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EU JOINT TRANSFER PRICING FORUM

Monitoring overview and proposals

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A. Background

Monitoring is an essential part of the work of the EU Joint Transfer Pricing Forum (JTPF).

The 2011-2015 JTPF Work Programme reads: *"Monitoring will be conducted with the aim of establishing to what extent the previous works of the JTPF are implemented, to evaluate their effectiveness and to consider how improvements might be made."*¹

According to the latest Commission Communication on the work of the JTPF from July 2010 to June 2012: *"An ongoing task of the JTPF is to monitor and manage the effective implementation of its achievements. This is done both by producing annual statistical reports and by preparing specific reports. The reports are then examined by the Commission services and the JTPF to identify where further work by the JTPF could be carried out. [...] As the JTPF has been in place for 10 years, a broader monitoring exercise of its achievements will be carried out. The Codes of Conduct on the effective implementation of the AC and on transfer pricing documentation in the EU, the Guidelines on APAs in the EU as well as the Guidance for low value adding intra group services will be reviewed together. The aim is to evaluate the overall effectiveness of the implementation of JTPF recommendations endorsed by MS, and to consider how improvements might be made."*²

This document presents an overview of the work of the Joint Transfer Pricing Forum on monitoring to date (Section B)³ and outlines the possible way ahead (Section C). A calendar for future monitoring is also proposed (Section D).

B. General overview of JTPF work to date

I. Arbitration Convention (AC)

1. Outcome

2006 Code of Conduct

- **Code of Conduct on the effective implementation of the Convention on the elimination of double taxation in connection with the adjustment of profits of associated enterprises (Arbitration Convention)**, contained in *Communication from*

¹ See [JTPF/016/2011/EN](#)

² Commission Communication ([COM\(2012\) 516 final](#))

³ The parameters of statistics collected by the JTPF have been adapted over the years to keep a balance between the relevance of yearly information and the administrative burden on Member States' tax administrations to provide such information. In addition, in some instances data supplied to the JTPF Secretariat in the past was incomplete. For the purposes of the charts included in this overview all available data has been aggregated. For precise information on individual MS the reader is invited to refer to the annual statistics published on the JTPF website.

the Commission to the European Parliament, the Council and the European Economic and Social Committee on the work of the EU Joint Transfer Pricing Forum in the field of business taxation from October 2002 to December 2003 (COM(2004) 297 final).

2009 Code of Conduct

- Revised Code of Conduct on the effective implementation of the Convention on the elimination of double taxation in connection with the adjustment of profits of associated enterprises, contained in *Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the work of the EU Joint Transfer Pricing Forum in the period March 2007 to March 2009 (COM(2009) 472 final).*

2. Monitoring

The JTPF monitors regularly the number of MAP cases under the Arbitration Convention⁴. Statistics have been collected on annual basis for the period since 2000⁵.

From 2003 to 2012 the JTPF also regularly maintained a list of independent persons of standing eligible to become a member of the Advisory Commission under Article 9 (4) of the Arbitration Convention⁶. In the future this will be done by the Council.

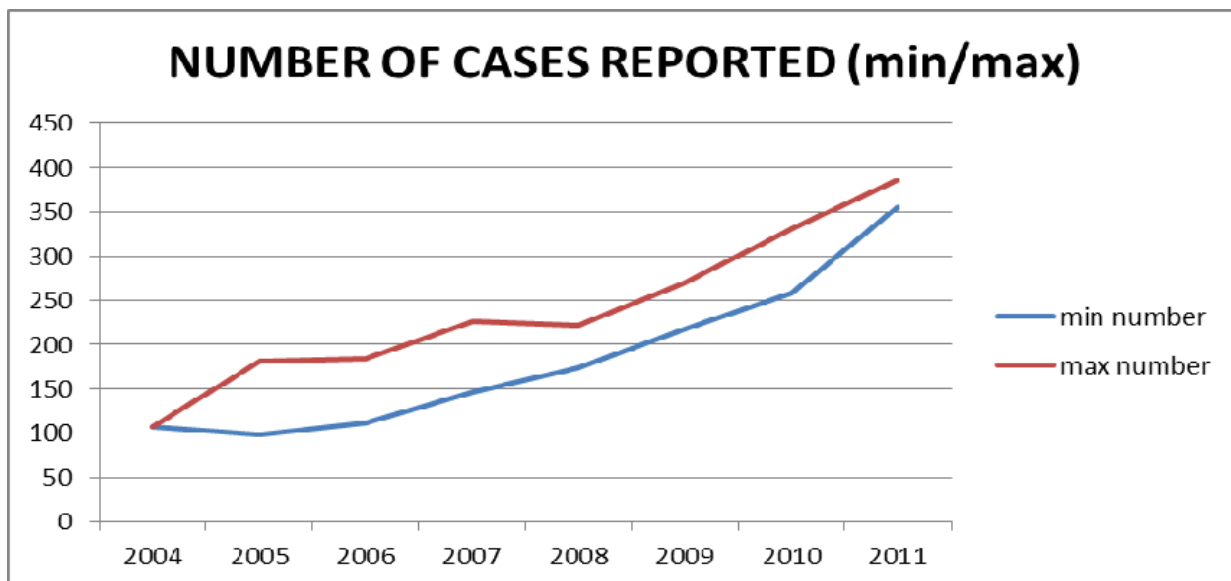
The chart below shows the evolution of reported MAP cases under the Arbitration Convention⁷.

