



EUROPEAN COMMISSION

DIRECTORATE-GENERAL
TAXATION AND CUSTOMS UNION
Direct taxation, Tax Coordination, Economic Analysis and Evaluation
Direct Tax Policy and Cooperation

JTPF/010/2018/EN

Brussels, 6 July 2018

Summary Record

52nd Meeting of the **EU Joint Transfer Pricing Forum (JTPF)** [E00951]
26 June 2018, Brussels (BE)

1. Introduction, adoption of the agenda and documents adopted under written procedure

The Chair welcomed the members and informed them that the March 2018 Summary Record (doc. JTPF/005/2018/EN) had been adopted in written procedure and published on the JTPF webpage. The Agenda (doc. JTPF/006/2018/EN) was adopted.

2. Information by the Commission Services on current ongoing issues

The Commission Services provided an update on current developments:

- Update on the state of play of the EU List of Non-Cooperative Jurisdictions where currently 7 jurisdictions are still included in Annex I (American Samoa, Guam, Namibia, Palau, Samoa, Trinidad and Tobago, and US Virgin Islands), while 65 jurisdictions feature in Annex II.
- The “Digital package” was adopted on 21 March 2018 featuring 2 draft Directives and a Commission Recommendation. The Significant Digital Presence Directive would enable Member States to tax profits generated in their territory, even if a company does not have a physical presence there, according to one of three thresholds based on annual revenues, number of users and number of business contracts respectively. The Digital Service Tax Directive should apply only as an interim measure, until the comprehensive reform has been implemented. Above a certain revenue threshold, the tax will apply to revenues created from activities where users play a major role in value creation.
- On 25 May 2018, the ECOFIN Council adopted the Commission proposal for a Directive on the mandatory disclosure of certain potentially aggressive cross-border tax planning schemes by intermediaries. The Directive will start applying as of 1 July 2020 and the first exchanges are due by the end of October 2020.
- On the Dispute Resolution Mechanism Directive, the Commission will soon start to work with Member States on exploring the practical details for setting up a Committee of permanent nature for Alternative Dispute Resolution (“Standing Committee”).
- The Directive on Administrative Cooperation is being evaluated, and before 1 January 2019 the Commission will submit a report that provides an overview and an assessment of the automatic exchanges of information and if appropriate, will present a proposal to the Council to further strengthen the efficiency of administrative cooperation.

- The first-ever exchange of Country-by-Country Reports under the Directive on Administrative Cooperation covering Fiscal Years commencing on or after 1 January 2016 is due by the end of June 2018.
- The trilogue discussions on the Directive that foresees public country-by-country reporting have not yet started, due to the Council not being able to agree on a mandate.
- The package (Communication and Directive) on whistleblowing was adopted by the College on 23 April 2018.
- A brief update on the Commission's State Aid work covered three recent and upcoming hearings of the General Court: (1) Fiat Luxembourg on 21 June 2018, (2) Belgian excess profits scheme on 28 June 2018 and Starbucks (Netherlands) on 2 July 2018. The hearing for the Apple case has not been scheduled yet. In addition, the Commission adopted a negative decision on 20 June 2018 with regard to illegal state aid granted by Luxembourg to the ENGIE group.

3. Presentation of the Italian – German initiative on joint audits

The initiative started in 2012 at the level of 2 regions in Italy and Germany, with the first pilot cases finishing in 2015. The cooperation later involved more regions and is currently extended to national level. The legal framework used was the Directive on Administrative Cooperation and in particular the rules on exchange of information, simultaneous controls and presence of officials from another Member State. Those tools were combined in real time to enable the actual operation that is very close in practice to a joint audit. Italy had to change its internal legislation to allow active participation of German officials in the audit, as well as to enable the conclusion of the audit with a downward adjustment. The programme is carried out under a Memorandum of Understanding signed in 2013, while each audit has a separate jointly agreed audit plan. The continuous exchange of information was enabled by assigning Competent Authority status to the tax auditors involved. The taxpayer is involved from the beginning and contacts with the taxpayer are coordinated between the administrations. The audits finish with a Final Report, which is not legally binding by itself and therefore has to be implemented domestically.

Questions were raised with regard to whether the procedure provides for guarantees for avoidance of double taxation and how the MAP procedure could be facilitated by the findings of such an audit.

4. Draft Report on Multilateral Transfer Pricing Audits within the EU

The two co-chairs summarised the views of the Member States (MSs) and non-governmental members (NGMs) respectively on the paper in general. The document received clear support by both MSs and NGMs. From MSs' perspective there is a need to unify the terminology, to work on what is feasible within the current legal framework; although as was the case in Italy MS may introduce legislation where necessary. Some recommendations were seen by MSs as too prescriptive and might need to be made more general. The NGMs thought that some of the obstacles should be clearly identified in the survey in Annex 1, which may also be integrated into the transfer pricing Member State profiles on the JTPF webpage. The reference to objectives such as tax avoidance and evasion was not considered by NGMs as suitable for a procedure that is primarily aimed at eliminating the risk of double taxation and where the taxpayer is viewed as cooperative. The efficiency of joint audits in preventing or shortening the time needed for lengthy MAP and arbitration procedures was also highlighted by NGMs. References to taxpayers' rights, confidentiality and communication should be added to Annex

III. The comments will be reflected in the next version of the document and there will be a separate term for cooperative Transfer Pricing audits.

