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TAXUD D1

Doc: JTPF/004/2015/EN

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

held in Brussels on 12 March 2015

1. ADOPTION OF THE AGENDA

The Agenda (doc. JTPF/003/2015/EN) was adopted by consensus.

2. DOCUMENTS ADOPTED UNDER WRITTEN PROCEDURE

The Summary Record of the October 2014 meeting (doc. JTPF/015/2014/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:

- **Rulings:** Proposal for Directive on tax transparency dealing with exchanges of tax rulings between tax administrations within the EU is expected to be presented by the Commission next week.
- **Action Plan on Company Taxation:** currently under preparation by the Commission services, expected publication before the summer.
- **CCCTB:** work is still continuing on the Proposal for a Directive as it is, but the Commission is also looking at options to “re-visit” the CCCTB following difficult negotiations in Council.
- **Interest and Royalties Directive:** ongoing effort by the Latvian Presidency to reach agreement on proposed amendments to the Directive.
- **Code of Conduct for business taxation:** current discussions on the scope of work of the Code of Conduct, to be subject of the forthcoming meeting of the Code of Conduct.

- **New JTPF mandate:** Commission Decision to renew the mandate of the JTPF until 31 March 2019 was adopted and a Call for applications for the selection of new non-government members of the JTPF (organisations¹) was published on 26 January. The selection process is under way.
- **Council Conclusions** 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 transfer pricing risk management was adopted by ECOFIN on 10 March.

4. ARBITRATION CONVENTION (AC)

The Revised Draft Final Report on Improving the Functioning of the Arbitration Convention (doc. JTPF/002/2015/EN) was the main discussion item at the meeting. The objective to cover all outstanding items in the report with view to finalising the text (recommendations and body of the report) and to agree on a revised Code of Conduct was achieved. Certain Report items have been finalised at this meeting without discussion, following MS' lifting their previously imposed scrutiny reservations on them; those items have already been discussed at previous meetings.

Report items discussed/finalised during the meeting were as follows:

Preamble of the Code of Conduct

The JTPF agreed unanimously to add the following sentence – inspired by the OECD discussion draft on Action 14 published in December 2014, which includes a commitment for governments to provide sufficient resources to a competent authority – at the end of the Preamble:

“This includes that Member States of the European Union provide their competent authorities with sufficient resources in terms of personnel, funding, training etc. to carry out their mandate, i.e. resolving cases of double taxation in accordance with the Arbitration Convention.”

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

1.1 b) Application of the AC in case of changes in the status of the taxpayer/entity subject to double taxation

New sub point to point 1 CoC was agreed with the following modifications to the drafting proposed in the Revised Draft Final Report:

“Cases submitted for resolution under the AC generally regard earlier years. This means that the entities or enterprises involved may have merged, restructured, entered into liquidation 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 under the Arbitration Convention, as relief of double taxation is generally still important.”

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.

1 MS made a scrutiny reservation.

1.3 Access to the AC and remedies against denial of access

New point 5 in CoC was agreed without any modification to the drafting proposed in the Revised Draft Final Report and would read as follows:

“Member States should consider providing domestic legal remedies for determining whether the denial of access to the Arbitration Convention by their administrative bodies is justified.”

3 MS made scrutiny reservations.

New point 7.3 e) CoC (amended former point 6.3 e) CoC) was agreed without any modification to the drafting proposed in the Revised Draft Final Report and 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.”

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

2.2. Independence of CA from audit

New point 7.1 c) CoC was agreed without any modification to the drafting proposed in the Revised Draft Final 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.”

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

New point 7.1 d) CoC was agreed without any modification to the drafting proposed in the Revised Draft Final Report and would read as follows:

“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.”

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

New point 6. b) CoC was discussed at length in an effort to find consensus wording. It was agreed to redraft the recommendation in order to provide for flexibility in the application of the new Article 7 MTC and its related commentary, in particular when existing DTCs between the MS involved have different wording or when, in the absence of a DTC, the MS involved agree on a common approach. In case no agreement is reached, the interpretation of Article 7 in the commentary to the July 2008 version of the OECD MTC would be applicable.