⁴ For the purposes of these statistics, a case is considered as pending as soon as the competent authority (CA) that receives a MAP request informs the CA of the other Member State involved of the request, and generally until closing letters have been exchanged.

⁵ For the latest statistics (for 2011) see [JTPF/013/2012/EN](#).

⁶ For the latest update from March 2012 see [JTPF/010/BACK/REV17/2005/EN](#).

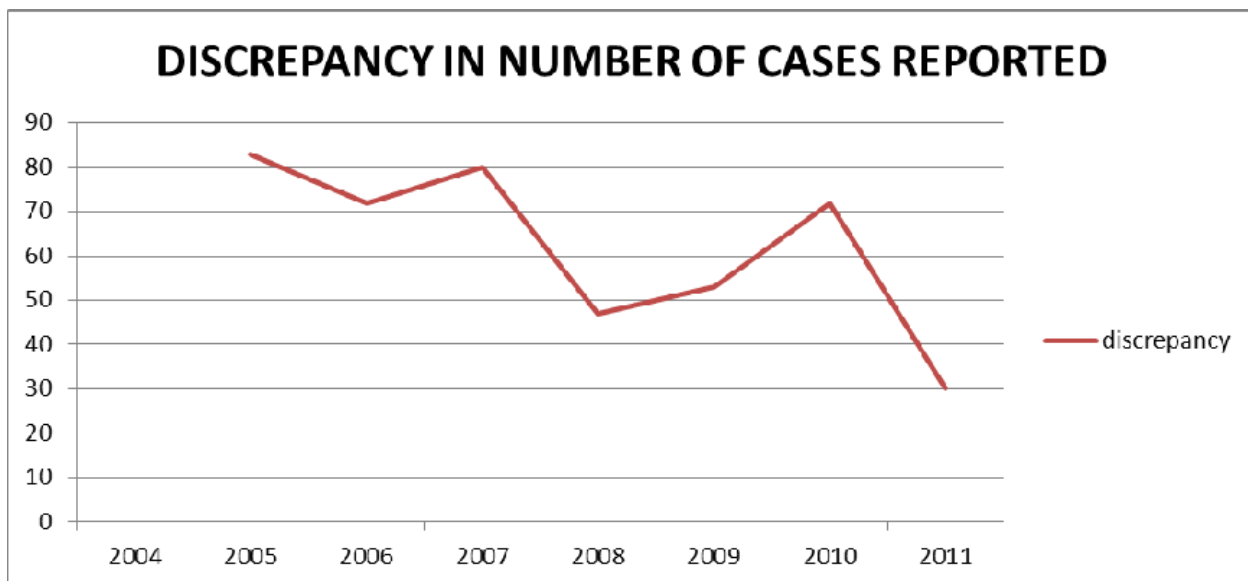
⁷ The chart shows the maximum and minimum number of reported cases per year, based on the respective statistics.



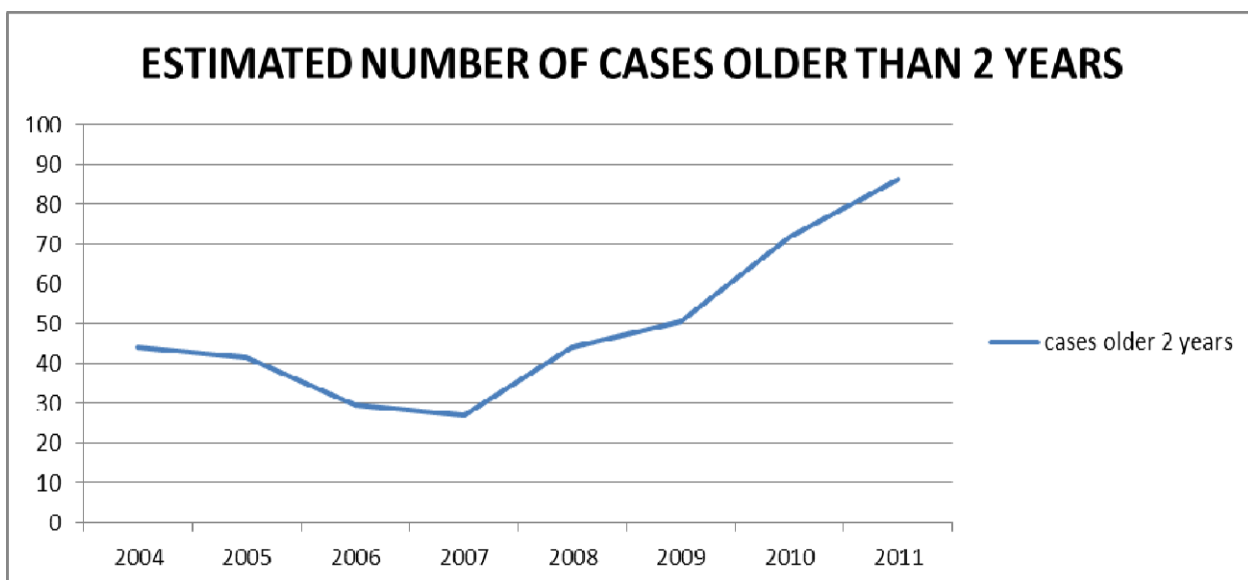
This chart illustrates the increasing importance of MAPs in transfer pricing which at least partly may result from an increased importance of transfer pricing issues in tax audits in general: since 2004 the number of reported cases has multiplied by three. The existence of discrepancies in the number of cases reported by one CA and a counterpart CA can be explained by several factors, such as differences among CAs as regards the opening or the closing dates of the case or differences among CAs on whether a case is admissible under the AC. It may also occur that one CA sees 1 case where a counterpart CA sees 2 or more cases (for instance because the first CA considers the whole audit period as 1 case and the counterpart CA sees every single tax year as 1 case each), or because in Member State X one company is involved (thus 1 case) and in Member State Y there are 2 related companies involved in the transaction (thus 2 cases)).

