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**EU JOINT TRANSFER PRICING FORUM**

**FOLLOW UP TO THE QUESTIONNAIRE ON THE FUTURE  
OF THE JOINT TRANSFER PRICING FORUM (JTPF)**

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## Follow up to the Questionnaire on the future of the Joint Transfer Pricing Forum (JTPF)

As the present mandate of the JTPF expires on 29 March 2019, this occasion is a good opportunity to look into ways for improving the work of the EU in the field of transfer pricing. To this end, the JTPF Secretariat sent a questionnaire to all JTPF members on 26 October 2018.

The questionnaire consisted of three parts discussing: (1) the structure and working methods of the JTPF and possible ways to improve those; (2) the content of the work and in particular the interaction with the initiatives of the OECD; and (3) areas for future work of the EU in the field of transfer pricing.

The Secretariat received 29 replies; 16 from Member States and 13 from non-governmental members (NGMs). Although the responses varied as they highlighted different possible approaches, often the underlying subjects were similar and one can identify some key trends which are discussed below. These trends are useful input for triggering a discussion on the future of the JTPF. The paper concludes with a few questions that will help us determine the direction of further action.

### A. THE KEY TRENDS THAT ARISE FROM THE CONTRIBUTIONS

#### 1. Work limited to the implementation of the OECD Transfer Pricing Guidelines

A substantial number of the JTPF members were explicit in that the group's mandate should be limited to dealing with the technical, procedural and administrative aspects of transfer pricing within the context of the arm's length principle (ALP). Thus, many of these members argue that the JTPF is better placed to agree practical arrangements and technicalities related to the implementation of the OECD Transfer Pricing Guidelines (TPG) in the EU, rather than discuss the policy aspects of, or questions of substance on, transfer pricing.

Along the same lines, **many members insisted on the importance of having one single interpretation of the ALP and claimed that this should be given by the OECD.** So, the JTPF should avoid getting involved in topics that are pending at the OECD.

Furthermore, a handful of members raised the need for working on topics in transfer pricing which are particularly relevant to the internal market but emphasised that the reference in this context should be the OECD outputs and their interpretation of the ALP.

In terms of structure, some members seem to share the idea that most of the JTPF topics should be worked on in smaller sub-groups. In this context, they suggest that reports should reach a substantially advanced stage within the sub-group before they are referred to the "plenary" for discussion and agreement. As a result, the JTPF plenary sessions should be reduced to one or two per year.

Although each contributor varies on the details, the key point of this approach is that a considerable number of members see the **scope of work of the JTPF limited to technical arrangements for applying the OECD TPG within the EU and definitely do not see it extending to exploring/shaping policies in transfer pricing. Compliance with the ALP should remain the overarching principle for all work on transfer pricing.**

## 2. Work to extend beyond the OECD

Some members found that it may be a good idea for the JTPF to deal with topics where the OECD does not seem to be in a position to reach consensus (e.g. financial transactions). This view leaves some prospect for going beyond merely implementing the OECD agreed principles. Yet, it seems to be confined to elements within a broad topic in connection with which the OECD failed to reach agreement while the main thrust of the work continues to be attached to implementing the various aspects of the ALP, as they feature in the OECD TPG.

Consequently, this point of view does not essentially differ from the general trend according to which the JTPF should steer away from contributing to the policy debate on shaping transfer pricing principles.

## 3. Platform for exchanging views

A small number of members seem prepared to reduce the operation and output of the JTPF to a minimum. These members set forth the argument that there should be no pressure for delivering concrete recommendations within a defined timeframe. Rather, the focus should be on gathering information from stakeholders in the EU, to act as advice to the Commission in view of further action.

## 4. Guidance on the implementation of existing EU acts

A few members would like to extend the role of the JTPF to producing guidance on the implementation and legitimate application of EU law, e.g. DAC6 on the disclosure of certain cross-border tax arrangements, Dispute Resolution Mechanisms (DRM) Directive and Arbitration Convention.

## **B. THE SECRETARIAT'S POINT OF VIEW**

Since its creation in 2002, the JTPF has worked on numerous transfer pricing topics many of which explored common solutions for the implementation of the OECD TPG in the EU. Some JTPF reports also laid the foundations for the OECD's BEPS-related guidance, e.g. guidance on transfer pricing documentation requirements and low-value adding intra-group services.

