EUROPEAN COMMISSION
DIRECTORATE-GENERAL
TAXATION AND CUSTOMS UNION
Direct taxation, Tax Coordination, Economic Analysis and Evaluation
Company Taxation Initiatives

Brussels, November 2014
TAXUD D1

Doc: JTPF/015/2014/EN

SUMMARY RECORD OF THE FOURTY FIRST MEETING OF THE EU JOINT TRANSFER PRICING FORUM

held in Brussels on 24 October 2014

1. ADOPTION OF THE AGENDA

The Agenda (doc. JTPF/011/REV1/2014/EN) was adopted by consensus.

2. DOCUMENTS ADOPTED UNDER WRITTEN PROCEDURE

The Summary Record of the June 2014 Meeting (doc. JTPF/009/2014/EN) was adopted under written procedure.

3. INFORMATION BY THE COMMISSION ON CURRENT ONGOING ISSUES

Tom Neale provided information on the state of play of the following topics:

- **Organisational matters**: Mr Pierre Moscovici will take office as the new Commissioner for Economic and Financial Affairs, Taxation and Customs on 1 November 2014. Directorate D in DG TAXUD has also a new Director, Mr Valère Moutarlier, as of mid-October.
- **Renewal of the JTPF mandate**: The mandate of the JTPF will expire on 31 March 2015. The Secretariat is in the process of preparing a Commission Decision for a new 4-year mandate and a Call for applications for the selection of new non-government members of the JTPF. Adoption and publication, respectively, is expected in December 2014. Applications will be sought from organisations[1], to be appointed as non-government members of the new JTPF.

[1] Organisations in the broad sense of the word including companies, associations, Non-Governmental-Organisations, trade unions, universities, research institutes, Union agencies, Union bodies and international organisations.

- **Council Conclusions** are expected to be adopted under the Italian Presidency on the Commission 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.
- **Parent Subsidiary Directive**: Further to the amendments adopted in June 2014, discussions are ongoing in the Council working group on the inclusion of an anti-abuse provision in the Directive.
- **Interest and Royalties Directive**: as in the case of the PSD, a possible inclusion of an anti-abuse provision in the Directive is discussed in Council.
- **CCCTB**: the CCCTB can be a solution to a number of problems identified under BEPS. Technical work continues – the most recent issue debated in the Council working group has been the definition of permanent establishments.
- **Patent boxes**: to evaluate the existing 12 patent box regimes the Commission is currently preparing an analysis, excluding the substance criterion which has not been defined yet. A decision of the Code of Conduct group on business taxation on patent boxes is unlikely by the end of the year. The next meeting of the group is scheduled for 20 November.
- **State aid**: a dedicated team in DG COMP is in charge of the investigations (Apple, Fiat, Starbucks, Amazon). DG TAXUD is not directly involved.

4. ARBITRATION CONVENTION (AC)

The Chair stated that the discussion of the revised draft report on improving the functioning of the AC would be the main item of the meeting and that the objective was to discuss the document in its entirety and to agree on a revised Code of Conduct, as attached in Annex 1 of the revised draft Report.

The revised draft report was discussed section by section, starting from the beginning with view to finalising the text (recommendations and body of the report), subject only to a linguistic and a legal check after the meeting.

The discussion resulted in the following outcome:

Preamble of the Code of Conduct

The addition on behavioural aspects to the preamble of the revised CoC proposed by the NGMs at the June meeting was accepted. In addition, it was agreed to complement it with two further sentences emphasizing the confidentiality of government to government communication (at the suggestion of MS) and the commitment of all parties to the spirit of the AC (at the suggestion of NGMs). The amended preamble would read as follows:

> "Without prejudice to the respective spheres of competence of the Member States and the European Union, this revised Code of Conduct concerns the implementation of the Arbitration Convention and certain related issues concerning mutual agreement procedures under double taxation treaties between Member States. The application of the Arbitration Convention is governed by mutual trust, cooperation and transparency between all parties involved as well as by recognising the need to maintain a sustainable and reliable procedure for resolution of disputes in a timely and resource effective manner. However, due respect should be given to the confidentiality of government to government

communication. All parties are committed to seeking the avoidance of double taxation as defined in Article 4 of the Arbitration Convention and abide by the letter and the spirit of the Arbitration Convention."