The data indicates, however, that these discrepancies decreased in 2011. A reason could be the approach of sending preliminary statistics to MS with an opportunity to crosscheck beforehand with the respective counterparts the number of cases reported. The chart below shows the evolution of discrepancies⁸. Discrepancies represent now around 10% of the total number of reported cases.

⁸ The chart shows the difference between maximum and minimum cases reported per year.



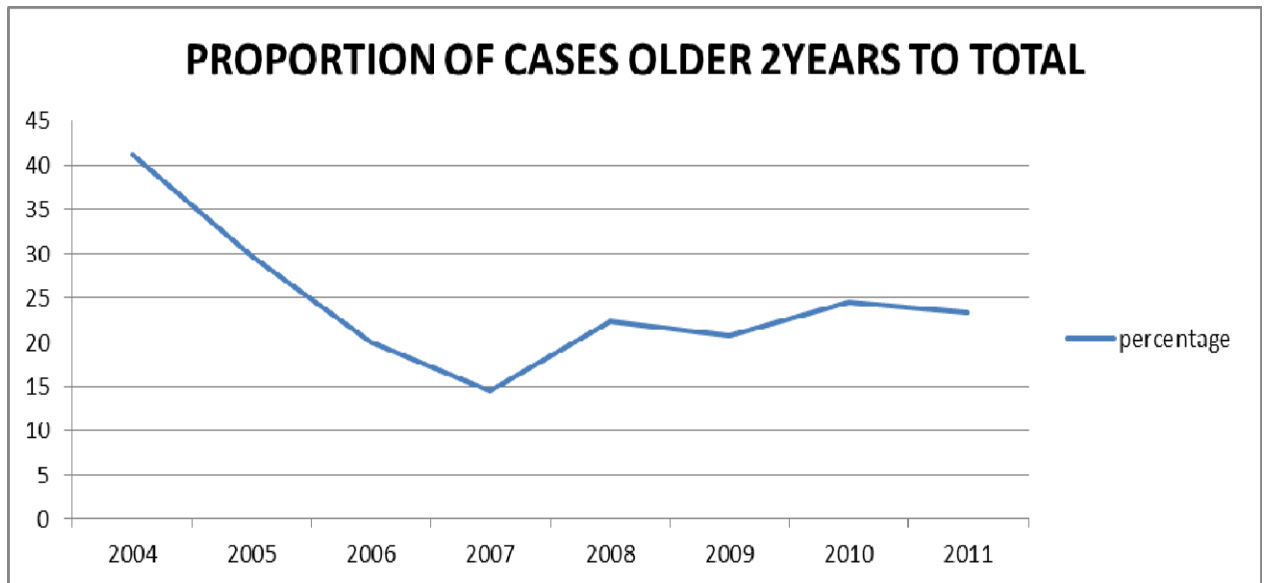
The data collected permits a rough estimate of the number of cases which are older than 2 years. A case appearing as older than 2 years in this chart does not, however, mean that the 2-year period in the meaning of Article 7 of the Arbitration Convention has expired⁹. The chart below shows an increase in absolute figures while the proportion of cases older than 2 years to total cases decreases.¹⁰ These two charts demonstrate that, on the one hand, the absolute number of reported cases is increasing while on the other hand, the average number of cases older than 2 years is stable. The figures indicate that more resources might need to be dedicated to resolving TP cases.



⁹ For example, when a MAP request has been filed and the case has been submitted to a court or tribunal at the same time (Article 7(1) second subparagraph of the AC).

¹⁰ Basis for this table is the average of minimum and maximum cases per year. Cases pending from 3 years or more before the end of the reporting period are considered as being older than 2 years (e.g. for 2011 cases pending from 2000 to 2008 are considered as being older than 2 years).

