



Brussels, August 2013
TAXUD D1

Doc: JTPF/014/2013/EN

SUMMARY RECORD OF THE THIRTY SEVENTH MEETING OF THE EU JOINT TRANSFER PRICING FORUM

held in Brussels on 6 June 2013

1. ADOPTION OF THE AGENDA

The Agenda (doc. JTPF/008/2013/EN) was adopted by consensus.

2. DOCUMENTS ADOPTED UNDER WRITTEN PROCEDURE

The Summary Record of the February 2013 Meeting (doc. JTPF/005/2013/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:

- Update on information requests by the Secretariat:
 - Questionnaire on SMEs and TP has been circulated; MS which have not sent their replies to the Secretariat should do so as soon as possible
 - EUTPD questionnaires (for MS and for PSM) have been circulated with a deadline end-July 2013; BusinessEurope will also provide feedback on the application of the EUTPD by its members
 - questionnaire on penalties will be launched by the JTPF Secretariat in the coming weeks
- Proposal for a Council Directive on a Common Consolidated Corporate Tax Base (CCCTB): the Irish Presidency has presented a compromise proposal. Technical discussions on the proposal are underway at the moment. It is not sufficiently complete for ECOFIN yet.

- Action plan to strengthen the fight against tax fraud and tax evasion: actions are ongoing. The Commission intends to present a proposal in autumn 2013 for the revision of the Parent Subsidiary Directive.
- Platform for Tax Good Governance, Aggressive Tax Planning and Double Taxation: the Platform is chaired by the Director-General of DG TAXUD, Mr. Heinz Zourek and will hold its first meeting on 10 June 2013.
- General arbitration in the EU: an initiative is currently planned towards the end of 2013. An impact assessment is currently under way and will assist in determining whether a legislative proposal is appropriate.
- Base erosion and profit shifting: the BEPS action plan should be agreed at the CFA meeting in June 2013. Some aspects of this work may be put on the table for the JTPF after the summer.
- Croatia will be joining the EU on 1 July 2013 therefore becoming a member of the JTPF.

4. TRANSFER PRICING RISK MANAGEMENT

The JTPF discussed the Draft Report on Transfer Pricing Risk Management (doc. JTPF/007/2013/EN, including its annex – an example of a TP audit work plan) prepared by the sub-group on TP risk management, with the objective to arrive at an agreed report in the meeting. The Forum reviewed the document section by section and some changes to the text were agreed. The draft report was adopted.

One Member State made two scrutiny reservations – one to the text under recommendation 6 and one to Recommendation 9a. It was agreed that the outcome of the internal review procedure with regard to these reservations would be communicated to the Secretariat as soon as possible. Following that, the final text of the report would be circulated by the Secretariat by e-mail and published on the JTPF webpage and CIRCABC. At the same time the Secretariat would start preparing a Commission Communication which would contain the Report on Transfer Pricing Risk Management and the Report on Secondary Adjustments adopted earlier by the Forum. Subsequent to the meeting the scrutiny reservations on the Report on Transfer Pricing Risk Management were lifted.

5. COMPENSATING/YEAR-END ADJUSTMENTS

Due to time constraints it was not possible to discuss the Draft Report on Compensating/year-end Adjustments (doc. JTPF/009/2013/EN) section by section.

On the Chair's request, the Vice Chairs summarised the conclusions of the discussions held at the respective pre-meetings.

TAs communicated their willingness to find a practical solution for cases where a taxpayer is confronted with different approaches followed by MS. The guidance proposed in Section 6.2 of the draft report was considered as a suitable starting point for this discussion. The guidance given on situations where third parties would agree on retrospective price adjustments, however, was regarded as going beyond of what would be necessary for such a practical solution and should therefore be removed from the document.

NGMs stressed the importance of finding a practical solution for conflicts that arise from different approaches in the EU and supported the proposal to start with collecting views on section 6.2 of the document.

The Forum agreed to focus its work on section 6.2 and especially paragraphs 26 ff. of the draft report. For this purpose Members were invited to send their responses to the questions in the boxes by 31 July. The section on price adjustments will be removed and consequential changes will be made in the next version of the document which will be tabled at the next meeting of the JTPF in November.

