



EUROPEAN COMMISSION

DIRECTORATE-GENERAL

TAXATION AND CUSTOMS UNION

Direct taxation, Tax Coordination, Economic Analysis and Evaluation

Direct Tax Policy and Cooperation

Brussels, August 2015
Taxud/D2

DOC: JTPF/005/FINAL/2015/EN

EU JOINT TRANSFER PRICING FORUM

JTPF PROGRAM OF WORK 2015 -2019

(“TOOLS FOR THE RULES”)

Meeting of 25 June 2015

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I. Introduction

1. Transfer Pricing: a priority in the Action Plan for a fairer corporate tax system in the EU

On 17 June 2015, the Commission communicated its Action Plan for a fairer corporate tax system in the European Union. Improving the transfer pricing ('TP') framework in the EU to ensure the taxation of intra-group profits is more fairly linked to the place of activity is a key element in this Action Plan.¹

In the Action Plan, the Commission emphasizes two priorities. The first is the need to reinforce the link between taxation and economic activity within the EU. The second is targeted and coordinated action to address the limitations of and loopholes in the existing transfer pricing framework. The Commission will begin to work with Member States and businesses to strengthen the current rules based on a common interpretation. This should result in a coordinated and concretely-tailored implementation within the EU, reflecting the reality of the Single Market, converting the transparency framework into tangible reality and delivering tools and clear guidelines on how profits should be effectively taxed in the EU28 area.

Since its set-up in 2002, the EU Joint Transfer Pricing Forum ('JTPF') has assisted and advised the Commission on transfer pricing tax issues. It has proven to be a valuable resource for the Commission's work in developing non-legislative solutions to practical problems and improving transfer pricing practices across the EU. These solutions have often provided a blueprint for solutions beyond the EU, e.g. at the level of the OECD.

Through its work programme, the Commission expects the JTPF to fully contribute to the move towards fairer company taxation in the EU. Although the Forum should focus on facilitating and effectively implementing this policy, it should also continue its efforts to provide all stakeholders with practical tools and solutions relating to the arm's length principle. For the Commission it is important to take into account the current and future political and economic environment and the cornerstones of EU tax policy design, i.e. strengthening the functioning of and removing obstacles to the internal market as well as supporting the EU 2020 growth and economic strategy, particularly as regards safeguarding tax revenue collection and reducing macroeconomic imbalances.

An overview of the work items together with their timeline and priority are outlined in appendices 1 and 2.

¹ See section 2.1 of the Action Plan http://ec.europa.eu/news/2015/06/20150617_en.htm

2. Areas of future work identified

The various items of work are summarized under the following work streams:

- Provide tools for the practical application of TP rules tailored to the EU
- Ensure efficient TP administration in the EU
- Position the EU globally towards third countries

The work will consist of monitoring and improving existing JTPF guidance and developing new tools and guidance where appropriate.

3. Flexibility of the Work Programme

The items of the JTPF work programme listed below and their prioritisation have been set up based on the factual and legal position and the state of affairs known in June 2015. To take into account future developments in the area of transfer pricing, the work programme and the prioritisation of the respective items is kept flexible and open for any future agreed items that the group and the Commission Services might wish to include or exclude particularly in light of the developments of the OECD BEPS work.

II. Items of the JTPF program of work 2015-2019

1. Broader considerations

Some horizontal issues, which have been identified by stakeholders in the broader context of TP, will be considered as common foundations for the future work of the JTPF. Rather than addressing the following items in isolation the JTPF will take them into account when working on the items suggested in subsections 2. – 4. below.

1.1 Increased importance of economic analysis in TP

The role of economic analysis is increasing in TP, similarly to how it has increased in other fields such as competition policy.

More sophisticated techniques are likely to be increasingly used. TP issues may require more use and mastery of techniques such as, bargaining power analysis, advanced valuation techniques, real options or scenario analysis rooted in the Value Chain of the Group, in order to provide a relevant view of the value creation process.

In the context of addressing the work items listed below, the JTPF members will consider this dimension in the reports with a specific evaluation of how these aspects have been integrated into the solutions proposed and developed for EU28, taking into account limits, constraints, costs and benefits and the need to avoid creating too much complexity.