The relation of the estimated number of cases older than 2 years to the total number of cases is as follows¹¹:



3. Improvement of monitoring

The statistics show a considerable increase in the number of cases reported over the years. These refer to the cases relevant for the AC (the "pending" ones), but the Secretariat encourages the Forum to agree on providing additional data relating to the number of cases solved annually. Publishing this information will help improve the assessment of the AC and supplement the data on pending cases in order to give a complete and more balanced picture of the overall increasing number of cases.

The discrepancies in the number of cases reported is a problem which affects the quality of the statistics and it is worth for Forum members to assess whether and how the situation can be improved. This is particularly evident in bilateral reporting. Unilateral reporting is not a solution to this issue, as it only masks the problem without solving it. However, five MS have suggested that the added value of bilateral information is not commensurate with the administrative burden its collection creates and have proposed to include additional questions in the annual JTPF questionnaire that should help find bottlenecks. In any case, an alignment of the EU and the OECD statistics is desirable and the Forum is working on this.

A way to improve the quality of data could be to further clarify the application of the criteria for categorising cases as open and closed (e.g. on how to count cases, i.e. per audit/per year and in situations where more than one related party is involved).

¹¹ Basis for this table is the average of minimum and maximum cases per year. The number of cases older than 2 years is shown in relation to the total number of pending cases.

Furthermore, the Forum could develop a template/form that may be exchanged between the respective CAs as they communicate each case. Such a template/form could help to identify eventual procedural issues at an early stage and ensure an equal level of information.

During the JTPF discussions it was also suggested to collect information from MS on whether the timelines foreseen under the AC are kept and if not – why it is so. While some members are not in favour of including this request in the annual reporting, it could be useful to collect this information at some point in time in order to explore possible solutions. On the reasons for delays of cases beyond 2 years the Forum will undertake a survey to establish the existing situation, so that appropriate solutions can be found.

Finally the Secretariat wants to draw attention to the fact that the Commission work programme includes a proposal to examine how to address double taxation within the EU (including a resolution mechanism for double taxation disputes). Therefore it is particularly important for the Commission to have sufficient and accurate data to be able to identify the most appropriate solution to accelerate the elimination of double taxation within the EU.

II. APAs

1. Outcome

2007 APA Guidelines

- **Guidelines for Advance Pricing Agreements (APAs) in the EU**, contained in *Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the work of the EU Joint Transfer Pricing Forum in the field of dispute avoidance and resolution procedures and on Guidelines for Advance Pricing Agreements within the EU* (COM(2007) 71 final).

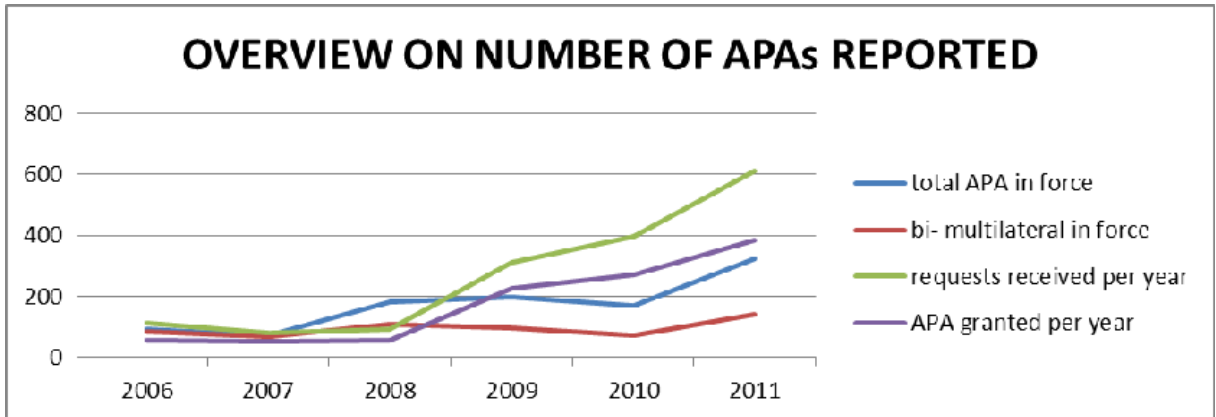
2. Monitoring

The JTPF monitors regularly the use of APAs in the EU. Statistics have been collected on annual basis since 2006¹² with the aim to follow how APA programmes evolve and how the Guidelines help promote and facilitate the use of APAs. The global trends are shown in the table below¹³. APA programmes have been set up or implemented in recent years in some Member States (e.g. Ireland, Italy, Portugal) and in some other Member States existing APA programmes have been better advertised and promoted

