



Brussels, March 2013
TAXUD D1

Doc: JTPF/005/2013/EN

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

held in Brussels on 14 February 2013

1. ADOPTION OF THE AGENDA

The Agenda (doc JTPF/001/2013/EN) was adopted by consensus.

2. DOCUMENTS ADOPTED UNDER WRITTEN PROCEDURE

The Summary Record of the October 2012 Meeting (doc JTPF/021/REV1/2012/EN) and the Report on Secondary Adjustments (doc JTPF/017/FINAL/2012/EN) were adopted under written procedure.

The Report on Secondary Adjustments will be part of the next Commission Communication. Timing depends on the timetable for the adoption of further report(s) by the JTPF, for inclusion in the Communication.

3. INFORMATION BY THE COMMISSION ON CURRENT ONGOING ISSUES

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

- Council Conclusions on the work of the JTPF: on 4 December 2012 the Council welcomed the Commission Communication on the work of the JTPF in the period July 2010 to June 2012 and the Reports on Small and Medium Enterprises and Transfer Pricing and on Cost Contribution Arrangements on Services not creating Intangible Property (IP).
- EU Financial Transaction Tax: as widely communicated in the media, following the consent of the European Parliament given in December 2012, the proposal for

enhanced cooperation between 11 Member States was approved by the Council in January 2013.¹

- Commission Communication on Double Taxation: current discussions about the possibilities for developing EU-wide arbitration continue. However, the Arbitration Convention (AC) remains in place. Moreover, the functioning of the AC might be used as a precedent for future projects and the work of the JTPF on the AC is very useful for the Commission.
- Proposal for a Council Directive on a Common Consolidated Corporate Tax Base (CCCTB): the first technical reading of the proposal has been completed. The Irish Presidency is currently involved in bilateral discussions with MS. Once in force, the CCCTB could also help to solve many of the difficulties identified in the OECD Report on Base Erosion and Profit Shifting (BEPS) released on 12 February 2013.
- In December 2012 the Commission adopted a Communication on an action plan to strengthen the fight against tax fraud and tax evasion and two recommendations – on aggressive tax planning and on good governance in tax matters in third countries. The action plan contains 34 actions including a proposal to establish a platform for Member States (MS) and stakeholders on the implementation of the two recommendations.
- Forthcoming information requests by the Secretariat:
 - Follow-up to the SME report: MS will be invited to provide to the Secretariat links to national websites where relevant information for SMEs on TP matters can be found; the links will be published on the JTPF webpage and updated regularly.
 - Monitoring of the EUTPD: questionnaires (for MS and for PSM) on the EUTPD will be launched.
- Private Sector Members: PSM will be invited to confirm their willingness to continue their work at the JTPF for the next 2 years.

4. TRANSFER PRICING RISK MANAGEMENT

The Secretariat informed the Forum about the state of play on the project after the second meeting of the subgroup which was held on 18 January. The subgroup will meet again in the second half of April. At this meeting a draft report will be discussed with the aim to present it for approval at the next JTPF meeting in June.

¹ On 14 February 2013 the European Commission adopted a proposal for a Council Directive implementing enhanced cooperation in the area of FTT.

5. COMPENSATING/YEAR-END ADJUSTMENTS

This item of the Agenda was introduced by a presentation from PSM (doc. JTPF/006/2013/EN).

On the Chair's request, the Vice Chairs summarised the conclusions of the discussions held at the respective pre-meetings on document JTPF/004/2013/EN - Supplementary Discussion Paper on Compensating/Year-end Adjustments.

TAs considered that the work of the JTPF on this topic should result in practical solutions and that the theoretical discussion (e.g. the meaning of the term "hindsight" used in the OECD TPG) should be left to the OECD. Further it was reported that most TAs seem to allow (with variations) year-end adjustments and that these have rarely caused real problems for them in practice. Only a few MS reported that they favour a 'preferred approach', which will be the arm's length price setting approach.

PSM reported that they do encounter problems in practice in relation to compensating/year-end adjustments. They would also support practical solutions. For them compensating/year-end adjustments are required to report an arm's length result in the tax return, especially when applying a Transactional Net Margin Method. According to PSM compensating/year-end adjustments should be allowed as long as they are made consistently, continuously and symmetrically in both MS involved.

The Chair stressed that the discussions should not focus on the assessment of the validity of benchmark studies and the quality of comparables. An underlying assumption in the present discussion should be that the method, the comparables and the arm's length range would at this early stage be acceptable to a reviewer.

The JTPF discussed the various aspects of the topic described in document JTPF/004/2013/EN and concluded that practical solutions may be developed and discussed along the following lines:

- The JTPF conclusions should be understood as a practical approach only to be applied to the time from the end of the year until the tax return is filed. It should not be understood as indicating a JTPF view on the issues linked to the more fundamental 'principles' currently discussed at the level of the OECD (e.g. hindsight, which data to be used or the quality of benchmark studies etc.).
- Compensating/year-end adjustments are found in practice in certain commercial relations between third parties.
- Compensating/year-end adjustments may also be allowed in cases where the taxpayer
 - made reasonable efforts to achieve an arm's length outcome at the time of the transaction,
 - is able to demonstrate for what reasons the forecast did not match the reality and how the adjustment was made,
 - makes the adjustment symmetrically in both MS involved,

- makes the adjustment before filing the tax return (noting that some MS require the adjustment to be reflected in the accounts) and
- applies the approach chosen consistently over the years.

