of their rights under the AC. While many MS were reluctant with respect to the first point, their positions on the second point were more balanced. It was clarified that 'advise', as used in the proposed wording should be understood as 'inform', not as 'counsel'. As regards the flexible interpretation of time limits MS had concerns over the so-called 'borderline cases'. This term could either mean cases for which the deadline has been exceeded by a minimal period of time or cases in which the starting point of a deadline seems not to be clear. On the second point previous work of the Forum was recalled: in 2003 the starting point of the three-year period (deadline for submitting a request according to Article 6 (1) of the AC) in the then 15 MS and 4 candidate countries was surveyed by the JTPF. It was concluded that this work should be used as a starting point in identifying issues that need to be addressed and in deciding how to address them in the most appropriate way.

C.2 Denying access to the AC

While some Members regarded the second sentence of the proposed recommendation as redundant, others thought it was useful. The need for separate requests under a Double Taxation Convention and the Arbitration Convention was discussed and it was suggested to elaborate in the next discussion draft on possible alternatives on how requests may be made. Members were explicitly invited to send their comments on these items to the Secretariat by 31 December.

With respect to the question on whether it is possible in MS to appeal against a denial of access to the AC, comments were invited.

C.3 Cases not ripe for the AC, disputes likely to arise

It was recognised that early submission of cases might be useful, but the existing workload on cases where double taxation has already arisen would probably not allow time to deal with those. It was clarified that in any case an early submission could not be used as a ‘shortcut’ to a MAP, as it does not kick off the three-year period. The Forum concluded that before deciding on whether to have a recommendation or not, the impact of such recommendation should be clarified. Also, it would be necessary to take stock of tools already available under the AC and to reflect them in the next discussion draft. Members were explicitly invited to send their comments on this item to the Secretariat by 31 December.

C.4 Implications of MAP results for other years

NGMs supported such a recommendation while most of the MS that took the floor were not convinced that it would be helpful. It was clarified by the Secretariat that the proposed recommendation does not suggest developing a specific “simplified procedure”, but aims to bring forward good practices on how work can be simplified. Certain Members regarded the application of MAP results for other tax periods in appropriate cases as self-evident. Some MS saw this item as already covered by recommendations of the JTPF in the context of risk management. It was concluded that this item needs to be given further thought. The recommendation could be re-drafted in a less prescriptive way.

Due to time constraints it was not possible to discuss the remaining sections of the document. The Chair invited comments on the sections of the document which were discussed, as well as on those which were not by 31 December.

6. ANY OTHER BUSINESS

Next meetings: Next meeting **6 March 2014** (tbc), **26 June 2014** (tbc), **23 October 2014** (tbc)