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

1.1 Application of the AC in specific cases

At the suggestion of NGMs, the heading of report item 1.1. (Application of the AC the in absence of an actual payment of tax) was changed to "Application of the AC in specific cases" and the item was split into two parts - addressing, respectively, the absence of actual payment of tax (covered by the existing text in the draft report) and changes in the status of a taxpayer/entity subject to double taxation which may lead to the disappearance of the actual taxpayer (covered by a new text proposed by NGMs).

Paragraph 3, including the following recommendation for a new point 1 in the CoC, was agreed as formulated in the draft report. The group decided to keep the first sentence of the recommendation and remove the brackets. New point 1 CoC would read as follows:

> "An action which results or is likely to result in double taxation within the meaning of Article 1 of the Arbitration Convention does not require that the transfer pricing adjustment within the meaning of Article 4 of the Convention leads to an actual payment of tax. Therefore cases where the entity subject to the adjustment within the meaning of Article 4 has losses carried forward against which an upward adjustment could be offset or cases where because of group relief no actual tax payment is due and similar situations, are within the scope of the Arbitration Convention."

At the suggestion of NGMs a new paragraph would be added to the report, containing a recommendation for a new subsection under point 1 in the CoC, to address changes in the status of a taxpayer/entity subject to double taxation. The addition specifies that such changes (resulting in possible mergers, restructurings, liquidation or other changes) should not be a barrier for cases to be handled. The new subsection of point 1 CoC would read as follows:

> "Cases submitted for resolution under the Arbitration Convention generally regard earlier years. This means that the entities or enterprises involved may have merged, restructured, dissolved or changed otherwise after the years in which double taxation has arisen. This in and of itself should not disallow the case to be handled as relief of double taxation is generally still important for the parties then involved."

3 MS made scrutiny reservations to the proposed text for a new subsection of point 1 CoC.

1.2 Application of the AC dependent on MAP under DTCs

The text of the recommendation was amended at the suggestion of MS: the sentence referring to the need for minimum information under point 7.6 (a) (ii) to be submitted was deleted. New point 2 in CoC would read as follows:

> "If access to the Arbitration Convention or the treatment of cases under the Arbitration Convention depends directly on the result of a mutual agreement procedure under an applicable Double Taxation Convention, care should be taken to ensure that the deadline under Article 6 (1) of the Arbitration Convention does not expire. The enterprise should file separate requests for a mutual agreement procedure under the Arbitration Convention and a mutual agreement procedure available under the applicable Double Taxation Convention. The requests may be combined in one letter. The two-year period referred to in Article 7 (1) AC will not start before the issue addressed under the Double Taxation Convention is solved."

1.3 Access to the AC and remedies against denial of access

The proposed change to the heading of report item 1.3 from "Remedies against denial of access to the AC" into "Access to the AC and remedies against denial of access" was accepted.

After a lengthy debate the proposed recommendation to define when a case is covered by the Arbitration Convention at the beginning of the CoC (under "Scope of the Arbitration Convention") was not supported. To define the scope of the Arbitration Convention Members expressed a preference to focus on the OECD TPG only rather than on their interpretation in Member States' domestic law. As new point 6 (a) CoC already recommends applying the arm's length principle as advocated by the OECD, the recommendation was considered to be redundant.

Changes to paragraph 6 are described in detail below, in the paragraph summarising the discussion on the recommendation on point 7.3 (e) CoC, as the respective wording in paragraph 6 and the recommendation is the same.

No changes to the following recommendation for a new point 5 in CoC were proposed, but 3 MS made scrutiny reservations to the text as formulated in the report.

The new paragraph to the report proposed by the Secretariat (as a new paragraph 7) clarifying the procedure foreseen in the AC for accepting/rejecting requests was accepted with 1 change – insert "first" in the third sentence, as follows: "Point 7.3 (h) CoC indicates that the competent authority receiving the request decides first about whether minimum information […]."

Two changes were proposed to the recommendation for a new point 7.3 (e) CoC (same as in paragraph 6 of the report, see above): to replace "will" with "should" in "[…] a competent authority will inform"; to replace "endeavour to reach a mutual agreement" with "exchange their views so as to try, where possible, to reach a common position". The first change was uncontroversial and received support. The second change was widely discussed and its final wording was a compromise between Members' different views. <u>New point 7.3 (e)</u> CoC would read as follows:

> "The competent authority will acknowledge receipt of a taxpayer's request to initiate a mutual agreement procedure within one month from the receipt of the request and at the same time inform the competent authority(ies) of the other Member State(s) involved in the case attaching a copy of the taxpayer's request. The competent authorities should reach a mutual understanding on whether they consider the minimum information as submitted. A competent authority should

inform the other competent authority(ies) when access to the Arbitration Convention is denied and provide them with the reasons for the denial. The competent authorities involved should exchange their views so as to try, where possible, to reach a common position on whether the denial of access to the Arbitration Convention is justified."