1.2 Interaction between transfer pricing and companies' internal information systems and tools – Impact of new technologies

Internal information systems (e.g. management reporting and IT systems) of companies, particularly MNEs, are well-advanced in Europe and share common features and processes. They tend to be increasingly used for transfer pricing purposes, both for the design and setting up of transfer prices and during tax audits. Simultaneously, new technologies (e.g. cloud computing) impact the MNEs' internal processes, collection and treatment of information as well as access to information which can be useful for transfer pricing purposes.

In the context of addressing the work items listed below the JTPF will evaluate and specifically address in its reports how to most effectively handle and consider these data and information sources as part of transfer pricing administration by tax administrations and taxpayers and how to best to integrate these aspects in guidance of the JTPF.

1.3 Spill-over effects

Transfer pricing is increasingly attracting attention in public debate about corporate tax, where it is viewed as a major source of profit shifting and tax base erosion. On the other hand, it remains the reserved area of practitioners and technical experts with no real cross-communication between the two audiences (i.e. respectively the public opinion and citizens and transfer pricing experts or practitioners).

In this particular context, the Commission Services will consider how it could ensure the wider communication of the JTPF's work. In particular key technical conclusions should be made accessible and understandable by EU citizens, if necessary by delivering targeted explanatory notes. The same conclusions should be flagged when they may serve as a model/good practice at a larger scale than EU28.

2. EU tailored tools for the application of TP rules

2.1 Starting point

The proposed revisions to Chapter I TPG in the context of the OECD/G20 BEPS project² restate the arm's length principle as well as the most appropriate way of determining the transfer pricing method to be used for the case under consideration.

2.2 Use of comparables in the EU

A key problem in transfer pricing is the difficulty of obtaining data about internal and external comparables, especially domestic comparables. Commercial databases are generally recognised as a practical and cost effective way for the identification of external comparables but a number of weaknesses have been identified.³ The OECD TPG suggest comparability adjustments to account for differences in the situations compared⁴. Further it is stated that a multi-country comparability analysis may be appropriate where the respective markets are in effect reasonably homogeneous⁵.

There are several aspects which the JTPF envisages to evaluate. As regards the use of external comparables, an evaluation will be done on whether the EU's internal market **can be regarded as homogeneous and if not, what the differences are**. The JTPF will also work on whether it is possible to account for these and other differences by way of **comparability adjustments**. This work could provide an insight on the benefits and limitations of using EU comparables.

Given the weaknesses encountered as regards commercial databases, work will be done on **whether and if so how improve the use of internal comparables**.

Comparable to what was done in the context of the guidance on low value adding services, work will be undertaken to determine whether there could be certain straightforward or standard transactions within the EU for which **certain margins or ranges of margins can be determined**, which may then be introduced as a simplification measure (e.g. for risk assessment or as a **rebuttable presumption**)⁶.

² Actions 8 – 10 of the OECD/G20 BEPS Action Plan

³ See Chapter III Section A.4.3.1

⁴ See guidance in Chapter III A.6 OECD TPG

⁵ Paragraph 1.58 OECD TPG

⁶ Paragraph 65 of the JTPF report on low value adding services as suggesting that the mark up on costs for low value adding services is between 3-10% and often 5 %

Some of the EU's major trade partners have developed tools to facilitate the **use of specific CUP⁷ approaches or applied methods** in a way, which could be seen as an alternative for targeting transactions involving intangibles (e.g. CUT in the USA). An area of future work will therefore be to evaluate European conditions and to **discuss whether comparable tools can and should be developed/facilitated in the EU**. The JTPF could evaluate sources of relevant data from the European Market used when setting transfer prices globally and allow the alignment of practices in Member States with practices of our major trade partners (e.g. the US). Given the high interest amongst the EU28 regarding intangibles, **the possibilities of European benchmarks, data bases, etc. for setting transfer prices in this area could be evaluated**. To improve the availability of comparable data in the EU, some ideas on how to set up similar declarative and disclosure obligations could be developed, e.g. referring to data collated by the EU Patent Office for instance for strategic intangibles and patents or those collated for listed companies within the EU, and possibly how such data might be improved.

