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EU JOINT TRANSFER PRICING FORUM

Discussion paper on Transfer Pricing Risk Management

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A. Background

The item "risk management" on the JTPFs current work programme was introduced by the "Discussion Paper on further Work in the Area of TP Risk Assessment" (doc [JTPF/011/2012/EN](#)). At its meeting in June, the JTPF discussed that paper and agreed on creating a subgroup that first met on 18 September. For this meeting the Commission services prepared the working paper attached to this draft in ANNEX 1. This working paper presented an overview of the material publicly available on risk management and listed the various items relevant in context of risk management. At its meeting the subgroup discussed the working paper and the suggestions made by the subgroup members.

This report summarizes the outcome of the first meeting of the subgroup for discussion by the JTPF and suggests the structure and content of a future JTPF report.

B. Suggested structure

It is suggested to structure the work/the report in the sense of a work plan which reflects in 3 steps the usual chronological development of a file in transfer pricing.

- Initial phase – period prior to review during an audit of the transfer pricing issue.
- Audit phase – period from start to end of audit (n.b. audit conclusions may not be agreed by taxpayer)
- Resolution phase – period during which tax authority and tax payer seek to resolve any disagreements.

The outcome of the project may be a report in the form of a work plan that provides a guide for addressing risk management in transfer pricing. If available and to avoid duplication of work, reference will be made to material already existing in the public domain which may or may not be supplemented with practical guidance from the JTPF. This work may also lead to separate projects that may be considered by the JTPF or at a first stage at subgroup level.

C. Summary of proposals

| Phase | Risk management work areas | Areas where material already available may be acknowledged | Areas where JTPF Members practices could be collected | Areas where (best/good) practices may be proposed | Areas where recommendations may be developed | Areas that may be addressed in separate JTPF projects |
|---------------|--|--|---|---|--|---|
| Initial phase | 1. Awareness of Risk in TP | X | | (X) | (X) | |
| | 2. Identification of risk triggers | X | X | X | | |
| | 3. Internal sources of information | X | (X) | | | |
| | 4. Gathering further Information | X | X | X | (X) | |
| | 5. Early contact/enhanced relationship | X | X | (X) | | |
| Audit phase | 1. Effective audit process | | | | | |
| | 1.1 Setting up a work plan | X | X | X | (X) | |
| | 1.2 Early audits | X | X | X | (X) | |
| | 1.3 Joint/simultaneous audits | X | | X | X | X |
| | 2. Clear documentation | X | | | | X |
| | 3. Measures to reduce TP risk | | | | | |
| | 3.1 Clear legislation | X | | | | |
| | 3.2 Voluntary compliance | X | | X | (X) | |

| | | | | | | |
|------------------|-----------------------------------|----------|----------|----------|--|------------|
| | 3.3 Safe harbours | X | | | | (X) |
| | 3.4 Other measures | X | | | | |
| Resolution phase | 1. APA | X | | | | X |
| | 2. Effective MAP | X | | | | X |
| | 3. Alternative Dispute Resolution | X | X | X | | |
| Evaluation | | X | | | | |

D. Explanatory Note

I. INITIAL PHASE

1. Awareness of risks in TP¹

There are currently no suggestions going beyond what is listed in the working paper.

2. Identification of risk triggers in TP²

Future work may first consist of a review of the existing material that, for the purpose of a report, may be supplemented with risk triggers stemming from experience.

3. Use internal sources of information³

Various sources of information are mentioned and introduced in material already available in the public domain. Further work could be the development of practical guidance on their use. However, given the specific nature of transfer pricing and the differences between MS, the advantages of issuing such guidance may be limited.

4. Gathering further information

Some MS gather additional information by issuing specific TP questionnaires to taxpayers (see 3.2.1 of the working paper 3rd bullet point). In the subgroup different views were expressed on the usefulness of these additional questionnaires and the compliance burden they may cause.

MS which already use specific questionnaires are invited to report at the JTPF meeting about their experience.

5. Early contact/enhanced relationship

The importance of establishing contact between tax payer and tax administration as early as possible was highlighted, even in the initial phase. In this context the enhanced relationship program of the Netherlands was mentioned.

While the general benefit of entering into early contact was shared, it was also highlighted that this would probably be an area of MSs' domestic procedures. Further there is already material available on enhanced relationship.⁴

Members' views on this topic in general and its potential for further work at the JTPF level are invited.

¹ See sections 2, 3.1 and 3.3 of the working paper.

² See section 3.2.2 of the working paper.

³ See section 3.2.1 of the working paper.

⁴ See section 4 of the working paper.