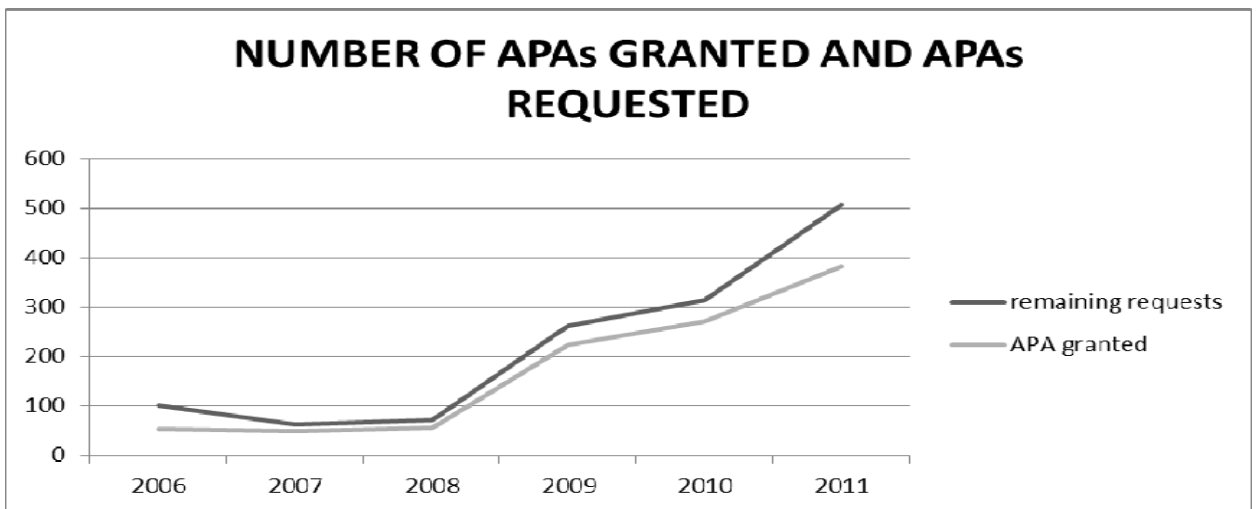
¹² For the latest statistics (for 2011) see [JTPF/014/2012/EN](#)

¹³ Basis for this chart is the aggregated data on APAs reported by MS from year 2006 onwards, notwithstanding possible differences in the parameters of national data provided to the Secretariat.

(e.g. the Czech Republic, Hungary, Poland). This explains the increasing number of APAs reported.



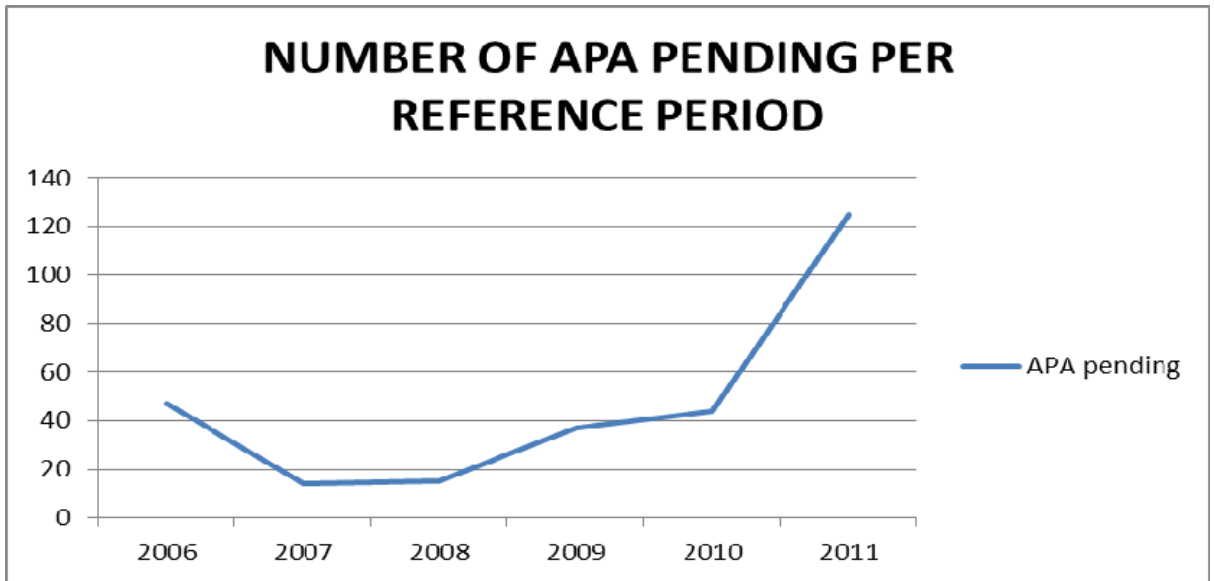
Comparing the number of APAs requested and APAs granted shows the following increase of remaining requests (after deduction of withdrawals and rejections) and of APAs granted per year.



