



Brussels, May 2014  
TAXUD D1

**Doc: JTPF/003/2014/EN**

## **SUMMARY RECORD OF THE THIRTY NINTH MEETING OF THE EU JOINT TRANSFER PRICING FORUM**

**held in Brussels on 6 March 2014**

### **1. ADOPTION OF THE AGENDA**

The Agenda (doc. JTPF/002/2014/EN) was adopted by consensus.

### **2. DOCUMENTS ADOPTED UNDER WRITTEN PROCEDURE**

The Summary Record of the November 2013 Meeting (doc. JTPF/017/2013/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: the European Parliament will vote on the Commission Recommendation for a Council decision concerning the accession of Croatia to the AC on 17 April. Council Decision should be adopted shortly afterwards.
- Commission Communication on the work of the JTPF in the period July 2012-January 2014: the Communication is in the process of adoption by the Commission. It contains the reports on secondary adjustments, risk management and compensating adjustments.
- MS TP profiles: 24 out of 28 MS have already submitted to the Secretariat country-specific TP information for publication on the JTPF webpage (MS TP profiles). The profiles will be published as soon as possible.
- Status of the initiative on general arbitration in the EU: areas covered under the Arbitration Convention are currently excluded from the scope of the future proposal. At the moment quantitative evidence is being collected by the

Commission on the size of the problem to substantiate the proposal. This work will likely continue under the next Commission.

- Proposal for a Council Directive on a Common Consolidated Corporate Tax Base (CCCTB): discussions are underway under the Greek Presidency. The next Commission will continue this work.
- Action plan to strengthen the fight against tax fraud and tax evasion: the third meeting of the Platform on Tax Good Governance was held on 6 February 2014. The main aim of this Commission expert group is to monitor the implementation of the Commission recommendations from December 2012. At its meeting in February the Platform discussed country-by-country reporting.
- Tax transparency and country-by-country reporting: EU disclosure requirements have recently been adopted for country-by-country reporting for the extraction industry and loggers of primary forests (EU Accounting and Transparency directives) and for banking institutions (EU Capital Requirements Directive IV). The future Directive on disclosure of non-financial and diversity information by certain large companies and groups (not adopted yet) will likely include a review clause making possible future measures on more transparency for large companies and groups.
- Taxation of the digital economy: the Commission expert group on taxation of the digital economy is looking at tax issues in the digital economy from an EU perspective. The group will issue a report in the near future.
- Vacancy in the JTPF: considering that there are only 3 meetings left till the end of the current mandate of the JTPF and the good functioning of the group as it is, the current vacancy on the JTPF will not be filled.

#### **4. ARBITRATION CONVENTION (AC)**

The Chair introduced the Revised discussion paper on the improvement of the functioning of the Arbitration Convention (doc: JTPF/011/REV2/2013/EN) and explained that the purpose of the discussion is to develop the basis for the future JTPF report ('the report') by

- formulating recommendations for a future revised Code of Conduct (CoC),
- identifying additional aspects which may not result in a recommendation, but may nevertheless be mentioned in the report and
- identifying a list of items which would (possibly) require an amendment of the AC.

It was agreed to go through the discussion paper item by item starting from the beginning. Although the first 4 items of the document were already addressed in November 2013, they were discussed again in light of further information and contributions which became available after that meeting.

The discussion resulted in the following outcome:

##### **1. Flexible interpretation of time limits**

A general recommendation to inform enterprises about their rights under the AC was supported.

Developing a common definition of the term ‘first notification’ was not supported. Rather it was concluded to update the list on the starting point of the 3-year period of Article 6 (1) AC originally annexed to the draft CoC (2003). The updated list may be annexed to the revised CoC and/or to MS’ TP profiles on the JTPF website. MS agreed to submit their information by 30 April 2014.

The proposal to define the term ‘double taxation’ for the purpose of clarifying that cases in which there is no actual tax payment (for example cases where the entity subject to the transfer pricing adjustment has losses carried forward) can also be addressed under the AC was supported. Members who commented saw no problem to address cases without actual tax payment under the AC and the Secretariat was asked to prepare a respective drafting suggestion in the report.

## 2. Denying access to the AC

The main aspect addressed under this item was how to deal with cases in which the existence of a Permanent Establishment (PE) is to be determined, as well as on the amount of profit which may or may not be allocated to the PE. The Forum confirmed that the issue of whether a PE exists (Article 5 OECD MTC) is not directly covered by the AC. However, all MS except 1 consider that once the existence of a PE has been clarified, the AC is applicable to the attribution of profits to that PE. That 1 MS explained its position with Article 1 of the AC according to which the AC applies to adjustments “on the grounds that the principles set out in Article 4 and applied either directly or in corresponding provisions of the law of the State concerned have not been observed”. This is, in the view of that MS, not the case where the reason for the adjustment is not a non-observation of the arm’s length principle, but the detection of a PE that the taxpayer had not declared at all. That MS emphasized that in its view this is however a largely theoretical issue, as in practice there were no agreements just on the existence of a PE without at the same time an agreement on the allocation of profits.