“Article 4(2) of the Arbitration Convention should be interpreted in the spirit of the most recent version of Article 7 of the OECD Model Tax Convention on Income and on Capital and the relevant Commentary. This will not apply 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 Convention, taking into account the OECD commentary on the provisions included in the Double Taxation Convention. In cases where there is no bilateral Double Taxation Convention between the Member States involved, the competent authorities should seek to reach an agreement on a common approach in the first phase of the procedure under the Arbitration Convention. If the Member States fail to reach an agreement, the interpretation of Article 7 in the Commentary of the July 2008 version of the OECD Model Tax Convention should apply.”

4 MS made scrutiny reservations.

2.7. Guidance on Multilateral MAP

Paragraph 20, Report: It was agreed that, given that in the short term additional guidance on multilateral MAP cannot be expected from the OECD, the original paragraph would be replaced with the following:

“The JTPF recognises the increasing importance of multilateral MAP, between Member States and between Member States and non EU States. The JTPF’s former work on EU triangular cases² and the report on Non-EU triangular cases form the basis for multilateral approaches. It is suggested that the JTPF takes up further work in the future.”

² See point 3 CoC and point 7.5 CoC

2.10. The three-year period

New point 7.2 CoC (amended former point 4 CoC) was agreed without any modification to the drafting proposed in the Revised Draft Final Report and 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 for the purposes of the three-year period under the second sentence 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.”

1 MS made a scrutiny reservation.

2.11. Guidance on position papers

New point 7.4 CoC (amended former point 6.4 CoC) was agreed without any modification to the drafting proposed in the Revised Draft Final Report. One MS expressed concerns that the revised guidance on position papers would create an unnecessary burden of work for CAs, as it could be interpreted as introducing rigid rules for the exchanges between CAs. It was clarified by the Chair that the suggested list of information items to be included in the position papers is not binding, but rather a proposal, as clarified in the last sentence of 7.4 (a) CoC: *“Depending on the facts and circumstances of the case the position paper may set out e.g.: [...]”*.

1 MS made a scrutiny reservation.

2.13. Serious penalties

New point 8 CoC (amended former point 3 CoC) was discussed at length with the aim to clarify the remit of the concept “gross negligence”. The prevailing opinion of JTPF members was that “gross negligence” cannot be regarded as tax fraud and therefore it was agreed to remove the reference “like fraud” from the 1st and the 2nd sentence of the recommendation. There was a suggestion to delete the 2nd sentence altogether, but this suggestion did not receive sufficient support. New point 8 CoC would read as follows:

“As Article 8(1) 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 when serious penalties are applied only in exceptional cases. Exceptional cases include tax fraud, wilful default and gross negligence.”

4 MS made scrutiny reservations.

2.14. Improving the “second phase” of the Arbitration Convention

a) Composition and functioning of advisory commissions

Paragraph 33, Report: it was agreed to remove the word “*formal*” to avoid giving the impression that the AC “*informally*” provides the possibility for separate deliberations. Paragraph 33 would read as follows:

“Revising the voting powers within the advisory commission and giving independent persons of standing the possibility to hold separate deliberations was considered to require changes to the AC.”

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

New point 9.3 (d) CoC (amended former point 7.3 d) CoC) was agreed without any modification to the drafting proposed in the Revised Draft Final Report and would read as follows:

“(d) Whilst respecting Article 10 of the Arbitration Convention, the advisory commission may request Member States and in particular the Member State that issued the first tax assessment notice, i.e. final decision of the tax administration on the additional income, or equivalent, which resulted, or may result, in double taxation within the meaning of Article 1 of the Arbitration Convention, to appear before the advisory commission. At the outset of the arbitration procedure each of the enterprises involved should be informed by their respective competent authorities of their right to make a statement before the advisory commission.”

e) Follow-up to advisory commissions’ opinions

Paragraphs 38-40, Report: the re-drafting suggestions of the Secretariat (grey boxes “Notes from the Secretariat”), following concerns expressed by MS on several issues in their written comments on the Revised Draft Final Report, were agreed. The three paragraphs would read as follows:

“38. According to Article 12 AC the competent authorities concerned are expected to take a decision which eliminates the double taxation within 6 months of the delivery of the advisory commission’s opinion. Their decision may actually deviate from the advisory commission’s opinion, but if they fail to reach an agreement, they are obliged to act in accordance with the advisory commission’s opinion. Acceptance by the enterprise of this decision is not formally required under the AC and the decision may therefore be implemented without the enterprise’s agreement. However, it can be expected that an enterprise would generally be satisfied when double taxation is removed.