Work is intended to be done on analysing the effective interpretation and use of information sources such as management accounts and IAS/IFRS standards, in line with recent recommendations for more demanding and transparent rules as regards accounting for transfer pricing, bearing in mind the current standards in the EU.⁸

The potential outcome of work item related to comparables may identify concrete recommendations for comparability adjustments in certain situations or the use of internal comparables or simplification measures like rebuttable presumptions⁹ for certain transactions, e.g. simple/routine transactions.

2.3 Use of the transactional profit split method (PSM) in the EU

The status of the PSM will remain unchanged as being a method which may be appropriate under certain facts and circumstances. The comments the OECD received on the public discussion draft on the use of profit splits in the context of global value chains highlighted inter alia the **need to apply a PSM ex-ante** but also the **problems the PSM raises in its practical application for taxpayers and tax administrations** especially when it is applied

⁷ Comparable Uncontrolled Prices see the OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations ("TPG") July 2010 – Chapter II.II.B pages 63 & seq.

⁸ See final conclusions of the above mentioned report of the French General Inspectorate of Finance to Minister Pierre Moscovici and Deputy Minister Bernard Cazeneuve <http://www.economie.gouv.fr/inspection-generale-finances-recommande-renforcement-contrôle-prix-transfert-groupes-internationaux>

Also for illustration on how accounting disclosure, IFRS/IAS standards and Financial communication can impact transfer pricing and provide some quantitative measurement data about them, see the same report page 5 and illustration for FIN48 Rules "Reviewing your intercompany pricing policies under FIN48" by K. Harold McClure, <https://tax.thomsonreuters.com/wp-content/pdf/transfer-pricing/review-intercompany-policies-fin-48.pdf>

⁹ See new Section E on safe harbours in Chapter IV of the TPG, paragraph 4.102: For example, a rebuttable presumption might be established under which a mandatory pricing target would be established by a tax authority, subject to a taxpayer's right to demonstrate that its transfer price is consistent with the arm's length principle. Under such a system, it would be essential that the taxpayer does not bear a higher burden to demonstrate its price is consistent with the arm's length principle than it would if no such system were in place. In any such system, it would be essential to permit resolution of cases of double taxation arising from application of the mandatory presumption through the mutual agreement process.

ex-ante. Another point raised was the **high degree of subjectivity** encountered when stakeholders determine how to share the profit.

Work of the JTPF will be done on the practical application of the PSM in the EU e.g. on determining the profit to be split, on the need for a high degree of cooperation between tax administrations or the need and potential measures to defend the profit to be split against arrangements with entities not participating in the profit split. Another angle for further work could be an evaluation of models available to split the profits, their pros and cons in substance and as regards their practical application as well as the compliance burden they may create.

The potential outcome may be an assessment of the various aspects and obstacles to recommendations/guidance for the concrete situation in the EU or a comprehensive model for applying the PSM in the EU in cases where it is the most appropriate method.

2.4 Use of economic valuation methods in the EU

Chapter IX of the OECD TPG recognises valuation methods that are used in acquisition deals as useful for valuing the transfer of an ongoing concern¹⁰. The discussion draft on transfer pricing aspects of intangibles recognises the possibility to **use valuation techniques to estimate an arm's length price** (ex-ante).¹¹ Economic valuation methods also play a role in the context of **price adjustment mechanisms to be applied in cases where prices were built based on projections** which did not turn out as currently discussed at the level of the OECD and applied by the US¹². While this seems to be a new approach for many MS, **some MS already foresee the application of these methods in their domestic law and have already gained some experience of them.**

The JTPF intends to **evaluate whether there are strengths and weaknesses** of the various valuation methods when used for transfer pricing purposes. MS who already apply these methods will be invited to share **their experiences in practice**. While trying to provide detailed guidance on the application of economic valuation methods would go beyond the JTPF, it should be possible to **identify advantages, obstacles and pitfalls** in the practical application of these methods in the TP context based on the experience already made by some MS and taxpayers.

The possible outcomes could range from an exchange of experiences to an assessment of the various methods (e.g. a SWOT or a cost and benefit analysis) or a list of “things to think about” when applying them in practice up to practical guidance on their practical application in the EU.

¹⁰ Chapter IX paragraph 9.94 TPG

¹¹ Paragraphs 6.150 ff. of the Guidance on transfer pricing aspects of intangibles

¹² Commensurate with income standard Section 482 US regulations

2.5 CCAs in general (including intangibles)

The previous JTPF suggested doing further work on CCAs including those involving intangibles. The OECD addresses CCAs under Action 8 (iv) of its BEPS action plan.

