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TAXUD D2

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SUMMARY RECORD OF THE FORTY SEVENTH MEETING OF THE EU JOINT TRANSFER PRICING FORUM ('JTPF')

held in Brussels on 23 June 2016

Presence: All MS were present except for Austria. From the 18 Non-Governmental Members ("NGM"), one Business Member (Moller-Maersk Group) was absent. For TPCA and ITC Leiden, the alternates were present. The OECD was represented by Andrew Hickman, Head of Transfer Pricing Unit, Center for Tax Policy and Administration and the United Nations by Michael Lennard, Chief of the International Tax Cooperation Section of the Financing for Development Office of the U.N. (Department of Economic and Social Affairs). An observer from the European Parliament also attended.

1. ADOPTION OF THE AGENDA

The Agenda (doc. JTPF/005/2016/EN) was adopted.

2. DOCUMENTS ADOPTED UNDER WRITTEN PROCEDURE

The Summary Record of the February 2016 meeting (doc. JTPF/004/2016/EN) was adopted by written procedure.

3. INFORMATION BY THE COMMISSION ON CURRENT ONGOING ISSUES

Commission Services gave an update on current developments: the agreement reached in Council on the Anti-Tax Avoidance Directive (ATAD) on 21 June 2016; the presentation of the Action Plan on VAT (7 April 2016); the Commission's proposal made on 12 April for a Directive on public tax transparency for multinationals (so-called "public Country-by-Country reporting (CBCR)").

In light of these achievements, the Commission Services emphasised that Member States seem to be now more prepared to adopt quickly proposals in the area of tax avoidance, when they are well-thought through. They are also ready to accept the necessity for the EU to go further on the implementation of the OECD BEPS, in particular as regards multi-option solutions for which one can be chosen and proposed as more adequately fitting to the EU context.

Information was then provided (i) on the progress made in the context of the two studies commissioned by the Commission in the area of transfer pricing, *i.e.* the

study on the comparable data used for transfer pricing in the EU and the study on the application of economic valuation techniques for determining transfer prices of intangibles in cross-border transactions, as well as (ii) on the outcome of the public consultation on improving double taxation dispute resolution mechanisms.

It was pointed out that one State Aid decision in the transfer pricing area (SA.38375 (Fiat)) had been published. Otherwise, the Commission Services stressed that they did not consider that discussion of ongoing Competition cases was within the Group's mandate and would not comment on such cases under any circumstances.

4. DRAFT REPORT ON THE USE OF COMPARABLES IN THE EU (DOCUMENT JTPF/007/2016/EN AND BACKGROUND DOCUMENTS)

The Chair introduced the Draft Report on the Use of Comparables in the EU which was then discussed in detail by the JTPF Members with the main focus on the structure and content of the recommendations.

It was agreed that the Draft Report will be reviewed and revised by the Secretariat. For a description of the proposed changes refer to the ANNEX.

Vice Chair of MS welcomed the draft and stated that MS could not express their position until the full Deloitte Report is available to them. She also expressed the MS concerns on the weight given to the Deloitte Report given the excessive number of references to it in the Draft Report.

The majority of the Draft Report was discussed in detail and the Chair asked Members to send written comments by the beginning of July on the remaining part (sections 5.3, 6, 7 and 8 - Recommendations 8 –part 2-, 9 and 10). A revised version will then be circulated to members for any further comments together with the Deloitte study.

Point 6 of the Agenda (Presentation of the state of play and overall outcome of the Study on "The Use of Economic Valuation Methods in the Transfer Pricing Area in the EU), as well as points 7 (APA and MAP statistics) and 8 were not discussed.

The Chair thanked the participants and closed the meeting after having announced the date of the next meeting, which is on 20 October 2016 (tbc).

- **Recommendation no.1 (R.1):** R.1.a, b and c will be merged; the concepts of quality and quantity should be kept and enhanced together with consistency and transparency. This latter notion should also be further clarified. The sentence in brackets in R.1b) should be deleted. A short introduction needs to be added, with a link to the corresponding parts of the OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations ("TPG");
- **Recommendation no.2 (R.2):** R.2.a and c. will be revised with a focus on the step- and result-driven approach (R.2a) and a more flexible and broader description of all available sources (R.2.c). R.2.e will be revisited in light of the OECD TPG, considering also that the deductive approach could be in the majority of cases the most appropriate approach but that the additive approach remains useful in some cases. R.2.d, f and g were agreed (deletion of "electronic files" and addition of "according to the national rules" in R.2.g) and R.2.b will be fully deleted;
- **Recommendations no.3 and no.4 (R.3) and (R4):** these recommendations will be reorganised together and also revised.
 - R.3.a and b will be consolidated together with R.4.c. R.3.c and d. will be merged with more emphasis to be laid on how using internal comparable search would be of interest, particularly as part of an additive approach (mentioning as examples the specific cases of restructuring and group comparables). R.3.e should remain in the principle, subject to some semantical revisions;
 - R.4.a needs further consideration as regards the particular situation of SMEs and requires more precision on "*small transactions*". R.4.b and f. will be considered together and shifted to the general comments. R.3.d should be integrated in section 6 on "*comparability adjustments*". R.3.e should remain in the principle, subject to some semantical revisions;
- **Recommendation no.5 (R.5):** R.5.c and d shall be carved out in the revised draft report and discussed as statements rather than as recommendations. R.5.b should be shifted to the section on Pan-European comparables, whereas R.5.a is kept in its principle subject to some language revisions;
- **Recommendations no.6 and no.7 (R.6) and (R7):** these recommendations will be addressed together in the final draft. R.6.a and b were agreed in principle subject to some wording changes (adding a reference to "*exclusion keywords*" in R.6.a and specify the meaning of "*automatic search*" in R.6.b). R.6.c will be maintained and shifted to a new box on qualitative analysis. The characterisation of a reasonable independence test in R.7.a should be envisaged in a separate part dealing with qualitative search, with some inflection in order to take into consideration some specific cases and also both shareholder and subsidiaries holding. R.7.b should remain as regards the principle defined in the first sentence (establishing the link to each comparable search and deleting the second sentence). R.7.c will be rephrased and expanded in order to address all extreme results (*i.e.* both loss and high profit) with also a link to the functional

and risk analysis. R.7.d and e. will be kept and enriched with inputs from the JTPF discussion (*i.e.* to provide precision on "*accounts from listed companies*" and "*diagnosis ratios*");

- **Recommendations no.8 (R.8 first part a) to c):** R.8.a will be rephrased considering that there is a wide agreement about interquartile range practice which could be strengthened and also considering some language revisions. R.8.b was agreed as being acceptable subject to deletion of the last sentence. R.8.c will be revised in order to strengthen the general agreed principle that in cases where taxpayer and tax administrations agree that statistical tools like the interquartile range have correctly been used to enhance the reliability of a range, every point situated in the interquartile range should be considered as being arm's length. As regards the question to which point within the arm's length range the adjustment should be made in case of a reassessment when it is established that conditions are outside the interquartile range (arm's length range), it was considered difficult to agree on prescribing a specific point/approach given the different approaches in MS. The respective part of the sentence would therefore have to be deleted.

As regards the rest of the text in the draft report, other modifications were discussed and agreed, particularly regarding the deletion of paragraph 15 and the reorganisation and the revision of the boxes describing the three steps of an external search on page 12 (after paragraph 16). Also, it was agreed that the references to the Deloitte study should be generally reviewed as part of the revision of the draft report.