39. Nevertheless, the relation between the AC and domestic remedies needs to be considered in this context. Article 7(1) AC provides that where a case has been submitted to a court or a tribunal, the 2-year period shall be computed from the date on which the judgement of the final court of appeal was given., Article 7 (2) AC allows Member State to initiate or continue judicial proceedings and Article 7 (3) AC provides - for cases where the domestic law does not allow the competent authority to derogate from the decision of their juridical bodies - that an advisory commission shall not be set up before

the time provided for an appeal has expired or the right for an appeal has been withdrawn.

40. Where there is a risk for inconsistencies between the outcome of the procedure under the AC and domestic remedies, the MS concerned may need to take the necessary action to prevent this, e.g. by requiring the enterprise to withdraw from the domestic remedies and appeals which concern the issues to be settled under the AC before entering the “second phase”.”

2.15. Tax collection and interest charges

New point 10 CoC: the existing point 8 of the current CoC asks MS to apply one of 3 alternative approaches. Following a lengthy discussion an agreement was reached to complement this provision with a recommendation that both MS should seek to eliminate any asymmetry in MAP, if it nevertheless arises, where possible. A sentence was added at the end that taxpayers should explicitly request that the interest issue is addressed in the MAP. Some MS noted, however, that for them agreements on interest in a MAP are (currently) not possible.

“[...]When, nevertheless, asymmetry results, MS should seek to eliminate any resulting asymmetry in the mutual agreement procedure where possible. Enterprises are advised to explicitly request that the interest issue is addressed in the mutual agreement procedure.”

1 MS made a scrutiny reservation.

2.16. Other issues *(numbering and headline to be changed in the Final Report)*

[New report item to be inserted after report item 2.3 in the final report] **Requesting and providing information**

Paragraph 43, Report: the re-drafting proposed by the Secretariat (grey box “Notes from the Secretariat”) following a suggestion by a MS in its written comments on the Revised Draft Final Report, was agreed. The paragraph would read as follows:

“The JTPF recognises that tax administrations and taxpayers benefit from a cooperative and fully transparent mutual agreement procedure while giving due respect to the confidentiality of government-to-government communication. Therefore all necessary information available at the time of the request to initiate the mutual agreement procedure should be provided by the enterprise to the tax administration(s).”

New point 7.1 h) CoC was agreed as follows:

“h) The enterprise should provide all necessary information available at the time of the request to initiate the mutual agreement procedure. Requests for additional information and responses to those requests should be complete, well-targeted and submitted without unnecessary delay (responses should be sent to both CAs). Failure to co-operate during any part of the procedure of the Arbitration Convention may have direct consequences on the length of time needed to obtain relief and whether such relief can ultimately be provided.”

[*New report item to be inserted after current report item 2.11*] **Information required for the start of the two-year period (Article 7 (1) AC)**

New point 7.6 a) (vii) CoC: the proposed modification of the existing provision in the current CoC (existing point 5 a) (vii) CoC) was not retained. It was agreed to delete the recommendation and to keep the current wording of the existing provision in the new CoC.

New point 7.6 a) (viii) CoC was agreed with some modifications to the drafting proposed in the Revised Draft Final Report:

“(viii) any specific additional information requested by the competent authority within two months upon receipt of the taxpayer’s request. Requests for additional information should be well-targeted and responses to those requests should be complete and submitted without unnecessary delay to both competent authorities. A competent authority should inform the other competent authority(ies) about additional information requested where appropriate.”