The JTPF guidance on CCAs on services not creating IP should be monitored in light of the final OECD conclusions to determine whether and when further work on CCAs in general (including intangibles) should be undertaken by the JTPF.

2.6 Financial Transactions

The previous JTPF suggested doing further work on transfer pricing aspects of financial transactions. In the context of Action 4 of the BEPS action plan the OECD stated that in connection with and in support of the foregoing work transfer pricing guidance will also be developed regarding the pricing of related party transactions including financial and performance guarantees, derivatives and captive and other insurance arrangements. **The developments at the level of the OECD will be monitored** and evaluated with respect to the question whether and if so when further work in this respect should be done by the JTPF.

3. Ensure efficient TP administration in the EU

3.1. Starting point

As regards TP administration, the JTPF report on transfer pricing risk management distinguishes between the initial phase, the audit phase and the resolution phase.

3.2 Initial phase - identifying TP risk

3.2.1 Country by country reporting

One part of its conclusions on Action 13 of the OECD/G20 BEPS Action Plan is the development of a so called country by country report ('cbr') which contains information relating to the global allocation of income and the taxes paid in different tax jurisdictions as well as certain indicators of local economic activities. The OECD proposal foresees that this information should be exchanged between tax administrations for the purpose of TP risk management. Additional guidance from the OECD on the implementation of cbr and the mechanism on how this information would be shared was published on June 8.

In the context of new cbr requirements the JTPF could work on two aspects:

The first aspect is **how to effectively and efficiently track, collect and reconcile the information to be filled out in the template**. Some MS are already implementing cbr and

many MNEs are currently developing processes to meet the new filing obligation. To ensure a consistent approach in the EU on issues which may not already be addressed in the OECD's implementation package and that the information is as meaningful as possible, the potential issues arising will be discussed at an early stage of the process.

The other aspect is **how tax administrations can actually make best use the information** for the purpose of risk management, considering the particular information provided in the cbr and the constraints cbr data may involve, i.e. treatment of mass information. Rather than evaluating the cbr information in isolation when assessing TP risk, MS and business may benefit from combining it with other data, e.g. from the master file or a value chain analysis. Furthermore the interaction of TP with internal management information and IT systems could be explored.

The possible outcome on the first aspect could be delivered in different forms, going from an exchange of views, to a collection of issues up to the development of best practices or to concrete recommendations, particularly on links with value chains and a possible common interpretation of cbr in the light of MNEs' value chains within the EU. For the second aspect the outcome may simply consist of an evaluation of existing links to good practices/recommendations or, becoming part of a more ambitious revision of the EU TP risk management/documentation package

3.2.2 TP documentation

Another part of the conclusions on Action 13 of the OECD/G20 BEPS Action Plan is the development of a Masterfile/local file approach for TP documentation. Structure and contents reflect to a very large degree the Code of Conduct on TP documentation in the EU ('EU-TPD') as developed by the JTPF in 2006. The questionnaire on the EU-TPD launched during the previous mandate revealed that all MS consider their domestic rules are broadly in line with the EU-TPD. **The EU-TPD will be monitored to take into account the conclusions of BEPS Project and the proposed JTPF work in this area are known.** It will be evaluated how to best put tax administrations in a position to effectively assess the facts and circumstances of cases and transactions to determine which of them are worth to be reviewed and if so, to draw well founded conclusions. An important aspect will be **the possible development of new IT based tools** intended to minimise the compliance burden for taxpayers and increase the efficient use of TP documentation by tax administrations (see section 1.2 above).

3.3 Audit Phase

3.3.1 Multilateral controls

The JTPF report on risk management in TP states¹³ that developing and improving existing legal frameworks and practical guidance on bi- or multilateral TP controls would be useful and that the JTPF will consider taking up work in this respect. The JTPF will **collect guidance** already available and **invite MS which already undertake joint or simultaneous audits to provide the Forum with their experiences**. Useful experience may also to be found in the context of VAT audits. Strengths, weaknesses opportunities and threats (“SWOT”) will be identified by the JTPF. The outcome may range from a summary of MS experiences up to specific guidance and recommendations tailored to multilateral controls in TP, particularly in the context of Fiscalis 2020 (see below).