Although the JTPF started as a highly ambitious group of experts able to reach consensus on a range of practical issues, it has become increasingly challenging for the group to reach consensus on most issues that it had to work on. Indeed, sometimes, several members held completely opposing views.

More recently, the OECD/G20 project against base erosion and profit shifting (BEPS) led the Commission Services to embark on a number of legislative initiatives some of which feature transfer pricing aspects (e.g. Dispute Resolution Mechanisms, DAC6). Most of these went through the Council and the legislation is being implemented by the Member States. During the preparation phase the Commission Services did not formally consult the JTPF, as the form and functioning rules of the group do not give much room for efficient and timely consultation on items beyond what is included in the mandate.

At present, the Inclusive Framework at the OECD is in the process of initiating some projects, to follow up on the BEPS output. A core part relates to the allocation of profit and is expected to have a critical impact on some of the fundamental principles that shaped international tax law over the past century. The Commission Services will necessarily be part of the debate that will delineate the new “international tax architecture” for future years. The expected changes involve an extensive policy discussion and re-consideration of principles in transfer pricing. However, given the views of many of the members of the JTPF concerning its role, it seems that the JTPF, in its present composition and with its current rules of functioning (especially, consensus), is not the most appropriate or efficient forum for discussing these developments. However, there does seem to be broad support for maintaining, in a simpler manner, the JTPF’s work on practical guidance on OECD agreed policy etc., although there may be fewer remaining areas where this is still needed. Finally, the Commission Services will not extend the work to include guidance on implementing EU legislation as this is not an appropriate function for an Expert Group.

### **Questions**

1. What do members think about the above conclusions?
2. Some members suggested that we should continue working on transfer pricing with a focus on agreeing practical guidance. Is this the view of the group? If yes, how should this be organised?
3. If we decided to carry out more policy-oriented work in transfer pricing, what are members’ views on how this could best be accomplished?

## Annex I Results of the Questionnaire on the future of the Joint Transfer Pricing Forum (JTPF)

### 1. Structure and working methods

The part of the questionnaire on structure and working methods outlined 3 possible ways forward:

- The JTPF's mandate should be renewed with no changes
- The JTPF's mandate should be renewed, but with some changes (asking for suggestions for such changes)
- Change of the current format to a more flexible structure involving ad hoc discussions with separate groups of stakeholders and meetings with the full range less often (e.g. twice a year)

#### *1.1. Renewal with no change*

Five members commented that no change might be necessary, some of them noting that the mandate is relatively broad and should cater for the required flexibility, in particular the already existing and used possibility of setting sub-groups.

#### *1.2. Renewal with some changes*

Nineteen members supported the second option<sup>1</sup> of a renewal of the mandate with some changes that include the suggestions summarised below:

- Fourteen members advocated for work in smaller topic-oriented sub groups (e.g. in the form of brainstorming sessions or workshops), some back-to-back with the plenary, and participation of external experts depending on the topic, one of those contributions extending the idea towards creation of project groups with appointed project leader based on technical competency and commitment
- Seven members preferred the number of meetings of the plenary to be limited to two, or even one per year
- Five members saw room for improvement in the communication of the results of the JTPF's work to the professional circles and the general public; in addition, public consultations should contain more background information
- Five members asked for more explanation of the documents and topics presented, more time for their review and more time during the pre-meetings (not back-to-back with the plenary, but some weeks in advance) for a more fruitful discussion; a lot of time pressure between the pre-meetings and the main meeting was considered as not facilitating flexibility of positions
- The following suggestions have been made by different sets of 3 members:
  - Expanding the scope of the JTPF to cover profit attribution of MNEs and even broader tax issues, e.g. the new rules mandatory disclosure
  - The JTPF may oversee the application of the Dispute Resolution Mechanisms Directive 1852/2017, some suggestions extending that involvement to analysing how

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<sup>1</sup> Some of those also commented on the third option, but those comments essentially complemented their comments on the second option and were still in the context of renewal of the JTPF