6. MONITORING

6 (i) Discussion with members of advisory commissions (2nd phase of the AC)

The Chair updated the Forum on work done in preparation of the discussion. Prior to the meeting Dr John Avery Jones CBE, Mr Malcolm Gammie CBE QC, Prof. Dr José Manuel Calderón Carrero (Chairmen of advisory commissions under the AC) and Prof. Sven-Olof Lodin (member of two advisory commissions under the AC) were asked by the Secretariat to provide written feedback on the administrative aspects of the arbitration procedure (the 2nd phase) under the AC. They were asked to comment on whether the respective provisions of the AC and the revised Code of Conduct on the effective implementation of the AC (CoC) provided them with sufficient guidance on the procedure, as well as to make suggestions on improving certain provisions of the AC and the CoC.

The suggestions in the contributions received were summarised in document JTPF/010/2013/EN (Summary of Suggestions received from Members of Advisory Commissions). Mr Malcolm Gammie CBE QC and Prof. Sven-Olof Lodin were present at the meeting and gave short presentations on their experience with the second phase of the AC. The presentations were followed by a discussion with the Members of the Forum. Important topics were the pros and cons of arbitration under the AC in comparison to the so-called 'Baseball Arbitration' envisaged under some bilateral treaties, the decision-making process in advisory commissions, as well as the roles of tax administrations and tax payers in the arbitration procedure.

An internal discussion took place after the interventions of the two speakers. All suggestions on how to further improve the practical functioning of the 2nd phase of the AC listed in document JTPF/010/2013/EN as items 1-7 were discussed with the following outcome:

1. Access to arbitration under the AC

Ensuring access to arbitration under the AC is already identified as an item for discussion in the ongoing monitoring of the AC (Discussion Paper on the Improvement of the Functioning of the Arbitration Convention (doc. JTPF/011/2013/EN)).

2. Composition and functioning of advisory commissions

The composition of an advisory commission is governed by the AC. However, a recommendation to appoint no more than 1 member per tax administration to the advisory commission could be appropriate and may be discussed under the ongoing monitoring of the AC.

3. Content of the arbitration proceedings

Although the option to invite a taxpayer to present their case before the advisory commission exists already now, the Forum could discuss a formal provision on hearing the taxpayer and the auditor at the outset of the procedure ('opening statements'). This

item will be taken up under the ongoing monitoring of the AC. Regarding the suggestion for guidance on the content and the format of the information to be provided to the advisory commission, the Forum considered that - given the fact-specific nature of each case in transfer pricing - it may be difficult to provide detailed guidance.

4. Timing of the arbitration procedure

The Forum regarded the 6-month period envisaged under the AC for an advisory commission to deliver an opinion as generally appropriate. It should, however, be ensured that at the beginning of this time period sufficient information is already available to the advisory commission. The time until the advisory commission is established may be used by the Competent Authorities for collecting and preparing this information. This item will be taken up under the ongoing monitoring of the AC.

5. Remuneration of chairmen and independent members of advisory commissions

The Forum considered that it is worth discussing how to appropriately adjust the remuneration of the members of advisory commissions. This item will be taken up under the ongoing monitoring of the AC. Members were invited to send their ideas and suggestions by 31 July.

6. Remit of and follow-up to advisory commissions' deliberations and opinions

Regarding the scope of the deliberations, the Forum considered Article 4 of the AC as sufficiently clear. The suggestion to extend the solutions to adjustments not covered by the arbitration procedure is already addressed under the ongoing monitoring of the AC. Whether or not agreements resulting from the arbitration procedure are always subject to the approval of the taxpayer seems to be an issue which has different legal implications in the different Member States. This item will be taken up under the ongoing monitoring of the AC. An assessment of the different legal scenarios was considered pertinent and Members were invited to send to the Secretariat their views by 31 July.

7. Publicity of opinions of advisory commissions

The Forum considered that the flexibility currently envisaged under the AC as regards publication is appropriate.

6. (ii) Discussion paper on the improvement of the functioning of the Arbitration Convention (doc. JTPF/011/2013/EN)

Due to time constraints the Discussion Paper on Improving the Functioning of the Arbitration Convention (doc. JTPF/011/2013/EN) was not discussed. The Secretariat will prepare an updated version of the paper in line with the outcome of the discussion on the second phase of the AC for the next meeting of the JTPF in November 2013.

6. (iii) AC statistics

MS agreed to change the reporting on the functioning of the AC. The new statistics will be published as soon as all responses are received from MS. MS who did not yet send their responses were invited to do so as soon as possible.

7. ANY OTHER BUSINESS

Next meeting: 5 November 2013 (tbc)