3.3.2 Access to and use of company data

Section I addressed the interaction between transfer pricing and MNEs' internal management, reporting and information systems. At least some MS **require access to certain company data in the context of a transfer pricing audit and process the company data for this purpose**. Some EU Member States practices in this area are considerably developed with relevant legislation, best practices and the establishment of interactive relationships between taxpayers and tax administrations. **New technologies** will also impact the transfer pricing landscape in the EU and the JTPF should provide some recommendations in this respect as regards risks and opportunities.

The JTPF will collect experiences from MS, NGMs and the Commission as well from any relevant work delivered by recognized external groups as regards the situation and implications in the EU. Based on this, guidance and best practices may be developed.

3.4 Resolution phase

3.4.1 APA, Providing security ex-ante

The benefit of getting bi- and multilateral certainty on transfer pricing issues in advance is recognised by all stakeholders involved in transfer pricing. The request from taxpayers for *ex-ante* certainty is now even stronger due to the new guidance on transfer pricing expected as a result of the OECD/G20 BEPS project and its implications. To date, nearly all MS have established programmes for bi- and multilateral APAs based on the 2007 JTPF work on APAs. Yearly statistics are provided by the JTPF on APAs in the EU which show an increased use of this procedure.

¹³ Paragraph 18 of the JTPF Report on TP Risk Management

It is envisaged to monitor the 2007 **JTPF guidance on APAs** during the new mandate and to collect experience from MS and NGMs. Based on this, the guidance may be updated. In particular, the **challenges encountered in multilateral situations** could be identified and potential solutions for the EU should be developed. An assessment exercise and some input are also needed on how **the format of the statistics on APAs could be improved**.

3.4.2 Further improving the functioning of Dispute Resolution in transfer pricing

The EU is the only region which has a multilateral convention for solving transfer pricing disputes. The Code of Conduct on the Arbitration Convention (“CoC) was monitored during the last mandate and a revised CoC is in the process of being communicated by the Commission and expected to be endorsed by the Council. The statistics show that the AC works in the vast majority of cases¹⁴. It is expected that the new CoC will further improve its functioning. Nevertheless the **work of the JTPF during the last mandate also indicated areas for which a discussion of some aspects of the AC may be considered**.

The OECD is working on improving the MAP process agreed in Double Taxation Agreements and putting arbitration on a broader footing. The JTPF will take the conclusions of the OECD into account when considering work on some aspects of the AC with the objective of further improving its functioning, especially on some open items like serious penalties, suspension of tax collection and thin capitalisation issues.

¹⁴ See JTPF statistics on cases under the AC

4. The EU as an actor, who is positioned globally in Transfer Pricing

4.1. Positioning towards third country approaches

Figures available for non EU countries show that 30% to 70% of the import value of major trade countries are made up of transfer prices. The **EU should position itself on some specific and targeted transfer pricing aspects** relating to major trade partners with whom transfer prices represent a significant part of the MS import or export values.

As a starting point, a preliminary analysis and impact assessment study should be initiated on targeted negotiations/exchange of views with some third countries encountering similar issues in terms of double taxation or even other issues connected to transfer pricing (e.g. withholding taxes, characterization issues, consequences for custom duties, tax or VAT credit or consumption tax issues; Brazil, Russia, China). Current trends in these countries should be identified and assessed.

This general study could particularly address (i) countries where some particular domestic regulations and/or practices (e.g. forex rules, investment regulations, specific taxes) may directly or indirectly interfere with TP aspects and (ii) TP methods as implemented may have implications for TP, with the view to ultimately assessing the possible impact in terms of trade and business obstacles for companies in EU28 and as part of transfer pricing tax audits and to recommend solutions at a EU level. A preliminary stage could be to collect data and information on the size of the TP element in import and export values per sector for key EU trade partners.

4.2 Addressing further aspects and side effects

Increasing pressure on transfer pricing in the context of OECD/G20 BEPS may lead MNEs to **develop alternative strategies for lowering their tax burden in the EU**. These alternative strategies could make use of EU legal instruments. Alternative tax avoidance strategies will have an impact on the functioning of the internal market, exacerbate harmful competition and may not be tackled by the current OECD/G20 BEPS work.