The work then focused on a section-by-section review of the document that involved a number of suggestions for technical enhancements to the text. These were largely agreed by both MSs and NGMs and will be taken on board when preparing the next draft of the document. The most relevant discussed issues were:

- Recommendation 1 should be supplemented by a reference to the identification of transfer pricing risks.
- In Recommendation 2, the right to be heard should refer to national law and be supplemented with the right to communicate to the tax authorities.
- The discussion of the legal base (i.e. Sections 1.2 and 1.4 and other references to the legal base and its practical impact on the possibilities to perform a cooperative transfer pricing audit) should be consolidated into Section 1.2.
- Recommendation 3 should recommend (without necessarily mentioning that “it is fundamental”) that Member States enable the active presence of officials from other Member States as foreseen in the option laid down in Art. 11 of the Directive on Administrative Cooperation.
- Section 1.5. should mention that it is important to empower the tax auditor to exchange information directly (even in real time) with the auditors from the other Member State in the context of the transfer pricing audit.
- Recommendation 5 raised questions about whether there should be a single contact point for cooperative transfer pricing audits and made public or notified to the taxpayer. That is especially relevant if the taxpayer would be entitled to request a coordinated transfer-pricing audit. There was also discussion on whether that the functions of a single contact point for coordinated transfer pricing audits should be performed by the already designated a multilateral control coordinator.
- Recommendation 7 should be amended to substitute “comprehensive justification” by “reasonable explanation”. In addition, the case where the audit is requested by the taxpayer should also be addressed in the Recommendation.
- The Section on the opening meeting should be moved to Section 2.2. It should also be recommended to have such a meeting.
- The paragraph on taxpayer rights should be moved to a more prominent part of the document. It should also be taken into consideration that a taxpayer might not be entitled to communicate with a tax administration from another Member State in the context of a cooperative transfer pricing audit.
- It was mentioned that the term “Final Report” should better be replaced by “Concluding Report”.
- If the tax administrations reach a common understanding in the Concluding Report, they should follow that common understanding domestically. If there is no agreement to the facts, that should also be highlighted and serve as a basis for any future MAP.
- The Concluding Report could serve as a basis for any separate national audit reports.
- Recommendation 9 should mention that it is good practice to share the Concluding Report with the taxpayer.
- It should be re-stated that the audit and MAP procedures are meant to be independent but not in isolation from each other.
- The Report should conclude that (1) cooperation in the context of transfer pricing audits is feasible and advisable under certain circumstances, (2) there are possibilities

to be explored in that respect, and (3) the JTPF should identify the obstacles that might warrant future EU legislative solutions.

It was agreed that additional comments could be sent by the end of the week, and that the Secretariat circulate a revised draft by mid-July. The members will then have the possibility to send written comments by 10 September. Based on this input, the Bureau will decide whether the draft report could be approved under the silence procedure before the next JTPF meeting (24 October) or would need to be discussed and agreed at that meeting.

5. Issues Paper on the Transactional Profit Split Method (PSM) – new guidance agreed by the OECD and scope of future work for the JTPF

The OECD presented the recently approved guidance on the PSM that is now part of the OECD Transfer Pricing Guidelines. The presentation covered the main topics discussed in the Guidance: the three circumstances where the PSM can be the most appropriate method; the exception to the application of the PSM when there are appropriate comparables; the criteria for choosing profit-splitting factors; the determination of the profits to be split; and the choice of splitting actual vs anticipated profits.

The OECD presentation was followed by 4 presentations of practical cases where the PSM was applied. The cases were organised in two groups, each group featuring a presentation by a MS and an NGM:

- Centralised supply chain company and local non-routine distributors
 - Denmark
 - ITC Leiden
- Manufacturing and distribution entities with unique R&D and marketing intangibles
 - Belgium
 - Nera Economy Consulting

Most of the members who commented stressed that in practice, the choice of splitting factors is closely linked to the specific sets of facts of a case. Consequently, these members pointed out that it would be a complex exercise to identify commonalities. More specific comments raised concerns about the appropriateness of using subjective approaches like interviews or employee remuneration as a splitting factor. Some of the approaches were also found complex. On the future work on the PSM, some members expressed the view that a JTPF report would only make sense if it made a contribution beyond the guidance provided by the OECD. There was some tentative interest in focussing on profit splitting factors and more generally, the methodology on identifying key value drivers and the determination of the contribution by group entities in the context of a value chain analysis. The Chair asked for written submissions on the questions at the end of the paper by 10 September.

6. Next meeting

Subject to the availability of rooms, it was confirmed that the date for the next meeting of the JTPF is 24 October 2018.

7. List of participants

From the Member States, Cyprus, Estonia and Lithuania were not present. From the Non-Governmental Members, the representatives of A.P. Moller Maersk, BDI (Federation of

German Industries) and Financial Transparency Coalition were absent. The OECD was represented at the meeting. The EP and the UN were not represented.

Brussels, 26 June 2018