As a next step, a draft report will be prepared by the Secretariat for discussion at the next JTPF meeting.

6. MONITORING

The Forum discussed document JTPF/002/2013/EN – Discussion Paper on Improving the Functioning of the Arbitration Convention – in the order of the questions listed in the boxes. The underlying issues were discussed with the aim to decide on whether they should be addressed further.

Section B 1. Exclusion of access to the AC based on different arguments

1.4: Exclusion of access

Q1: Potential recommendations should be discussed once the overview on the reasons for the rejection of cases is available and on the basis of AC data collected through the 2013 revised questionnaire on statistics.

Q2: This item would not have a high priority, but may be taken up.

Q3 and Q4: These items should be understood as a mere reminder not requiring further work.

1.5: Triangular cases

The issue of triangular cases was regarded as important but it was concluded that addressing it now would be premature. Rather, an in depth discussion should be postponed till the general monitoring of triangular cases envisaged for 2014.

1.6 and 1.7: Secondary adjustments and interest

Secondary adjustments are addressed in a separate project; on interest no further work should be done as the topic was already discussed in depth by the JTPF.

1.8: Implications of a MAP on future periods

This item should be explored further.

1.9: PSM examples

This item might be explored further. The examples submitted by PSM should be considered after the review on the reasons why cases are rejected from the AC is completed. In this context cases should be discussed where a party (the taxpayer or another MS) does not agree with rejecting the case considered as not being covered by the AC.

Section B.2. Improving the functioning of the AC in general

2.1: Manual on the AC

While there was reluctance with respect to the idea of developing a separate manual for the AC, the JTPF saw a benefit in publishing country specific information already available at the OECD website on the Commission website. MS which are non-OECD states agreed on providing similar information. The importance of keeping such information updated by establishing a process of monitoring and a link to the work done at the level of the OECD was highlighted.

2.2: Early information

This item would not be addressed further under this project, but may be taken up in the work on risk management.

2.3: Double taxation not yet confirmed

This item may be discussed in the context of Section B.1, exclusion from access to the AC.

2.4: Submission of AC request to both CAs involved

This item should be explored further. The suggestion on submitting a request under the AC to both MS involved was considered as a helpful recommendation. In this context it was also highlighted that the information submitted to the two MS should be the same.

2.5: Multilateral MAP

This item should be explored further. It was highlighted that bilateral (or multilateral) MAP need to be distinguished from bilateral (or multilateral) audits. A bilateral MAP may, however, be the consequence of a bilateral (or multilateral) audit. While simultaneous and joint audits are addressed in the context of the project on risk management, further work on multilateral MAP could be done, keeping in mind that OECD is currently also considering multilateral approaches.

2.6: Requests for information in MAP

This item should be explored further.

2.7: Common working language

The item should not be addressed further.

2.8: Independence of Cas from audit

The item should be addressed in line with the MEMAP recommendation, but adapted to the specific structure of some MS.

2.9: Information mismatch between CAs

The item should not be addressed further.

2.10: One sided settlement proposals

This item should be explored further. The JTPF could consider issuing a recommendation along the lines of the MEMAP.

2.11: Extension of payment:

This item should be explored further. TAs will be invited to report to the Secretariat on how point 8 of the CoC was implemented.

2.12: Confidentiality

This item should not be addressed further, as the CoC is clear on this point.

2.13: Informing the taxpayers during MAP

This item should be explored further.

Section B.3: The 2 year period under Article 7 AC

3.1: Request for additional information under point 5 (i h) of the CoC

This item should be explored further.

3.2: Delay in submitting position papers

This item should be explored further. It was recognised that the deadlines are clear and that not meeting them is often a consequence of a lack of resources. The proposals in the discussion paper should be addressed.

3.3: Extending the 2 year period

The item should not be addressed further, as the guidance in the CoC seems to be clear.

3.4: Possibility of cancelling MAP

This item should be explored further.

Section B.4. Second phase of the AC

This item should be explored further. The Chair informed the JTPF that Member States have provided the Secretariat with the names of those who have chaired an advisory commission. The Secretariat will contact them and ask them to share their experience on the second phase of the AC. The Chairmen may be invited to attend the next JTPF meeting. TAs and PSM will be invited to report on their experience to the Secretariat.

Section B.5: Serious Penalties

This item should be explored further. TAs and PSM will be invited to report on this issue to the Secretariat.

Section B.6: Implications of the new Article 7

This item should be explored further. Members will be invited to comment on document JTPF/006/BACK/2011/EN – Belgian contribution on interaction between Art 7 and AC. Based on these responses it will be decided whether a sub-group could be set up to work further on this.

Section B.7: Change to Baseball Arbitration

Although doubts were raised on whether such a change would be possible under the AC, this item might be explored further within the context of the discussion about the second phase of the AC.

Section B.8: Arbitration clauses in tax treaties

This item should be explored further. MS will be invited to inform the Secretariat on their practice as regards MAP requests on TP when a DTC includes an arbitration clause.

Way forward:

The Secretariat will draft a new discussion paper for the next meeting.

6.(iv) AC Statistics

MS agreed to change the reporting on the functioning of the AC. The new statistics will allow a more detailed insight in the functioning of the AC, e.g. number and reasons why cases were rejected, number and reasons why certain deadlines are not met etc. MS agreed to submit the information by mid-May at the latest.

7. ANY OTHER BUSINESS

Next meetings in 2013: 6 June and 24 October 2013 (tbc)