4 MS made scrutiny reservations to the second change.

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

2.1. Informing enterprises of their rights under the AC

The recommendation on new point 7.1 (a) CoC was accepted as formulated in the draft report with 1 change: replace "at the time of the first notification" with "in a timely manner". An alternative suggestion was to add "at the latest" before "at the time of the first notification", but this suggestion was not supported due to concerns that it could be perceived as creating an obligation to supplement a tax assessment with an advice on rights, which itself could trigger legal consequences, and due to MS' different rules and practices as to the timing when a taxpayer could be informed of his rights. The formulation "in a timely manner" was agreed as a compromise. New point 7.1 (a) CoC would read as follows:

> "A tax administration making an adjustment is encouraged to inform the enterprise in a timely manner of its rights under the Arbitration Convention, including about any time limits in the Convention for initiating a mutual agreement procedure. The onus for making a timely request in order to preserve access to the mutual agreement procedure rests with the enterprise and enterprises should take all reasonable steps to ensure that time limits do not expire."

2.2. Independence of CA from audit

The recommendation for a new point 7.1 (c) were agreed as formulated in the draft report and would read as follows:

> "Although competent authorities and audit (function) may belong to the same tax administration, competent authorities should maintain a degree of autonomy from the audit function of the tax administration in order to ensure the independence of any subsequent review of a case by the competent authority. The guiding principle should be that the competent authority's function is to ensure a fair and appropriate application of the Arbitration Convention, not to seek to uphold all adjustments proposed by the tax authorities of its Member State."

1 MS stated that it would make a formal reservation (final, not a scrutiny reservation) on this provision.

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

The recommendation for a new point 7.1 (d) was agreed as formulated in the draft report:

> "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 maintained its scrutiny reservation which can hopefully be lifted in due time.

2.4. Implication of the new Article 7 OECD MTC (2010)

The recommendation for a new point 6 (b) was agreed as formulated in the report. New point 6 (b) CoC would read as follows:

> "Article 4 (2) of the Arbitration Convention should be interpreted in conjunction with the most recent version of Article 7 OECD Model Tax Convention and the relevant Commentary. This will not 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 between the Member States involved has a different wording. In cases where Member States have concluded bilateral Double Taxation Conventions, Article 4 (2) should have the same meaning as the relevant Article on attributing profits to permanent establishments in the applicable Double Taxation Conventions, taking into account the OECD commentary on the provisions included in the concerned Double Taxation Convention."

2 MS made scrutiny reservations.

2.5. Disputes likely to arise

Paragraphs 13 and 14 were agreed as formulated in the draft report, without a discussion.

2.6. MAP request and informing the other CA involved

The recommendation for a new point 7.3 (d) CoC were agreed as formulated in the draft report. A typo identified in the last sentence of the proposed recommendation would be corrected – "point 6.3 (d)" should read "point 7.3 (e)".

2.7. Guidance on Multilateral MAP

Paragraph 16 was agreed as formulated in the draft report without a discussion.

2.8. Informing the enterprise during MAP

Paragraph 17 was agreed as formulated in the draft report without a discussion.

2.9. Implications of MAP results for other years

The recommendation for a new point 7.3 (i) CoC was agreed with one modification: addition of "regarding the same enterprise" in the second sentence. New point 7.3 (i) CoC would read as follows:

> "Where a new request by an enterprise for a mutual agreement procedure is linked to issues which are already covered by an ongoing mutual agreement procedure with the same enterprise, competent authorities should, where appropriate, consider treating the new request together with the ongoing mutual agreement procedure. Where a request for a mutual agreement procedure is linked to issues which have already been covered in another mutual agreement procedure regarding the same enterprise, competent authorities should typically

consider applying the outcome in the earlier mutual agreement procedure to the new request and where appropriate, to apply that outcome."