II. AUDIT PHASE

1. Ensuring an effective audit process

Various features of an effective audit process are listed in section 3.4.2.1 of the working paper, from which the following were identified as being the most relevant:

1.1 Setting up a work plan

Agreeing on a work plan at the beginning of the audit was seen by the subgroup as a key requirement. Such a work plan can cover e.g. a sequence of steps, a timeline envisaged for the audit and each other's expectations with respect to the request and provision of information. An opening meeting between the taxpayer and the competent authority should precede the establishment of the work plan.

1.2 Early audits

The earlier an audit is performed the better. On the other hand, it was recognised that this issue would be once more on the level of domestic procedures and it was questioned what kind of further work could be done at JTPF level that would go beyond recognising the value of early audits.

1.3 Joint audits/simultaneous controls

The subgroup felt that the benefit of joint audits⁵ or at least simultaneous⁶ controls should be further explored on the basis of specific tools that are available in the EU. This may result in a kind of EU TP audit programme that may be initiated e.g. on request of the taxpayer and even make use of the EU TPD. Given the broadness of such an approach this would however be a separate project rather than outcome of the risk management project.

| |
|---|
| JTPF Members' views on this suggestion are invited. |
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2. Clear Documentation⁷

Clear and targeted documentation is essential for an effective audit process and the reduction of TP risk. For this purpose a sheet was prepared by one member of the subgroup summarizing documentation requirements under UN/OECD documentation guidelines and

⁵ Following par 7 of the OECD Forum on Tax Administration's 2010 report, "a **joint audit** can be described as two or more countries joining together to form a **single audit team** to examine an issue(s) / transaction(s) of one or more related taxable persons (both legal entities and individuals) with cross-border business activities, perhaps including cross-border transactions involving related affiliated companies organized in the participating countries, and in which the countries have a common or complementary interest; where the taxpayer jointly makes presentations and shares information with the countries, and the team includes Competent Authority representatives from each country."

⁶ In a **simultaneous control**, two or more Member States agree to conduct a control simultaneously **in their own territory**, of one or more persons of common or complementary interest to them, with a view to exchanging the information thus obtained. (based on Article 12 of the directive on administrative cooperation in the field of taxation of 15 February 2011 (2011/16/EU).

⁷ See section 3.4.1.2 of the working paper.

EU TPD (see ANNEX 2). With respect to what actually should be done to improve documentation/documentation requirements the discussion showed that the EU TPD seems already quite targeted. It was, however, highlighted that currently not many taxpayers officially opt for the EU TPD.

The application of the EU TPD will be monitored under the 2011-2015 JTPF work programme. Further work on documentation may be envisaged based on the results from this monitoring exercise.

3. Apply measures to reduce TP risks

3.1 Clear legislation⁸

The importance of clear legislation was recognised and should be mentioned as an important feature for reducing TP risk.

3.2 Increase voluntary compliance⁹

The benefit of increased voluntary compliance was well recognised and components such as clear legislation/guidance, a penalty regime for taxpayers who do not comply and/or a reward for those who do was highlighted. MSs' practices may be collected.

3.3 Use of safe harbours¹⁰

The pros and cons of safe harbours were discussed. With respect to the work currently undertaken at the level of the OECD it was concluded to wait for its outcome before considering whether and what kind of further work on EU wide safe harbours may be done.

3.4 Other measures

The exchange of views with respect to tax certificates¹¹ and approaches on tax payers' own risk assessment revealed some reticence about these possibilities.

JTPF Members are asked to share their views and experience with the measures listed in section 3.4.1.5 of the working paper.

III. RESOLUTION PHASE

1. APA¹²

Further work on this topic would be monitoring the APA Guidelines during the 2011-2015 JTPF work programme.

⁸ See section 3.4.1.1 of the working paper.

⁹ See section 3.4.1.3 of the working paper.

¹⁰ See section 3.4.1.7 of the working paper.

¹¹ See section 3.4.1.5 of the working paper.

¹² See section 3.4.1.3 of the working paper.

2. Effective MAP/Arbitration

Further work on improving transfer pricing arbitration in the EU will be done by way of monitoring the AC and the Codes of Conduct in the context of the 2011-2015 JTPF work programme. Also, the Commission work programme contains a proposal to examine how to address double taxation within the EU, including a resolution mechanism for double taxation disputes.

3. Alternative dispute resolution¹³

There were different views about establishing a process of alternative dispute resolution reaching from very positive experience of subgroup members with implementing such a process to hesitation of adding further processes to MAP and arbitration by others.

F. Evaluation¹⁴

An exchange of experiences may be done in the context of an eventual future monitoring of the JTPF's work on risk assessment.

F. Way forward

JTPF Members' general views on the items shown in the boxes above will be welcome at the next JTPF meeting.

On the basis of the discussion, the subgroup could continue its work with the aim of preparing a first draft report for the JTPF meeting in February 2013.

ANNEX 1:

Working paper

ANNEX 2

Summary of documentation requirements

¹³ See section 3.4.2.2 of the working paper.

¹⁴ See section 3.5 of the working paper.