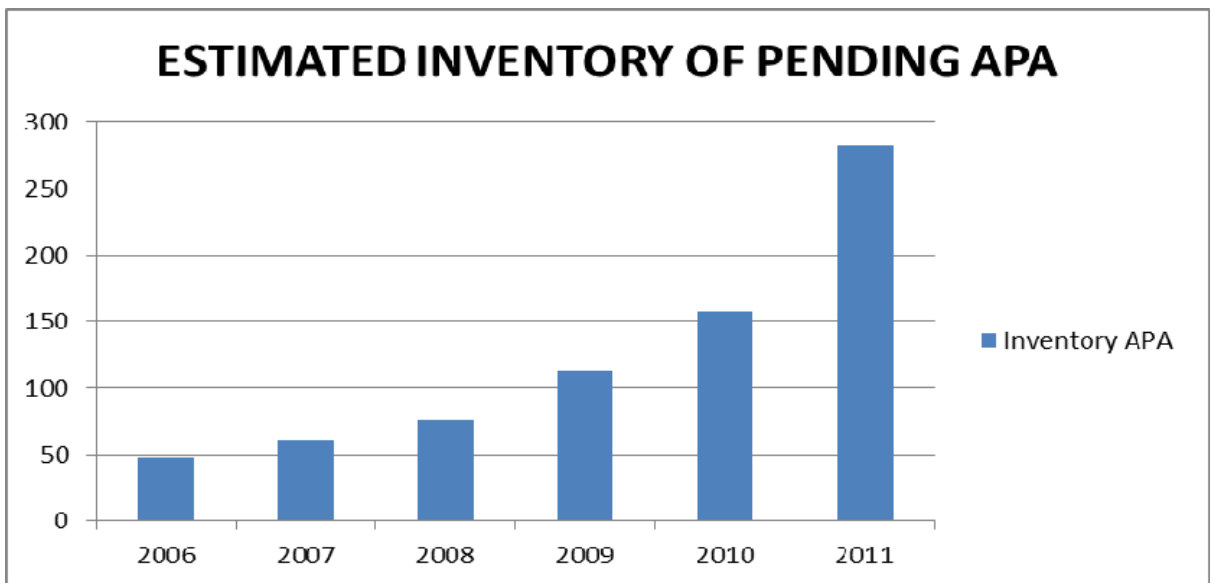
These charts show that with the adoption of EU Guidelines the number of APAs requested and granted has increased¹⁴. The fact that there are more remaining requests than APAs granted, results in an inventory of open cases. As shown in the charts below, the number of pending APAs increases per year and consequently in total¹⁵.

¹⁴ It should be noted that one MS reported from 2009 onwards global figures on APAs (including a huge number of unilateral APAs) which contributed to the considerable increase between 2008 and 2011.

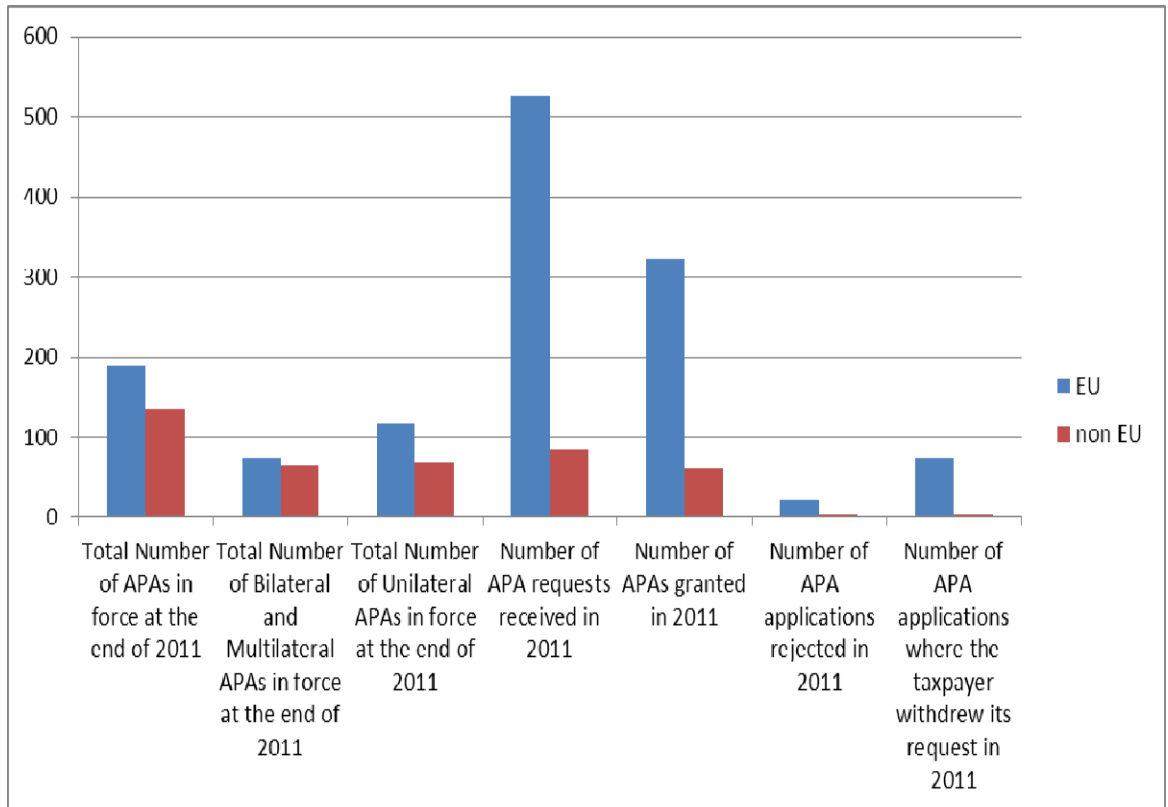
¹⁵ The number of pending APAs was calculated by deducting the total number of APAs granted from the total number of APA request per year. The statistics do not therefore take into account the fact that the APAs granted in one year are the APAs requested in other years. In the next chart these numbers are cumulated.