2.10. The three-year period

The proposal for an addition to new point 7.2 CoC – making a distinction between "presentation" of a case in the meaning of Article 6 (1) AC (cut-off date for the 3-year period) and "submission" of a case for the purpose of Article 7 (1) AC (kick-off date of the 2-year period) – as elaborated in new point 7.6 (a) CoC), was discussed at length. The proposed addition aims to ensure that a case which is presented within 3 years of the first notification of the action under Article 6 (1) cannot be rejected as out of time where additional information requested by the concerned State is received after the 3-year time limit. Some MS were concerned about a possible situation in which, once a taxpayer has secured eligibility for the AC and suspension of tax collection (by providing the information required under new point 7.6 (a) (i) – (vii), necessary for a case to be considered as presented), the taxpayer does not cooperate further and does not respond to any additional requests for information. As a remedy, it was discussed that the final report could specify that, if the taxpayer does not respect its undertaking to respond to all reasonable and appropriate requests of a CA, the two competent authorities can decide to drop the case. New point 7.2 CoC would read as follows:

> "The date of the 'first tax assessment notice or equivalent which results or is likely to result in double taxation within the meaning of Article 1 of the Arbitration Convention, e.g. due to a transfer pricing adjustment', is considered as the starting point for the three-year period. A request is considered as presented in the meaning of Article 6 (1) AC when it contains the information listed in (point 7.6 (a) (i) – (vii) CoC. As far as transfer pricing cases are concerned, Member States are recommended to apply this definition also to the determination of the three-year period as provided for in Article 25.1 of the OECD Model Tax Convention on Income and on Capital and implemented in the double taxation treaties between Member States."

3 MS made scrutiny reservations to the recommendation for an addition to new point 7.2 CoC.

It was explicitly agreed that Annex 2 to the report would be annexed to the revised Code of Conduct.

2.11. Guidance on position papers

The recommendation for a new point 7.4 CoC was agreed as formulated in the draft report.

2.12. MAP outcome and domestic remedies

The recommendation for a new point 7.7 CoC was agreed as formulated in the draft report.

As regards Annex 4 the decision taken at the June meeting not to annex it either to the final report or the CoC (due to the specificities of individual MS' national procedures which cannot be reflected in the graph) was confirmed. However, due to its usefulness as a general information tool, it was agreed to publish the chart elsewhere on the JTPF

webpage, including the amendments proposed by NGMs and a clarification by a MS, with a mention that the chart is not a consensus document.

2.13. Serious penalties

The recommendation to complement new point 8 CoC with the definition of fraud taken from the Commission Communication on concrete ways to reinforce the fight against tax fraud and tax evasion (COM (2012) 351, 27.06.2012) and/or to define 'gross negligence', was discussed at length. NGMs stressed the need to distinguish between what a MS defines as a serious penalty (according to its domestic law) and what should constitute a serious penalty justifying denied access to the AC. NGM suggested moving the focus of this provision of the CoC away from describing concrete sanctions for unacceptable taxpayer's behaviour in the different MS (MS' unilateral declarations on serious penalties), and to define instead a commonly recognised qualification of unacceptable behaviour (a common standard) barring access to the AC. This would mean that it is not the penalty imposed as such which bars access to the AC, but the actual underlying behaviour. In the same vein, as a way to avoid definitional problems around terms like "fraud" and "gross negligence" a MS suggested to draw up a commonly agreed list of instances/cases of offenses that would objectively justify denied access to the AC. However, some members had concerns that a list of offenses could not by definition be exhaustive and cover all possible situations.

Nevertheless, there was a consensus among members that denial of access to the AC is not automatic in case of a serious penalty, but instead optional – that is, access to the AC should be denied only when a serious penalty is imposed in exceptional cases like fraud and similar situations. On this basis it was agreed to amend the existing text in the CoC; the new point 8 CoC would read as follows:

> "As Article 8 (1) AC provides for flexibility in refusing to give access to the Arbitration Convention due to the imposition of a serious penalty, and considering the practical experience acquired since 1995, Member States should deny access to the Arbitration Convention only when serious penalties are applied in exceptional cases like fraud. Exceptional cases like fraud include tax fraud, wilful default and gross negligence."