Apart from that MS, there was support for taking the recommendation suggested in the discussion paper as a starting point for further discussion in the report and to supplement it with considerations on the 2-year deadline under Article 7 (1) AC.

Regarding the possibility to appeal against a denial of access to the AC it was agreed to have an overview on the state of play in MS before deciding about further action. MS who had not yet responded to this question were asked to do so by 30 April 2014.

The suggestion to extend the AC to further issues (for example thin capitalisation) was referred to the list of items which may be addressed when considering a revision of the AC.

## 3. Disputes likely to arise

There are rare circumstances in which an early submission could be useful. The report will refer to the various possibilities and state that in appropriate cases an early submission would be accepted, without making explicit recommendations.

## 4. Implications of MAP results for other years

The drafting suggestion by Ireland was regarded as a good basis for a recommendation in the report. When discussing the exact wording, special attention should be given to the implications a combination of cases may have on deadlines.

## 5. Webpage with MS information

MS TP profiles containing country-specific TP information will be published on the JTPF webpage in due time. MS who had not yet send their TP profiles were invited to do so as soon as possible.

## 6. MAP request to both CAs

The draft recommendation was regarded as an appropriate starting point for the report. It was agreed to supplement it with guidance on the language to be used when submitting the MAP request.

## 7. Independence of CA from audit

Making a recommendation to this effect was generally accepted.

## 8. No waiver of rights for audit settlements

Making a recommendation to this effect was generally accepted and the Secretariat's drafting suggestion adopted as a starting point for further discussion. Some MS stressed the need to take care that a recommendation would not be misunderstood as hampering the willingness to compromise in audits.

## 9. Guidance on position papers

The proposed additional guidance in ANNEX 2 of the revised discussion paper received support and was adopted as a starting point for further guidance in a revised CoC.

## 10. Improving the second phase based on suggestions by members of advisory commissions

- Members of advisory commissions – no more than one representative with voting rights per CA: While supported by NGM and some MS, other MS were against such a recommendation. For them the possibility to appoint only one representative per CA is already foreseen in the AC and this should be sufficient. It was agreed that the advantages and disadvantages of either option would be described in the report and re-discussed.
- Opening statements: A recommendation to hear a statement by the enterprise at the outset of the procedure was considered by some MS as being too prescriptive. It was instead suggested to recommend requesting a statement at an appropriate point in time. However, care should be taken that such a recommendation would not simply repeat Article 10 AC. The suggestion for a pre-filing procedure in the MAP context was not supported and regarded as making less sense compared to an APA procedure.
- Timing: It was agreed to make a recommendation that the time until an advisory commission is established should be used by CAs to already compile relevant information, so that it is readily available at the start of the procedure.
- Remuneration of members of advisory commissions: The JTPF could not agree on changing the remuneration, but will keep this point under review.
- Follow up to advisory commissions' opinions: Distinction should be made between the first (MAP) and the second phase (arbitration) of the AC as regards the acceptance of the agreement by the enterprise. For the first phase the acceptance and withdrawal of domestic remedies and court proceedings may generally be required in a comparable way as it is done for MAP under a Double Taxation Convention (DTC). With respect to the second phase, most Members shared the view that there is generally no discretion under the AC not to implement the advisory commission's decision. However, given the limited number of cases resolved in arbitration till now and assuming that an enterprise would generally be satisfied when double taxation is removed, it was concluded that this is a hypothetical issue rather than a practical one. The importance of providing clarity on this item was nevertheless recognised and it was agreed to collect MS practices in this respect. MS who had not yet responded to an earlier request (see ANNEX 4 of the discussion draft) were

invited to inform the Secretariat by 30 April 2014 about whether agreements reached under the AC (1st phase/2nd phase) are made subject to the approval of the enterprise. Furthermore the discussion revealed the need to clarify the relationship between the AC and remedies available under domestic law.

#### 11. Serious penalties

The AC leaves it to each MS to define “serious penalties”. A common definition would improve clarity and consistency. However, as the AC is a multilateral convention between MS a common definition could only be recommended to MS for adoption in their unilateral declaration under Article 8 AC. As an alternative, NGMs suggested that the type of infringement giving rise to serious penalty could usefully be defined instead and highlighted that access to the AC should only be denied in the rather exceptional case of fraud, as is provided for in point 3 of the CoC. Reference was made to the definition of the term “fraud” in the Commission Communication on concrete ways to reinforce the fight against tax fraud and tax evasion including in relation to third countries<sup>1</sup>. At its next meeting the Forum will discuss this definition. In the meantime MS will examine if their current definitions of serious penalties are up-to-date.

