



Brussels, March 2016  
TAXUD D2

**Doc: JTPF/004/2016/EN**

## **SUMMARY RECORD OF THE FORTY SIXTH MEETING OF THE EU JOINT TRANSFER PRICING FORUM ('JTPF')**

**held in Brussels on 18 February 2016**

**Presence:** All MS were present except Croatia. From the 18 Non-Governmental Members ("NGM", one academic (ITC Leiden) and 1 NGOs (Eurodad) were absent. For the BEPS Monitoring Group, the alternate was present. The OECD was represented by Andrew Hickman, Head of Transfer Pricing Unit, Center for Tax Policy and Administration.

### **1. ADOPTION OF THE AGENDA**

The Chair introduced the agenda and stated that the main items to be discussed at this meeting are comparables in the EU and Joint Audits.

The Agenda (doc. JTPF/002/2016/EN) was adopted.

### **2. DOCUMENTS ADOPTED UNDER WRITTEN PROCEDURE**

The Summary Record of the October meeting (doc. JTPF/017/2015/EN) was adopted in written procedure.

### **3. INFORMATION BY THE COMMISSION ON CURRENT ONGOING ISSUES**

Tom Neale gave an update on current issues ongoing at the level of the Commission:

- The Commission proposal for an Anti Tax Avoidance Package from 28<sup>th</sup> January 2016 which includes a proposal for non-public CBCR in the EU and which is currently discussed in Council;
- Based on the June 2015 Action Plan for a Fair and Efficient Corporate Tax System in the EU<sup>1</sup> ("the June 2015 Action Plan"), the Commission is committed to work on improving MS coordination in tax audits. Work is going on with MS in this respect and is not only limited to direct taxation;
- Two studies have been commissioned in January by the Commission in the transfer pricing area, which cover respectively (i) the use of comparable data

---

<sup>1</sup> Com (2015) 302 Final, 17 June 2015 – see  
[http://ec.europa.eu/taxation\\_customs/taxation/company\\_tax/fairer\\_corporate\\_taxation/index\\_en.htm](http://ec.europa.eu/taxation_customs/taxation/company_tax/fairer_corporate_taxation/index_en.htm)

in the EU and (ii) the application of economic valuation methods in the area of transfer pricing in the EU. The result of the studies should be available before the June 2016 meeting of the JTPF;

- A public consultation on improving double taxation dispute resolution mechanisms<sup>2</sup> was launched on 16<sup>th</sup> February (deadline for comments: 10 May). The consultation is part of the work on implementing the June 2015 Action Plan (section 3.2) and aims at gathering views from all stakeholders in particular on how double taxation dispute resolution mechanisms can be improved and on the solutions under discussion. The public consultation will be supplemented by a targeted questionnaire aiming at gathering concrete information from affected stakeholders mainly on the size of the problem - this will be sent to JTPF members in the next couple of weeks for completion by the end of March;
- As regards the CCCTB, the impact assessment procedure is ongoing. A public consultation has been launched in this respect and closed on 8 January 2016.

#### **4. JOINT AUDITS (DOCUMENT JTPF/003/2016/EN)**

The Chair referred to the previous meeting where a paper on Joint Audits in the EU was presented by the Commission and discussed by the Forum. At this meeting two experts from The Netherlands and Germany gave a presentation about a pilot project which took place in the two countries recently.

The presentation was well received by the Forum and the following aspects were subsequently discussed and addressed both by the Member States and Non-Governmental Members:

- The potential of reducing administrative burden for the taxpayer;
- The potential of avoiding Mutual Agreement Procedures ("MAP") in the EU or at least shortening their duration;
- The need to translate the result into the legal system of the MSs and how to ensure legal certainty for the MS;
- The combination of a Joint Audit with a subsequent Advance Pricing Arrangements ("APA") and similarities/differences to an APA with a rollback;
- How to select appropriate cases;
- How to deal with disputes between the auditors

The Chair summarised the discussion as having identified merits and challenges but also interest to move forward on this subject and to solve practical problems identified rather than regarding them as blocking factors for further progress. At some stage a paper will be produced by the Secretariat, which will take into account the conclusions of MS and other stakeholders as well as further developments at the level of the Commission. On this basis, it will be decided on how the JTPF can

---

<sup>2</sup>[http://ec.europa.eu/taxation\\_customs/common/consultations/tax/double\\_tax\\_dispute\\_en.htm](http://ec.europa.eu/taxation_customs/common/consultations/tax/double_tax_dispute_en.htm)

contribute to the future development of Joint Audits in the context of transfer pricing.

## 5. COMPARABLES IN THE EU (DOCUMENT JTPF/001/2016/EN)

The Chair introduced the agenda item and stressed that the paper is a discussion paper, meaning that there will not be a discussion/agreement on the exact wording. The discussion will rather form the basis for a subsequent report which will take into account the conclusions of the study on comparables in the EU launched by the Commission.

The Chair and the Secretariat clarified, particularly to address a preliminary remark of the Vice Chair of Governmental Members, that it is a key aspect of the JTPF to work on the basis of the OECD TPG but rather develop solutions which go beyond the OECD Transfer Pricing Guidelines ("OECD TPG") in the sense of improving their application. The paper was discussed section by section:

### Section I. Background

The following general aspects have been discussed and it has been supported to consider them in the subsequent report:

- That a general target should be to improve the practical functioning of transfer pricing in the EU staying in and building on the OECD TPG framework in this respect;
- That finding and choosing the comparables to be used involves some levels of assessment and can create challenges for taxpayers and tax administrations. This should be recognised and the general purpose the work of the JTPF will be to improve the current state of the art by developing guidance for some targeted areas, making it more operational and connected to the economic reality;
- That there are practical problems finding comparables and the aim is to develop pragmatic and fair solutions for all stakeholders.

### Section II. Accurate delineation of the controlled transaction and risk analytical framework

The two Vice-Chairs, respectively for the Governmental Members and the Non-Governmental Members, suggested that it was important to establish what arises from the recent revised Chapter I of the OECD TPG. The subsequent report should focus on the benchmarking exercise, once the actual transaction is delineated. Consequently, some specific aspects should be targeted in this report such as the impact of the delineation and of the recent revisions of Chapter I of the OECD TPG on the benchmarking strategy and some directly-impacted areas, (e.g. adjustments).

MS stressed that the subsequent report should make clear that the conclusions from the BEPS project do not create a new standard but are just an update.

The observer from the OECD referred to the project on comparability at the level of the OECD which is more focussing on the situation in developing countries but that both projects can benefit from each other.

## Section III. Search for comparables

### 3.1.1 Internal comparables

The Vice-Chair of the Governmental Members reported that MS suggest not to use language on "general preference" of internal comparables but rather state the aim of arriving at the most reliable comparable. MS agreed that before rejecting internal comparables it should be evaluated whether adjustments can be made (e.g. for differences in market, product and volume).

The Vice-Chair of the NGM reported that there is support for working on reducing the risk of rejecting internal comparables and confirmed that in practice internal comparables are often rejected without taking into account the quality of a potential alternative, i.e. external comparables. As regards the ways forward and particularly the improvement of documentation, NGMs stressed the importance of not creating additional compliance burden but also the possibility of using the tools available to the company.

Another aspect discussed was the extension of the search for internal comparables to the MNE Group as a whole and not only to the enterprise subject to review. In this context, the value chain of the MNE may help to show where there are external transactions at the level of the MNE

### 3.1.2 External comparables

The Vice-Chairs summarised the outcome of the respective pre-meetings. For MS it would be important to have information on the screening criteria documented, especially the reasons for rejection in the context of quality screening. Also information on which databases are available in the EU would be welcome.

Although often not the main issue of an audit, NGM supported the development of a common approach for a database search to promote consistency and as an indicator for having done a proper analysis. As regards the proposals on documentation and storage of the search strategy NGMs did express the need to keep an appropriate ratio of effort vs. benefit as regards the compliance burden created for business.

In the subsequent discussion the following aspects were considered:

- Although generally agreeing on discouraging the use of so-called "data base dumps", it was stressed that what is called a "database dump" has to be distinguished from the need of broadening the search to obtain meaningful third party data;
- The relevance of the profit split method will be addressed in accordance with the Programme of Work at a later point in time;
- Search criteria based on economic ratios should be considered, noting, however, the practical limitations of some databases in this respect;
- The need to develop common pragmatic approaches on criteria which are most relevant when designing the search strategy, e.g. how to deal with loss making comparables, publicly traded comparables and access to publicly listed companies, use of consolidated data, definition of independence and deductive vs. an additive approach.

The Chair summarized the discussion and concluded that as a next step, the Secretariat will launch a questionnaire to take stock of the practices in MS as regards:

- Data screening
- Sources of data
- Use of economic ratios
- Loss making comparables,
- Publicly traded comparables and access to publicly listed companies,
- Possibility of and ways on how to use consolidated data of the group,
- Dealing with differences in accounting standards
- Independence criteria and
- Deductive vs. an additive approach

In addition, the Secretariat will review existing practices outside the EU and if helpful integrate them.

### 3.2 Exploitation of data

#### 3.2.1 Adjustments (general)

The Vice-Chair of Governmental Members indicated that MS supported working further on accounting adjustments and the room to make progress in this area, particularly to set up a clearer distinction between situations where comparables should be rejected and/or adjusted. The specific situation of adjustments in the context of the Resale Price Method especially was noted and the difficulties of solving them was recognised.

The Vice-Chair of NGM also reported on the usefulness of working on comparability adjustments. In the subsequent discussion the following issues were addressed:

- How to consider the impact of some specific treatments applied to potentially comparable companies' financial statements in the available databases;
- How to apply and arbitrate between screening criteria and possible adjustments;
- How to avoid that differences are accounted for twice, e.g. when setting the screening criteria and when considering an adjustment;
- How relevant are accounting adjustments within the EU especially when taking into account that accounting standards are at least to certain degree harmonised in the EU;
- How to consider consequences arising from different function and risk profiles of independent comparables versus the tested transaction, in terms of adjustments, particularly at the level of the tested MNE group as whole.

#### 3.2.2 Multiple year comparables

The Vice Chair of governmental members summarized that MS see benefits in a multiple year analysis provided there is consistency as regards the comparables chosen and the years considered but had concerns with providing fixed time periods as being too prescriptive.

NGMs concluded at the pre-meeting that the use of multiple year data should be encouraged as it reduces fluctuations, gives more certainty to companies in their price setting strategy and helps to avoid the need for huge adjustments. However, this would also mean that tax administrations should not make adjustments based on a one year evaluation only if the taxpayer is consistent in his multiple year

approach. A further suggestion would be that for making an adjustment tax authorities should not use data which was reasonably not available to the taxpayer at the time of the transaction.

There was no further discussion on this section and the Chair noted broad consensus on addressing the points made in the future discussion.

### 3.2.3 Ranges

The Vice-Chair for Governmental Members stated that MS support work on how to use statistical tools to deal with ranges, how to determine a point within the range and how to use statistical tools..

The Vice-Chair for NGM stated that NGMs also support the work on this item. The following aspects were regarded as worth to be considered by the JTPF:

- The Forum should work on how to determine a position within the range and it should be accepted that no adjustment should be made if the taxpayer reports within the range;
- Guidance on what happens if the taxpayer reports outside the range should be developed, i.e. to which point should an adjustment be made;
- Exploring the possible relationship between the existing screening criteria and the interpretation of the range;
- In cases where there are no adjustments to the comparables constituting the range, can there be adjustments to the range or guidance on how to adjust the range or the point in the range to take into account e.g. differences in risk profiles?

The Chair summarized the discussion and concluded that there will be a stock taking on the practices in MS on how to deal with ranges, i.e. their determination, statistical tools, adjustments etc.. It should also be evaluated whether there are differences in these practices between an APA or an audit. As a general conclusion the guidance to be developed should be more process oriented rather than aiming at a certain result.

### 3.3 EU Comparables

The Chair introduced the section by referring to the guidance agreed in the EU TPD which basically only says that pan European comparables should not be rejected automatically. As outlined in the paper, there are still different practices in MS and the aim would be to come to a common approach especially as in practice the use of pan European comparables is common practice. In the subsequent discussion the following points were addressed:

- When considering foreign comparables, an important aspect is whether a difference in the markets would matter. If so it would be important to determine which market features are important and whether there is a difference in this respect rather than whether the comparable comes from a neighbouring country;
- What are the implications of the fact that business often sees the EU as one market.

The Chair closed the discussion on this Agenda item and stated that the aim is to discuss at the June meeting a draft report which will take into account the results of the study, as well as the input which will be requested from MS on the state of play on the issues identified during the discussion.

## **6. STATE OF PLAY ON FOLLOW UP TO ACTION ITEM 13 OF THE OECD'S BEPS ACTION PLAN IN THE EU**

The Vice-Chair of the Governmental Members gave an update on the process of implementing CBCR in MS. Given the proposal for a directive on CBCR, a further discussion on the implementation aspects in the Forum would for the moment not make sense.

The Vice-Chair of NGM stated that NGMs would nevertheless be willing to continue to contribute on the practical issues companies face when actually filling out the CBCR report. The Secretariat welcomed this initiative and invited members to submit any issues encountered in practice on an ad hoc basis. Depending on the result, the issues may be addressed at the next meeting.

## **7. ANY OTHER BUSINESS**

One Non-Governmental Member raised the question on the implication of the conclusions of DG Comp on the interpretation of the arm's length principle in the State Aid cases on the work of the Forum. The Chair noted that following Article 2 of the Commission decision of 26 January on setting up the 'EU Joint Transfer Pricing Forum' expert group (C(2015) 247 final), the task of the Forum is to assist the Commission in finding practical solutions, compatible with the OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations and does not get involved in pending cases.

The Chair thanked the participants and closed the meeting after having announced the date of the next meeting, which is on 23 June 2016 (tbc).

**Update after the meeting** - The Commission Services re- confirm and re-emphasise that they do not consider that discussion of ongoing cases is within the Group's mandate and will not comment on such cases in any circumstances