3 MS made scrutiny reservations to the amendment (new point 8 CoC).

2.14. Improving the "second phase" of the Arbitration Convention

a) Composition and functioning of advisory commissions

The proposal that independent persons of standing should be able to hold separate deliberations was believed by some members contrary to the letter of the AC and did not receive sufficient support. There was also a proposal to emphasize in the CoC the possibility to appoint to the advisory commission only one representative per CA, but this was not accepted either, based on the argument that the AC already contains a provision which allows that only one representative per CA is appointed to the advisory commission. It was agreed not to amend the existing relevant provision of the CoC (new point 9.2 (c)) and to delete the proposed new point 9.3 (h) CoC in its entirety.

b) Opening statement by the enterprise and auditor(s)

The recommendation to complement new point 9.3 (d) in CoC was agreed as formulated in the draft report, including the additional sentence at the end.

1 MS made a scrutiny reservation to the recommendation for an addition to new point 9.3 (d) CoC.

c) Preparation of the arbitration procedure

The recommendation to complement new point 9.2 (f) in CoC was agreed as formulated in the draft report, including the additional sentence at the end.

d) Remuneration of chairmen and independent members of advisory commissions

Paragraph 30 was agreed as formulated in the draft report without a discussion.

e) Follow-up to advisory commissions' opinions

Paragraphs 31 and 33 were agreed as formulated in the draft report without a discussion. Paragraph 32 was agreed with one modification: the last sentence referring to annex 4 would be deleted, in accordance with the earlier decision to remove annex 4 from the report/CoC. 2 MS made scrutiny reservations on paragraph 32.

2.15 Tax collection and interest charges

The existing CoC recommends a suspension of tax collection during dispute resolution procedures (similar to that applicable under domestic procedures) and allows MS a choice between 3 approaches to interest charges and refunds. Following a lengthy discussion which also linked to other elements of the new CoC, members agreed that when MSs involved in a case choose each a different approach to interest charges and refunds (out of the 3 CoC recommended approaches) it is appropriate that they should attempt to eliminate any resulting asymmetry. New point 10 CoC would therefore read as follows:

> "(a) Member States are recommended to take all necessary measures to ensure during cross-border dispute resolution procedures under the Arbitration Convention that enterprises engaged in such procedures can benefit from suspension of tax collection under the same conditions as those engaged in a domestic appeals or litigation procedure although these measures may imply legislative changes in some Member States. It would be appropriate for Member States to extend these measures to the cross-border dispute resolution procedures under double taxation treaties between Member States.
>
> (b) Considering that, during mutual agreement procedure negotiations, a taxpayer should not be adversely affected by the existence of different approaches to interest charges and refunds during the time it takes to complete the mutual agreement procedure, Member States are recommended to apply one of the following approaches:
>
> (i) tax to be released for collection and repaid without attracting any interest; or
>
> (ii) tax to be released for collection and repaid with interest; or

(iii) each case to be dealt with on its merits in terms of charging or repaying interest (possibly during the mutual agreement procedure).

When, nevertheless, asymmetry results, MS should seek to eliminate any resulting asymmetry in the MAP process where possible."

Several MS asked for more time to reflect on this report item, which they described as complicated. It was agreed to conclude the discussion on it at the next meeting of the JTPF in March 2015.

As regards suspension of tax collection and interest charges during dispute resolution procedures under the AC, the discussion also touched upon the issue of whether a reservation can be made on existing provisions in the current CoC. The Chair reminded members that it is not the CoC currently in force, but amendments to it, that are subject of the discussion.

Way forward: the Secretariat will prepare a draft Final Report based on the discussion and circulate it among members by December. Where necessary the body of text of the Final Report will be aligned with the recommendations agreed at the meeting. Members who have made scrutiny reservations on any of the recommendations will be invited to lift, if possible, those reservations by the end of January 2015. Members who wish to comment on the draft Final Report will also be welcome to submit their written comments by the end of January 2015. However, comments will only be accepted on new wording proposed at the meeting, as well as on new changes to the body of the report made by the Secretariat in order to align it with the text of the agreed recommendations, not on recommendations already agreed.

5. EU TPD

Due to time constraints this Agenda item was not discussed.

6. JTPF WORK PROGRAMME FOR 2015-2019 – ROUND TABLE DISCUSSION

Due to time constraints this Agenda item was not discussed. The Chair invited Members to submit to the Secretariat in writing their ideas on the future work programme.

7. STATISTICS

Due to time constraints this Agenda item was not discussed.

8. ANY OTHER BUSINESS:

Next meeting: 12 March 2015 (tbc)