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TAXUD D1

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SUMMARY RECORD OF THE FOURTIETH MEETING OF THE EU JOINT TRANSFER PRICING FORUM

held in Brussels on 26 June 2014

1. ADOPTION OF THE AGENDA

The Agenda (doc. JTPF/006/2014/EN) was adopted by consensus.

2. DOCUMENTS ADOPTED UNDER WRITTEN PROCEDURE

The Summary Record of the March 2014 Meeting (doc. JTPF/003/2014/EN) was adopted under written procedure.

3. INFORMATION BY THE COMMISSION ON CURRENT ONGOING ISSUES

Dieter Kischel provided information on the state of play of the following topics:

- **Communication:** On 4 June the Commission adopted a Communication on the work of the JTPF in the period July 2012 – January 2014 containing the reports on secondary adjustments, compensating adjustments and risk management. The Communication will now be sent to the European Parliament and the Council which will hopefully endorse the relevant recommendations.
- **Croatia:** On 15 April the European Parliament delivered a favourable opinion on the Commission Recommendation for a Council Decision on Croatia's accession to the Arbitration Convention. On 6 June the Council WP on Tax Questions approved the text of the Decision and agreed on the date of the entry into force of the AC in relation to Croatia – 1 January 2015. The file will now be submitted for political agreement.
- **Member States' Transfer Pricing Profiles:** 27 out of 28 MS' profiles containing country-specific TP information were published on the JTPF webpage.

- **Action plan to strengthen the fight against tax fraud and tax evasion:** The fourth meeting of the Platform was held on 10 June. Main issues discussed were recommendations on tax havens, aggressive tax planning (ATP) and remaining cases of double taxation outside the transfer pricing area/arbitration.
- **Initiative on general arbitration in the EU:** The Commission is still in the process of collecting quantitative information on double taxation cases outside the transfer pricing area with a view to measuring the size of the problem and making an appropriate proposal. The issue was discussed at the last Platform meeting on 10 June. The position of MS on this initiative remains to be clarified.
- **Taxation of the digital economy:** On 28 May the High-level expert group on taxation of the digital economy issued its final report. The report examines key issues related to taxing the digital economy in the EU and presents recommendations on the best approach to various challenges and opportunities in this field. The Commission will now consider the report and decide on policy orientations in due course.
- **CCCTB:** Technical work on the proposal is under way. The Greek presidency presented a compromise proposal to Working Party on Tax Questions on 6 June. The Italian Presidency will take over on 1 July and will focus on the international aspects of the system and certain cross border intra-EU situations.
- **Parent Subsidiary Directive:** On 20 June 2014 ECOFIN reached political agreement on amending and updating the EU's Parent Subsidiary Directive (PSD). The amendment counters distorting effects of mismatches resulting from differences in the tax treatment of hybrid loans within the scope of application of the PSD.
- **Composition of experts groups:** On 12 May the European Ombudsman Emily O'Reilly launched a public consultation concerning the composition of Commission expert groups. Civil society organisations have in the past complained to the Ombudsman that certain Commission expert groups have unbalanced composition. If JTPF members may want to contribute to this exercise by sharing their point of view, they can do so by writing to the Ombudsman by 31 August 2014. The Secretariat will provide JTPF Members with the respective internet link in a follow up email after the meeting.

4. ARBITRATION CONVENTION (AC)

The Chair stated that the discussion of the draft report on improving the functioning of the AC will be the main item of this meeting and that the objective is to discuss as many paragraphs as possible and to ideally reach agreement on them. Different from the discussion draft discussed at the last meeting, the draft report now follows the structure of the Arbitration Convention, i.e. it addresses the issues in the order they appear in the Arbitration Convention itself. The draft report forms the basis for a revised Code of Conduct for the effective implementation of the Arbitration Convention. A first draft of the revised Code of Conduct is attached as Annex 1 of the draft Report.

The Chair highlighted the value of the Arbitration Convention and stressed the importance of ensuring its practical functioning.

It was agreed to go through the draft report section by section, starting from the beginning.

The discussion resulted in the following outcome:

I. Introduction

The text of the introduction was accepted.