#### 12. Implications of the new Article 7

It would be important to get an overview on MS’ preferred option on the implications of the new Article 7. MS and NGMs were invited to send by 30 April 2014 their views on the options listed in Section A of ANNEX 6 of the revised discussion paper and to indicate which option they prefer.

#### 13. Multilateral MAP

It was agreed to postpone the discussion and closely monitor the developments at the level of the OECD.

#### 14. – 16. Information not sufficient for MAP, Cancelling MAP and Information submitted in MAP but not in audit

The issues addressed under items 14 – 16 were regarded as being interrelated. The Forum recognised that there should be a balance between the amount of information necessary to initiate a case under the AC and what may be provided/requested at a later point in time. It was also recognised that it might be difficult to provide general guidance which would be appropriate for all cases, but that the Forum would look into this. CAs and enterprises should avoid extreme behaviour such as overly extensive and continuing information requests by CAs before initiating a case and discontinuation of an enterprise’s cooperation once a case has been initiated.

#### 17. Suspension of tax collection

It would be useful to receive an overview on how point 8 of the CoC is implemented in MS. Given the strong interaction of this item with interest charges, this overview should also cover MS practices with respect to interest charges. However, considering that information is being requested from MS on various other points for the next meeting in June, it was agreed that this information would be collected for the JTPF meeting in October.

#### 18. Informing the enterprise during MAP

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<sup>1</sup> COM (2012) 351, 27.06.2012

This is an important point and it will be elaborated in the report. Future work may focus on how to improve the practical application of the existing recommendation to this effect in the CoC.

#### 19. Change to baseball arbitration

According to some the wording of the AC does not allow for baseball arbitration and therefore the item should be addressed in the context of amendments to the AC itself. In addition, doubts were expressed on whether a system of baseball arbitration would actually be more appropriate than the current approach. It was agreed to closely monitor the discussion on the pros and cons of the two approaches at the level of the OECD.

#### 20. AC and Arbitration under DTC

The JTPF agreed to do further work on issues arising from the co-existence of the two procedures in bi- and multilateral situations and regarded the proposals in the discussion paper as an appropriate starting point.

As it was possible to address all items of the revised discussion paper in a sufficient manner, the Secretariat was asked to prepare a draft report for the next meeting.

### **5. EU TPD – ROUND TABLE DISCUSSION TO IDENTIFY NEXT STEPS**

The monitoring of the Code of Conduct on transfer pricing documentation for associated enterprises in the EU (EU TPD) in 2013 provided information on the impact of the EU TPD on MS' legislation and administrative practice and the extent to which the EU TPD is used by MNEs. Summaries of MS' and non-government stakeholders' responses to the EU TPD questionnaires were shared and published in January 2014. The aim of the round table discussion was to allow for an exchange views on the follow-up to the findings of the monitoring exercise.

The OECD representative updated the Forum on the preliminary results of the OECD public consultation on the discussion draft "TP documentation and Country-by-Country Reporting".

With respect to next steps on the EU TPD the Chair opened the floor for a round table discussion which resulted in the following outcome:

- The JTPF recognised that the functioning of the EU TPD can be improved and agreed to undertake work to this end.
- Existing weaknesses would be addressed by revising the EU TPD Code of Conduct.
- Possible issues for consideration in the revision process could include (preliminary list):
  - Compulsory EU-wide use of the EU TPD?
  - Comparables/benchmarks
    - Standardised use of pan-European comparables?
    - Pan-European benchmarks?
    - Guidance as regards benchmarking analysis and the selection of comparables?
  - Languages
    - Acceptance of English as language for the masterfile?
  - Master file and country files
    - Simplifying/reducing the content required of the masterfile?
    - Moving content related to specific MS to country files?

- EU-wide harmonisation of country-file requirements?
  - Guidance on the possibility to produce more than one masterfile or to have a group member exempt from the EU TPD?
  - SMEs
    - Common EU definition of SMEs for TP documentation purposes?
    - Guidance on the use of the EU TPD by SMEs ('light' EU TPD for SMEs)?
  - Penalties
    - Guaranteed non-application of penalties in case the EU TPD is used in full?
  - Deadlines
    - Guidance as regards deadlines for submission of TP documentation?
  - Subsequent periods
    - Guidance on considering documentation as relevant for subsequent periods?
  - County-by-country reporting
- As regards the timing for the revision of the EU TPD it was agreed that the Secretariat would already start preparatory work on the basis of the round table discussion. Developments at the level of the OECD will be closely monitored. A discussion on substance on the revision of the EU TPD will only be possible at the October 2014 meeting of the JTPF.

## **6. ANY OTHER BUSINESS**

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