There is a need beyond the achievements of the OECD/G20 BEPS project **to detect and tackle alternative avoidance strategies and to close new loopholes**. For the digital economy the Commission Expert Group already highlighted the need for new solutions and recommended the Commission and the Council take action in this area in both the short and the long term.¹⁵ Moreover, tax administrations may resort increasingly to non-transfer pricing

¹⁵ Report of the Commission Expert Group on Taxation of the Digital Economy 28/05/2014 (pages 46 & seq.)

methods to tackle problems which have hitherto been regarded as transfer pricing issues. This would result in significant reassessment of the amounts at stake. It appears crucial in this context that the relevant EU instruments be adjusted to guarantee an appropriate combination of the transfer pricing rules with other legal rules both regarding the substance and procedural aspects in sensitive areas for the EU, *e.g.* the digital economy.

III. Organisation of work

In accordance with the JTPF rules of procedure¹⁶ each project will consist of the ‘initial phase’ (assessment, scoping, discussion) and the ‘subsequent phase’ (formulation of a report and recommendations). Where appropriate the process may be supplemented with pilot projects and measures of capacity building

Given the volume of issues and taking into account the **positive experience when developing the report on risk management subgroups may be created for the initial phase of the work streams** outlined in sections II.2 and II.3 above. The considerations outlined in section **II.1 will generally be taken into account** in these two work streams. For the items listed in **II.4 there will be an ongoing monitoring exercise** and a reaction by the Forum when a need is identified. It is envisaged to supplement the assessment phase with studies from external providers to receive further input.

The results achieved will be **summarized as the framework for TP in the EU and constitute a model**. This model will not be static but reflect TP’s status as a facts and circumstances approach which requires a toolkit that can be adjusted to the aspects of the respective cases under consideration.

Subject to the need of keeping the work program flexible, the JTPF identified the following items as most relevant for the current mandate of the Forum and assigned priorities as reflected in the order below:

- Work on practical issues arising from country-by-country reporting (“CBCR”) and transfer pricing documentation sections 3.2.1 and 3.2.2);
- Use and improvement of comparable data and comparability methods in the EU section 2.2);
- Economic valuation methods applied to transfer pricing in the EU (section 2.4);

5.2.2.1: The Group recommends the Commission and the Council to undertake a review of transfer pricing standards to enable tax administrations to ignore intercompany transfers of IP in extreme circumstances where there is a lack of economic substance and the creation of a tax benefit is the main purpose.

5.3: The Group would like to stimulate wider consideration on how to tackle corporation tax in a fair and transparent way, ultimately at global level but initially at EU level. The EU Member States should therefore examine to what extent the new international standards and in particular a possible movement towards transfer pricing profit split methods would justify additional simplification within the EU, particularly if the new rules generate significant costs.

¹⁶ Article 10 Section 2.1

- Stocktaking review and assessment of the state of play of Multilateral controls in the EU in the area of transfer pricing (section 3.3.1);
- Assessment of practical issues linked to the use of Profit Split within the EU, once the OECD conclusions will be available in the context of the BEPS project (section 2.3);
- Internal Monitoring and follow up of the functioning of Dispute Resolution and APAs in transfer pricing (doc JTPF/005/2015/EN, section 3.4).

Work on Cost Contribution Arrangements (CCAs) and financial transactions are not considered as a priority

The work streams are illustrated in Annex 1 and the organisation of the work until the end of 2016 in Annex 2.