II. JTPF analysis and recommendations

1. Scope of the Convention (Chapter I, Articles 1 and 2 of the AC)

1.1 Application of the AC in the absence of an actual payment of tax

NGM supported broadening the recommendation by saying that the case of loss carry forward is only one example but there are others as well. MS did not support broadening the scope of the recommendation and requested a clear statement on what cases are addressed by the recommendation, i.e. instances where no actual payment is made as a result of a loss carry forward. For MS already the current wording of the recommendation would allow an interpretation that cases without double taxation and even cases of double non-taxation should be covered by the AC. NGM referred to other cases without an actual cash payment to which the AC should be applicable, e.g. instances where there is no tax payment because of tax credits or because of loss compensation in cases of fiscal unity. The Chair proposed to keep the first and second sentence of the recommendation and to supplement the second sentence with the additional cases suggested by NGMs (*...and other cases such as group relief and similar situations*). The third sentence was considered as no longer necessary and should be deleted. The Chair stated that this issue is under consideration by Members and the Secretariat should develop revised drafting. The revised drafting will be open for JTPF Members' comments.

1.2 Application of the AC dependent on MAP under DTC

It was agreed to give taxpayers the clear message that it is recommended to file requests for each procedure which may nevertheless be combined. With such a clear message the third sentence on allocating the benefit of doubt would no longer be necessary. The last sentence of the proposed recommendation should explicitly state that the 2-year period under the AC would only start once the issue not eligible to the AC is solved under the provisions of the applicable MAP. 1 MS indicated that it does not agree with this recommendation and 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 another issue like the existence of a PE. Additionally, in this MS view the wording of Article 7 AC on the starting point of the 2-year period would speak against applying the AC in cases where one would first have to wait for the outcome of a MAP under DTC. This MS therefore considers reserving its position in a footnote.

1.3 Remedies against denial of access to the AC

The Group agreed on softening the recommendation by stating that MS should consider providing domestic legal remedies against the denial of access to AC. 1 MS reserved its position against such a recommendation another entered a scrutiny reservation. Furthermore, current paragraph 6.3 d) of the Code of Conduct (CoC) should be supplemented with a recommendation to inform the other MS also about a denial of access. Additionally, the MS concerned should endeavour to reach an agreement on whether the denial of access to the AC is justified. 5 MS made a scrutiny reservation.

2. General provisions (Chapter II, Articles 3 to 14 AC)

2.1 Informing enterprises of their rights under the AC

The Group agreed to change the order of the sentences to make it clear that informing the taxpayer is recommended but that it is the taxpayer's responsibility to make sure that deadlines do not expire. Additionally the new first sentence will be supplemented with a recommendation to provide information on the rights under the AC at the time of the first notification of the adjustment in the meaning of Article 6 (1) AC. MS requested not to use "should" but rather a softer wording like "recommended" to indicate that it is a recommendation/good practice rather than a legal obligation.

In this context the Chair noted that the CoC uses various formulations like "will", "shall", "should" and "is recommended" and that the use and meaning of these formulations and of the formulation to be used for new recommendations will probably require further discussions in the future in order to find a coherent approach. The discussion at this meeting should therefore not focus on the terminology used in this respect.

2.2 Independence of CA from audit

It was agreed to put at the beginning of the recommendation a clarifying statement on the fact that audit and competent authorities may belong to the same administration and to leave the wording of the recommendation very close to the wording as drafted but to remove the words "as far as possible". 1 MS reserved its position on this recommendation.

2.3 No waiver of rights for audit settlements or blocking MAP access through unilateral APA

Subject to the final wording, the Group agreed on drafting the recommendation along the following lines: *"Enterprises and tax administrations should not include waiver of access to a mutual agreement procedure in audit settlements and unilateral APAs, as it would be inappropriate for two parties (the enterprise and one tax administration) to exclude a third party (the other tax administration) from the final resolution of a file in which they had an interest."* 1 MS made a scrutiny reservation.

2.4 Implication of the new Article 7 OECD Model Tax Convention (MTC) (2010)

Subject to the final drafting, the Group agreed to start the recommendation with the general statement that Article 4 (2) AC should be interpreted in conjunction with the most recent version of Article 7 OECD MTC and the relevant commentary. An exception will apply in cases where a MS made a reservation in the OECD MTC against implementing the new version of Article 7 OECD MTC and in cases where the bilateral Double Taxation Convention ("DTC") between the MS involved has a different wording. If MS have concluded bilateral DTC, Article 4(2) AC should have the same meaning as the relevant Article on attributing profits to permanent establishments in the applicable DTC taking into account the relevant OECD MTC commentary.