- transfer pricing disputes are resolved under the Dispute Resolution Mechanisms Directive 1852/2017 and issuing relevant general recommendations
- The JTPF is best suited to deal with technical, procedural and administrative aspects of transfer pricing, rather than policy aspects or substance issues
  - The written comments to papers should be shared with all JTPF members
  - The following suggestions have been made by different sets of 2 members:
    - Proven technical expertise and continuous involvement should be a prerequisite for inviting and keeping an NGM as a member of the JTPF
    - Allow experts to contribute in their personal capacity that would bring more open discussions
    - (from Member States) Additional meetings to be held in Member State-only format with more flexible agenda
    - Use of IT tools to share documents, case studies, comments, best practices, etc. as a separate work stream, not necessarily limited by the JTPF's work programme
    - The topics to discuss should be reviewed more often and should not be set once in the beginning of the JTPF's mandate, also adding that a bottom-up approach in selecting topics should be maintained
    - Explicit insistence that the method of working should remain based on consensus
    - The focus should not always be to come up with prescriptive written reports, but the JTPF should also be a place to exchange views and gather information
    - The JTPF could deal more closely with Member States' transfer pricing legislation, e.g. by issuing opinions on important developments, including follow-up to the recommendations in the JTPF Reports
    - Need of better facilities for the pre-meetings, with a projector, etc.
  - One member suggested the exclusion of professional tax advisors on the basis that they have vested interests

### *1.3. No renewal, only ad-hoc work*

Four members did not favour a renewal of the mandate, commenting that there is no need of a fixed group with a defined timetable and meetings, but rather a more flexible format with involvement of experts and stakeholders on an ad hoc basis. Still, the need to consult a wide range of stakeholders (and in any event all Member States) was recognised.

## 2. Content of the work – interaction with OECD's work

### *2.1. Avoid topics reviewed currently by the OECD*

Question 1 asked whether the work on transfer pricing in the EU should avoid topics that are currently reviewed by the OECD.

Eleven NGMs and eleven Member States replied that, as a general rule, the work on transfer pricing in the EU should avoid working in parallel with the OECD on the same topics, with the main concern being duplication of standards and divergences in the approaches. Nevertheless, five of those replies were somewhat nuanced and open to the JTPF forming a common position on the OECD consultations and discussion drafts, working on topics that have been too long in the works at OECD level or following up the impact of implementation of the OECD BEPS project.

Two NGMs and three Member States were interested in looking into issues that the OECD is dealing with, either from the perspective of the possibility of forming a common position at EU level or for discussion purposes only, i.e. without an obligation to come up with concrete recommendations.

## *2.2. Cover (also) topics outside of the OECD's current work, including alternatives to the arm's length principle*

Question 2 asked whether the work on transfer pricing in the EU should (also) cover topics on different areas from those on which the OECD is not currently working or has not worked at all (including alternatives to the arm's length principle). In 26 replies, the members were open to looking into topics on which the OECD is not currently working or has not worked at all. Only in the replies of one NGM and one Member State there was no wish to review such areas. Nevertheless, of the 26 positive replies, eight replies by NGMs and four replies by Member States explicitly expressed concerns that the JTPF should not look into matters beyond the arm's length principle.

## 3. Areas of future work

Question 3 asked the possible areas the EU work on transfer pricing should focus on in the future. The topics that were mentioned, ordered in terms of their frequency, are as follows:

- Simplification and clarification (6 replies)
- Financial transactions (6 replies)
- Digital economy (5 replies)
- Transfer pricing technical, procedural and administrative solutions (4 replies)
- Common methodology on transfer pricing audits and risk assessment, including a proposal for a study on transfer pricing audit and other administrative costs (4 replies)
- Mutual agreement procedures (4 replies)
- Per-industry analysis of challenges, case studies and best practices (3 replies)
- Arbitration convention and Dispute Resolution Mechanisms Directive 1852/2017 (3 replies)
- Implementation of the country-by-country reporting and use of the information (3 replies)
- Profit split method (3 replies)

Apart from those more generally mentioned topics, the following topics were mentioned two replies: business restructurings, value chain analysis, safe harbours, high value added intra-group services, cost contribution arrangements, coordination or harmonisation of documentation requirements (including thresholds), allocation of profits to permanent establishments, taxpayer rights, implementation of the exchange of rulings and use of the information, implementation of mandatory disclosure (DAC6).

The following topics featured in one reply each: re-characterisation and non-recognition, definition of intangibles and adjustments for hard-to-value intangibles, location savings, advance pricing agreements, application and simplification of the transactional net margin method, valuation techniques, interaction with customs valuations, reduction in double taxation in general, year-end adjustments, use of other methods than the five methods, moving away from the transactional approach of the arm's length principle and all other topics that were not finalised during the last JTPF mandate.