From the previous chart and the chart below it can be concluded that TAs have more and more APA requests in stock. This situation should be addressed by dedicating more resources to APA programmes.



The chart below shows the relation of total numbers between EU and non-EU APAs for 2011. This format of the statistics will allow, from 2011 onwards, to follow the trends shown in the charts above for EU and non-EU APAs.



3. Improvement of monitoring

Monitoring of APAs is being constantly improved. A further improvement would be to distinguish with respect to all categories between bi-/multilateral APAs and unilateral APAs. The Secretariat suggests that all TAs commit to provide also data on unilateral APAs: this would allow a better overview of the global situation and eliminate a bias between countries providing global data including all types of APA and countries limiting the information to non unilateral APAs. Such data would make it possible to align the data collected for APAs with the data collected with respect to the Arbitration Convention. Until now data provided was aimed to inform on the trends in each MS and therefore TAs were invited to provide only information readily available.

III. EU TPD

1. Outcome

2005 Code of Conduct on EUTPD

- **Code of Conduct on transfer pricing documentation for associated enterprises in the EU**, contained in *Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the work of the EU Joint Transfer Pricing Forum on transfer pricing documentation for associated enterprises in the EU* (COM(2005) 543 final).

2. Monitoring

A questionnaire on the Code of Conduct on EU Transfer Pricing Documentation was launched to TAs at the end of 2008.¹⁶ This questionnaire mainly intended to monitor the implementation of the EUTPD but also raised specific questions on some issues directly relevant to MS as e.g. specific regulations for SMEs or penalties. A similar questionnaire was launched to the private sector on the extent to which the EUTPD has been taken up by MNEs. Responses were received from two sources - PSM and BusinessEurope¹⁷. From this monitoring exercise it was concluded that TAs had not yet had enough time to implement the Code of Conduct in national legislation or administrative practice. Many MNEs reported that they did not officially opt for the EU TPD but used it in practice. Therefore the planned 2013 monitoring is crucial to assess the implementation of the EUTPD.

¹⁶ For the results from the survey, see [JTPF/012/REV4/2009/EN](#) (Member States' replies), [JTPF/015/BACK/REV3/2009/EN](#) (summary of Member States' replies).

¹⁷ For the results from the survey, see [JTPF/017/BACK/2009/EN](#) (JTPF Private Sector Members' contributions), as well as the two excel files published on the JTPF website under "meeting 27 October 2009", Agenda Item 5 (data collected by BusinessEurope).

IV. Other projects

1. Outcome

- **Summary Report on Penalties**, contained in *Commission Staff Working Document accompanying the Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the work of the EU Joint Transfer Pricing Forum in the period March 2007 to March 2009 (SEC(2009) 1168 final)*.
- **Guidelines on low value adding intra-group services**, contained in *Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the work of the EU Joint Transfer Pricing Forum in the period April 2009 to June 2010 (COM(2011) 16 final)*.
- **Report on Potential Approaches to non-EU triangular cases**, contained in *Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the work of the EU Joint Transfer Pricing Forum in the period April 2009 to June 2010 (COM(2011) 16 final)*.
- **Report on Small and Medium Enterprises and Transfer Pricing**, contained in *Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the work of the EU Joint Transfer Pricing Forum in the period July 2010 to June 2012 (COM(2012) 516 final)*.
- **Report on Cost Contribution Arrangements on Services not creating Intangible Property (IP)**, contained in *Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the work of the EU Joint Transfer Pricing Forum in the period July 2010 to June 2012 (COM(2012) 516 final)*.
- **Member States' answers to the questionnaire on secondary adjustments within the scope of the AC (2011)**¹⁸
- **Member States' answers to the questionnaire on compensating/year-end adjustments (2011)**¹⁹

2. Monitoring

Given that the IGS Guidelines and the reports on non-EU triangular cases, SMEs and CCAs on services not creating IP were published just recently, they have not yet been monitored.

¹⁸ See [JTPF/018/REV1/2011/EN](#)

¹⁹ See [JTPF/019/REV1/2011/EN](#)

C. JTPF Monitoring – the way ahead

I. EU Arbitration Convention and the related Codes of Conduct 2006/2009.

At the JTPF meeting in June 2012 Members were invited to provide information on problems encountered in the application of the EU AC including the Codes of Conduct and to make suggestions for improvement. The JTPF members' proposals are reflected in document JTPF/020/2012/EN.