How to deal with multilateral situations where the provisions on attributing profits to permanent establishments in the relevant bilateral treaties differ, will be addressed in the context of item 2.7, Guidance on multilateral MAP.

2.5 Disputes likely to arise

The wording suggested in the report was accepted.

2.6 MAP requests to both CAs

The Group agreed to change the headline of this section into “MAP request and information of the other CA involved” to make clear that the formal MAP request is sent to the CA foreseen in Article 6 (1) AC and the other CA is only put in copy. For cases where the request is not made in a common working language, the Group agreed to recommend the taxpayer to provide a translation of the request in a common working language.

2.7 Guidance on multilateral MAP

The discussion of this item will be postponed until the first results of the respective OECD project become publicly available.

2.8 Informing the enterprise during MAP

The template contained in Annex 3 did not receive support and should be removed. As the text now simply repeats what is already in the current CoC it was agreed to delete the last sentence.

2.9 Implication of MAP results for other years

The Group agreed to keep the recommendation but to modify it by (i) adding “where appropriate” in the third line, (ii) replacing “as part of” by “together” at the end of the third line and (iii) add “typically” in the sixth line after “should” and remove “whether it is appropriate” at the end of this line.

2.10 Information on the starting point of the three year period

The language in paragraph 19 of the draft report and the approach of publishing MS definitions of the term “first notification” as an Annex to the CoC and on the JTPF website was broadly accepted. However, 1 MS made a scrutiny reservation on the penultimate sentence.

2.11 Guidance on position papers

Implementing the additional language was generally supported subject to a statement at the beginning clarifying that the information suggested is only illustrative and should not be taken as a kind of minimum requirement for a position paper. In paragraph 6.4 (b) CoC, the words “methods for adjusting differences” will be replaced with “comparability adjustments”.

2.12 MAP outcome and domestic remedies

The recommendation was accepted with adding at the beginning of the second sentence “*Where at the time agreement is reached domestic remedies are still pending,.....*”. The last sentence in paragraph 22 will be removed and the flowchart in Annex 4 should not be added to the report.

2.13 Serious penalties

While the addition to point 3 of the CoC was supported by NGM, some MS had concerns with limiting additional language to tax fraud and tax evasion as this may be read as excluding cases of gross negligence from the scope of serious penalties. It was agreed that the Secretariat will try to define of gross negligence for the next meeting. Members were asked to send suggestions for the definition as well.

2.14, 2.15 and Chapter III

Due to time constraints the remaining part of the document was not discussed.

NGMs suggested to supplement the next draft of the CoC with a preamble on behavioural aspects and to more explicitly address in the report points 14 – 16 of the revised discussion draft (doc JTPF/011/REV2/2014, Information not sufficient, cancelling MAP and information submitted in MAP but not in audit).

Way forward

The Group agreed on the following way forward:

- The document up to section 2.12 is considered as agreed in principle but subject to the final drafting and the reservations indicated during the meeting. The changes agreed and consequential amendments will be reflected in a revised draft report. Comments on this part of the revised draft report should be limited to the wording.
- Section 2.13 of the document will be redrafted to reflect the outcome of the discussion.
- Written comments on the remaining part of the document are invited by 15 September.
- With respect to section 2.15, MS will be asked to submit information on how the recommendations in point 8 (a) and (b) of the CoC were implemented.
- The revised CoC and the related report will probably be the main item for the next meeting. An additional point may be a discussion of the way forward on the EU TPD in the light of the OECD project and the result of the JTPF survey.
- The Chair reminded the Group that the mandate of this JTPF will terminate in March 2015 and that it is important to think at an early stage about the future work program of the JTPF. This would probably form a further item on the Agenda for the next meeting. Suggestions should be made to the Secretariat by 15 September 2015.

5. STATISTICS

Due to time constraints and the fact that not yet all MS submitted their statistical information, this Agenda item was not discussed. NGMs stressed the importance of the statistics and of making them available at an early point in time.

6. ANY OTHER BUSINESS

The mandate of this Forum will expire on 31 March 2015. The Chair stressed that it would be useful to already think about the program of work of the next Forum and invited Members first considerations/contributions by 15 September.

The Chair informed the Group that the date for the next meeting has been shifted to **Friday 24 October 2014 (tbc)**.