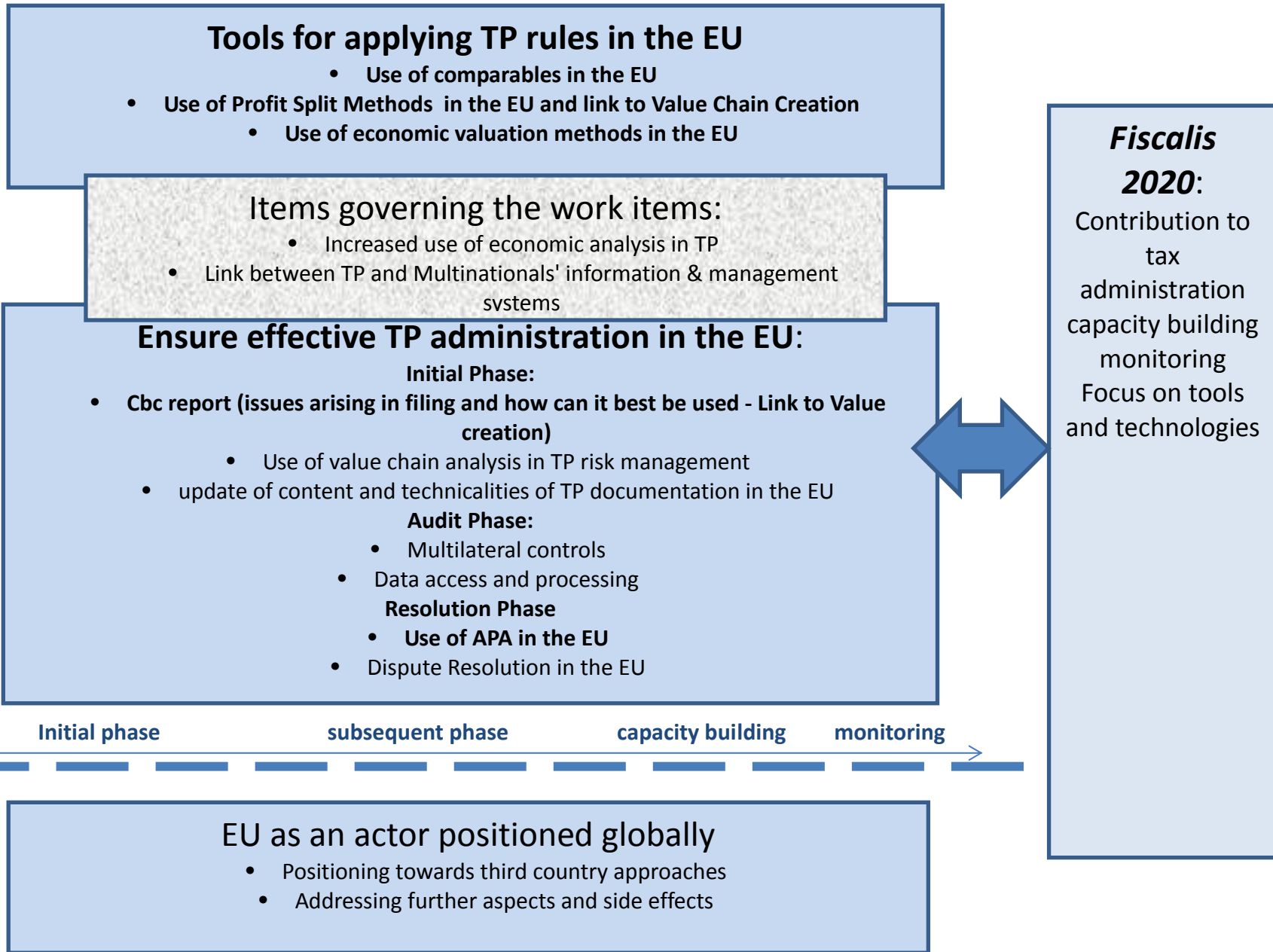
IV. Input from and to Fiscalis and other Expert groups

Fiscalis 2020 is a cooperation program for tax administrations of Member States and candidate countries, aiming at supporting the fight against fraud, tax evasion and aggressive tax planning and the implementation of the Union law in field of taxation by ensuring exchange of information, supporting administrative cooperation and enhancing administrative capacity of participating countries.

Under Fiscalis 2020 some activities (such as workshops and working visits) address transfer pricing and include recent JTPF works as well as outputs of the BEPS project. Some work is performed on a long term basis by Fiscalis Platforms. A good example of recent effective sharing of knowledge between Fiscalis and the JTPF is the JTPF guidance on TP Risk Management guidance.

To address the need for capacity building on TP in the EU Fiscalis activities (e.g. workshops or project groups) on Transfer Pricing (*e.g.* common manuals or documents to be used for the Fiscalis workshops) should be supported to benefit from the input of conclusions reached under this programme.

Annex 1: Overview on work items



Ongoing monitoring and action if needed

‘DD’ = Discussion Draft
 ‘SG’ = Subgroup
 I, II, III = first, second and third meeting of the JTPF

Annex 2: timeline and priorities:

