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TAXUD D2

**Doc: JTPF/017/2015/EN**

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

**held in Brussels on 22 October 2015**

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

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

The Agenda (doc. JTPF/012/2015/REV2/EN) was adopted.

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

The Summary Record of the June meeting (doc. JTPF/010/2015/EN) and the JTPF Programme of Work 2015 – 2019 (doc. JTPF/005/FINAL/2015/EN) were adopted in written procedure.

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

Tom Neale reminded the Members about respecting Chatham house rules as agreed in the Rules of Procedure and gave an update on the following current ongoing issues:

- Work on dispute resolution in direct taxes envisaged in the June Action Plan
- Re-launching of the CCCTB project
- Translation of the BEPS project outcome into an EU action and in this context the state of play of the country-by-country reporting ('CBCR') project led by DG FISMA
- Presentation of the JTPF work at the HLWG, restating that the JTPF is a technical group not being involved in legislation
- Two state aid decisions recently published by DG COMP (Starbucks (NL) and Fiat (LU))
- Political agreement on the exchange of rulings reached after only 7 months
- Update of the EC website on non-cooperative tax jurisdictions

- Expected update of the EU JTPF website including the CVs of the NGM
- Invitation of the observer from the UN for this and future meetings

#### 4. COMPARABLES IN THE EU

At the outset of the discussion the Vice Chair of Governmental Members gave an overview on the following general conclusions from the MSs' pre-meeting on the documents submitted for this meeting: (i) the need to prioritise as all three projects are very ambitious, (ii) MS broadly agree with most of the conclusions of the papers but not necessarily with the draft text, (iii) some conclusions in the documents referring to a revision of the EU Code of Conduct on TP documentation ('EU-TPD') seem premature and should be postponed until the EU-TPD is fully discussed and (iv) language used in the documents referring to legislative action should be clarified as the JTPF is limited to make proposals rather than taking legislative action.

The Chair and the Secretariat clarified that the documents are submitted to the JTPF only for discussion. The main purpose is to agree on how to take the work forward rather than on the exact wording of the documents. General comments from the group on the documents will then be reflected in the summary record of the meeting.

The discussion of the paper on scoping the work on comparables in the EU (doc JTPF/015/2015/EN) was split in 3 parts:

##### (i) Delineation of transactions/ value creation/value chain analysis (Section II.1)

MS stated that the discussion on value creation seemed premature as a discussion may take place at the level of the OECD in the context of profit splits. The OECD observer clarified that the future work currently envisaged at the OECD will focus on the profit split method and not on clarifying what is meant with value creation. NGM stressed that Section II.1 should not be understood as aiming at determining the perfect comparable but rather at interpreting the data available to find pragmatic solutions on how to deal with the situation at stake.

The JTPF concluded to focus on the second and third part of the paper and address aspects of delineation of transactions/value creation/value chain analysis at a later stage in the process.

##### (ii) Guidance on comparability (Section II.2)

The Vice Chair of Governmental Members summarised MSs' main conclusions at the pre-meeting:

- The difficulty encountered in developing a minimum standard on comparability
- The importance of putting the focus on the understanding of and working with the information actually available
- The need to clarify terms used, *e.g.* "benefit of single market"
- A request to discuss the relevance of differences in accounting standards in the comparability analysis
- The importance of developing guidance on common comparability adjustments and on how to deal with ranges

- The need to ensure that other methods than TNMM are not ignored and the search for comparable data is not limited to commercial databases but should also include other sources like internal comparables and collections of statistical data

NGM agreed with MSs that developing ways on how to deal with the existing data should have priority rather than improving the availability of data. In this context also the potential of safe harbours should be explored noting, however, that under certain circumstances small differences in margins applied may have a significant impact.

The observer from the OECD referred to the toolkit on comparability the OECD is developing in the context of its G20 work for developing countries and which is envisaged to be finalised in late 2016/beginning 2017. The JTPF concluded that the work of the OECD (addressing the issues in general) and the work of the JTPF (addressing the issues on the basis of the actual situation in the EU) can benefit from each other and that consistency between the two work streams should be ensured.

The Chair concluded that the Commission services will start with an assessment of the situation in the EU and take into account the developments at the OECD when working on the priorities expressed during the discussion.

(iii) Use of Pan European comparables (Section II.3)

The Chair stated that the item is closely related to the item addressed in section II.2 and suggested that after having assessed the situation in 2004 it would be appropriate to revisit the issue and the guidance developed at that time. The suggestion was supported by the JTPF.

## **5. ECONOMIC VALUATION TECHNIQUES IN THE EU**

On the discussion paper on scoping the work on economic valuation methods in the EU (doc. JTPF/013/2015/EN) the Vice Chair of Governmental Members stated that MS support future work suggested in the paper but see a need for practical guidance rather than on theoretical aspects. For MS it would also be important to take into account work of other Groups than the RTD group.

NGMs stressed the need for pragmatic solutions and practical guidance on the key building blocks and focussing on those items which really have the biggest effect. Another view stressed the high complexity of these methods making them difficult to apply in practice with a risk of being imprecise.

Other NGM representatives stated that these methods are daily business in third party deals and stressed that they therefore should have a role to play in related party transactions.

The JTPF concluded that work needs to start on the basis that these methods are recognised, that they are applied in third party deals and that the practical issues when applying them in transfer pricing should be addressed. In this context it would be important not to limit the work to income based valuation methods and given that economic valuation is a very dynamic field, the work should not be constrained by the conclusions of the RTD report.

MS regarded the language in the document on capacity building as unbalanced as there are tax administrations already having built up the capacity to apply the methods. Rather some MS encountered a lack of actual cases provided by business and some reluctance in the tax departments of MNEs for using the methods. Furthermore, it was stressed that what is said in the section on legislative measures would go beyond the role of the JTPF which is working on practical solutions rather than on legislative aspects.

While MS were concerned that the simplified approach to be developed may become the norm, NGMs supported the development of such simplification mechanisms. NGMs and MS agreed on putting the focus on the practical application. It was recalled that the economic valuation methods should not be a TP method itself but rather a tool.

## **6. STATISTICS**

The Chair introduced the statistics on Mutual Agreement Procedures under the Arbitration Convention ('MAPs', doc. JTPF/008/2015/EN) and Advance Pricing Arrangements ('APAs', doc. JTPF/009/2015/EN). With respect to the MAP statistics he noted a strong increase of cases initiated and cases pending longer than 2 years but also an increase of cases solved. While NGMs expressed concerns about these developments, especially as the increase is a continuous phenomenon, MS regarded the situation more positive and referred to a normal time delay for building up capacities to address an increased workload. NGMs and MS agreed that the statistics show that both tools are increasingly used and taxpayers show an increased interest in using them. The NGMs suggestion to evaluate more closely the causes of the disputes, (*e.g.* a different interpretation of facts and circumstances, benchmark studies etc.) was welcome but would have to be addressed at a later stage in the programme of work.

For APAs, the Chair regarded the increase of bi- and multilateral APA in force as a positive signal but noted that it is obviously not sufficient to cope with the increase of disputes. Some Members identified APAs as an area where the EU can take the lead and make bi- and multilateral APA work much better.

## **7. JOINT AUDITS IN THE EU**

As regards the discussion paper on joint audits for transfer pricing in the EU (doc. JTPF/014/2015/EN) the Vice Chair of Governmental Members summarized the discussion of the pre-meeting and noted that MS agreed on the possible benefit and potential of joint audits but regarded the paper as not being balanced in a sense that only the benefits of joint audits are described but not the problems. Furthermore, MS criticized the negative tone of the paper as regards the increase of cases under the AC and suggested a discussion on whether the expected benefits can't at least partly be achieved with tools already available like APAs or simultaneous audits.

NGMs agreed with MS that joint audits are one tool within the toolbox available but stressed the positive aspects of joint audits in the context of transfer pricing compared to what can be achieved by simultaneous controls. It was agreed that MS and/or NGMs with experience in joint audits will at an appropriate point in time of the process be invited to give a presentation on their experience.

The Chair summarized that the potential of joint audits was seen (i) in the application to cases where an APA with or without roll back does not provide a satisfactory solution, (ii) in the possibility to clearly identify a potential disagreement which would then improve a subsequent MAP and (iii) in addressing the situation where MS see a need to position themselves towards third countries. These potential benefits should, however, not hide the fact that joint audits may raise difficult legal issues and involve a high administrative burden and may not serve as a general solution for a huge number of cases. MS who recently performed pilot projects on joint audits agreed to provide the group with their experience.

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

The Vice Chair of NGMs presented the main conclusions in the submissions received from NGMs on practically implementing Action 13 of the OECD BEPS Action Plan (see doc. JTPF/016/2015/EN). NGMs stated that CBCR is regarded as a fact now and suggested considering the following areas of future work on CBCR

- Clarification of definitions – work on common EU guidelines
- Interpretational guidelines – CBCR risk assessment code of conduct
- Common approach on language regime
- EU-law implications
- Timing and implementation

The Vice Chair of the Governmental Members gave an update on the process of implementing CBCR in MS. Currently one MS (Spain) has legislation in force, in one MS the parliamentary process is finished (Poland) and four MS have published draft legislation (UK, The Netherlands, Denmark and Ireland). In most MS the political decision is made with the intention to include the proposal in the next finance act and only in very few MS the political decision is pending. MS generally welcomed input on the practical issues that arise and are faced by business

NGMs stressed the urgency of receiving guidance as the process of preparing the data is currently going on and offered support in identifying the most pressing issues. A possible starting point was seen in guidance already available in other areas of CBCR as e.g. CBCR provided by financial institutions under CRD4.

The observer of the OECD underlined that similar issues are raised at the level of the OECD and that they will have to see whether further guidance should be provided. Although worldwide consistency is a key feature of the CBCR template, the JTPF with participation from business and governments would provide a unique opportunity to address the practical issues which may arise at this early stage. However, he warned that the OECD would not be interested in national or regional interpretations of the type of information to be reported since this would undermine global comparability.

The JTPF concluded that care will be taken on not being too prescriptive and therefore the outcome of the group's work may not be something formal like a code of conduct but rather a discussion of issues and potential avenues on how to address them. A discussion on these concrete issues was suggested for the next meeting.

**9. ANY OTHER BUSINESS**

The Chair thanked the participants and closed the meeting after having announced the date of the next meetings: 18 February 2016 (tbc) and 23 June 2016 (tbc).