As the main areas for review/improvement members suggested:

- the determination of the 2-year period,
- which information should be provided,
- MS practices relating to denied access to the AC, e.g. in case of serious penalties or thin capitalisation or by offering settlements subject to condition that no access to MAP is available,
- MS practices of asserting criminal penalties,
- interest and penalty relief as part of the MAP,
- how to deal with information provided at a later stage, and
- the implications of the new Article 7.

It was also suggested to discuss the relation between the EU AC and treaty arbitration under the OECD MTC and possible improvements to the AC procedure based on TAs' practical experience with the new Article 25 (5) of the OECD MTC model, especially the so-called baseball arbitration.

JTPF Members' suggestions already provide a sufficient basis for future work on the AC and the Code of Conduct.

The Secretariat draws JTPF members' attention on the fact that the monitoring exercise of the AC will also be considered by the Commission as a way to facilitate its work relating to its initiative to address double taxation within the EU, including a resolution mechanism for double taxation disputes.

II. Guidelines on APAs in the EU

A questionnaire on the practical experience with respect to the guidance in the APA Guidelines will be launched, e.g. on:

- APA policy/programmes in MS (sections 1-5 of the APA Guidelines)
- documentation (section 6 APA Guidelines)
- conduct of the APA process (section 7 – 8.5 APA Guidelines)
- facilitation of APAs for SMEs (8.6 APA Guidelines)

III. EU TPD

The practical application of the Code of Conduct on transfer pricing documentation in the EU will be reviewed e.g. by:

- Updating the information received in the 2009 Questionnaire on the implementation of the EU TPD in MS and MNEs and comparing current MS's national legislation with EUTPD provisions.
- Updating information on whether MNEs opt officially for the EUTPD and if they do not, analyse the reasons and search for appropriate solutions to the possible situation that MNEs do use the EUTPD in their daily practise but do not opt officially for it.
- Launching a questionnaire on the practical experience with the respective parts of the EUTPD and invite proposals for improvement. This exercise should be seen in the context of a potential project on risk management, which may include a discussion on whether and how the EU TPD may be improved by applying risk based approaches.

IV. Other projects

1. Penalties

Monitoring will cover collecting up-to-date information on EU Member States' definitions of serious penalties and on the state of play in enforcing penalties.

2. IGS

A questionnaire on the first practical experience and suggestions for improvement will be launched covering e.g.:

- whether the guidance is actually applied in practice,
- whether the information requested by the narrative is appropriate ,
- whether the allocation keys works in practice or
- whether the guidance on mark ups provides appropriate results.

3. Triangular cases

It has been suggested by one MS to address certain practical questions that arise in the context of both EU- and non-EU triangular cases. With respect to non-EU triangular cases, a question for re-consideration could be the application – in part or fully – of the AC to these cases.. Furthermore a questionnaire on the first practical experience and suggestions for improvement will be launched on:

- the development of the treaty network and
- experiences and problems encountered with respect to the coordination of actions between the CAs in the EU.

4. SMEs

With respect to the SME report, the implementation of the recommendations on SMEs contained in the SME report will be monitored by asking MS what measures were taken to address the specific issues arising for SMEs in transfer pricing. Experience on the implication of these measures will also be collected.

Further on the JTPF website an updated list of websites will be maintained that contains information on:

- TP rules, legislation, administrative practice, training material and contacts in MS which are relevant for SMEs,
- definitions of SMEs in use by MS,
- other relevant information for SMEs on TP matters.

Member States will be invited to submit the above information to the JTPF Secretariat.

5. CCAs

The implementation of the recommendations contained in the report on CCAs will be monitored and information on first practical experiences will be collected. The latter may e.g. relate to:

- experience with using the MNEs own accounting system,

- experience with using costs for measuring participants contributions, or
- whether the information requested in the narrative is appropriate.

In addition, the pending issue of how to deal with government subsidies when measuring participants' contributions should be addressed before a global monitoring of the recommendations in the report on CCAs is conducted.

D. Calendar

Below is the suggested calendar for consideration by the Forum members:

| Monitoring topic | Year |
|---|-------------|
| EU Arbitration Convention and the Codes of Conduct | 2013 |
| EU Transfer Pricing Documentation | 2013 |
| Penalties | 2013 |
| Guidelines for APA in the EU | 2014 |
| Guidelines for Intra Group Services | 2014 |
| Non-EU Triangular cases | 2014 |
| SMEs and Transfer Pricing | 2015 |
| CCAs on services not creating IP | 2015 |

E. Conclusion

This overview provides factual information about the growing importance of MAPs in transfer pricing (notably shown in the number of cases under the Arbitration Convention). It explains the role and the work of the JTPF which represents the main tool to facilitate a common understanding and approach to TP by EU tax administrations and MNEs.

Ongoing monitoring is a tool to check how TP issues develop within the EU by helping to review the implementation and efficiency of the various EU JTPF outcomes and recommendations. It also helps to discover new areas where a common approach is opportune to facilitate cross border trading within the EU.