III. Concluding remarks

Paragraph 47, Report: to convey the message that more issues and ideas than those appearing in the new CoC have been discussed by the JTPF, but could not be resolved, partly due to limitations originating in the text of the AC itself, it was agreed to include a list of issues that could be taken up by the JTPF in a future revision of the AC/CoC in the concluding remarks of the Final Report. Paragraph 47 would read as follows:

“Beyond the amendments to the Code of Conduct proposed in this Revised Draft Report the JTPF notes that based on the findings of the AC and CoC monitoring process carried out, further amendments to the Code of Conduct and/or the AC itself may be discussed in the future. Possible issues for consideration include:

- *Composition of advisory commissions (Article 9 AC), voting rights, possibility for independent persons of standing to hold separate deliberations*
- *Alternative approaches to arbitration (e.g. last best offer approach, also called “baseball arbitration”) compared to the independent opinion approach currently provided under the AC (Article 11)*
- *Possibility for CAs to mutually cancel the procedure under the AC in certain cases*
- *Application of the AC to establish the existence of a permanent establishment (Article 5 OECD MTC)³.*
- *Application of the AC to issues of thin capitalisation⁴*
- *Application of the AC to secondary adjustments⁵*
- *Interaction of domestic legal remedies and the AC.*
- *Application of the AC to permanent establishments of non-EU enterprises.”*

³ Two MS made scrutiny reservations.

⁴ Two MS made scrutiny reservations.

⁵ Three MS made scrutiny reservations.

It was agreed that the Secretariat would revise the Report in line with the discussion at the meeting and circulate it by Friday, 20 March with view to clarifying any outstanding issues and finalising the report before the end of the current mandate of the JTPF on 31 March 2015.

5. EU TPD

As part of its 2011-2015 Work Programme (doc. JTPF/016/2011) the JTPF monitored the implementation of the EU TPD within the EU in 2013. A Discussion paper on improving the EU TPD (JTPF/010/2014/EN) was tabled in October 2014 – it intended to inform an initial discussion on improving the functioning of the EU TPD, but due to time constraints it was not discussed.

In order to validate the state of play and the work already completed by current JTPF members under the current mandate the JTPF adopted the following statement:

“The monitoring of the EU TPD has indicated that that MS’ national practices are in line with the EU TPD, but that the functioning of the EU TPD can nevertheless be improved in certain respects. A discussion on the EU TPD is also desirable in light of the revised Chapter V OECD TPG. However, the OECD’s BEPS Action Plan contains various other action points with possible impact on transfer pricing and the continuing work of the OECD on BEPS may result in further guidance touching upon transfer pricing documentation in 2015. The JTPF will discuss possible improvements to the functioning of the EU TPD in the future.”

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

On 1 April 2015 the JTPF is due to start its new mandate. At the JTPF meeting in June 2014 members were invited to submit their first suggestions for the future work programme. The Secretariat received suggestions from DK, DE, ES and NGMs. These were compiled in document JTPF/013/2014/EN, tabled at the October 2014 meeting to facilitate the exchange of ideas, but due to time constraints they could not be discussed.

At the JTPF meeting the following further items were suggested:

- CCAs (on IP intangibles)
- Financial transactions
- Safe harbours and further guidance on APAs
- Alternative Dispute Resolution
- Common e-mail system for MAPs under the AC
- Other issues which may become relevant in the aftermath of BEPS and in general.

The Secretariat clarified that current JTPF members could still send their suggestions in writing before the end of the JTPF mandate on 31 March 2015. As of 1 April 2015 suggestions would be accepted from new members.

Suggestions will inform the preparation of a draft work programme by the JTPF Secretariat which would be tabled at the JTPF meeting in June 2015 (the first meeting of the JTPF under its new mandate).

7. ANY OTHER BUSINESS:

This was the last meeting of the JTPF under its current mandate.

On behalf of the Commission the Director-General of DG Taxation and Customs Union Heinz Zourek thanked all members for their excellent work during the whole mandate. The JTPF Secretariat also thanked members and recognised the important contributions made by the Chair and Vice-Chairs to the work of the JTPF.

The Chair also thanked members for their efforts and commitment and noted the successful completion of the 2011-2015 JTPF Work Programme.

Next meeting: 25 June 2015 (tbc)