



Council of the European Union
General Secretariat

Brussels, 05 September 2024

**Interinstitutional files:
2023/0322 (CNS)**

WK 11005/2024 INIT

LIMITE

ECOFIN

FISC

This is a paper intended for a specific community of recipients. Handling and further distribution are under the sole responsibility of community members.

MEETING DOCUMENT

From: Presidency

To: Delegations

Subject: Presidency steering note (transfer pricing)

STEERING NOTE

FOR THE WPTQ OF 12 SEPTEMBER 2024

1. BACKGROUND

A potential new EU transfer pricing platform (EU TP Platform) would be expected to overcome the shortcomings of the previous Joint Transfer Pricing Forum (JTPF) and contribute to a uniform understanding and more effective application of transfer pricing rules across the EU, as well as facilitate the functioning of the dispute resolution mechanism in the area of transfer pricing, thus contributing to an increase in tax certainty both for businesses and tax authorities. **In this context, particular attention shall be given to the constraints imposed to the Council by the third paragraph of Article 296 TFEU.**

A new EU TP Platform could be established either as a Commission group, a Council working party or a committee, or function as a combination of these two options.

A. COMMISSION EXPERT GROUP/CO-ORDINATING GROUP

The Commission has the possibility to create a Commission **expert group** in accordance with **Commission Decision C(2016) 3301¹** or a **co-ordinating or high-level group** for which no horizontal rules are established in case it does not fit with any existing framework.

Expert group

According to the Commission Decision C(2016) 3301, the Commission expert groups are consultative bodies **set up by the Commission or its departments**, composed of public and/or private-sector members, which are foreseen to meet more than once.

Their primary role is to provide specific **advice and expertise** to the Commission and its departments on a given subject and in light of a specific mandate. Expert groups do not take any binding decisions, but they may formulate opinions or recommendations and submit reports.

The **Commission and its departments remain fully independent** regarding the way they take into account the expertise and views gathered from the experts.

Expert groups are set up either by a **Decision of the Commission (“formal expert group”)** or **by a Commission department** after having obtained the agreement of the responsible

¹ Commission Decision C(2016) 3301 of 30.5.2016 establishing horizontal rules on the creation and operation of Commission expert groups.

Commissioner and Vice-President and the Secretariat-General (“**informal expert group**”)².

When setting up an expert group **the Commission or its departments** define its **mandate**, as well as the tasks of the expert group, as precisely as possible, while also indicating its area of activity and the type of advice required.

According to the horizontal rules, expert groups may be **composed** of:

- (i) individuals appointed in a personal capacity (type A members),
- (ii) individuals appointed to represent a common interest (type B members),
- (iii) organisations in the broad sense of the word (type C members),
- (iv) Member States’ authorities (type D members), and
- (v) other public entities, such as third countries’ authorities, including candidate countries’ authorities (type E members).

The selection of expert group members shall be carried out via public calls for applications, except for type D and E members.

Expert groups shall be chaired by a representative of the Commission or by a person appointed by the Commission or the Commission departments. Alternatively, **the Commission or its departments** may decide that the group shall elect its **chairperson** by simple majority of its members.

In principle, expert groups shall adopt their opinions, recommendations or reports by **consensus**. **In the event of a vote, the outcome of the vote shall be decided by simple majority of the members**. The members that voted against or abstained shall have the right to have a document summarising the reasons for their position annexed to the opinions, recommendations or reports.

The Commission may establish **sub-groups** for the purpose of examining specific questions on the basis of terms of reference defined by the Commission. Sub-groups shall operate in compliance with the revised horizontal rules and shall report to the expert group to which they belong.

All Commission expert groups and other similar entities including their sub-groups shall be registered in the **Register of expert groups**. In addition, the revised horizontal rules foresee

² See article 4 of Commission Decision C(2016) 3301.

that in principle all relevant documents of an expert group, including their agendas, minutes, and the participants' submissions, are to be published on the Register of expert groups.

Co-ordinating or high-level group

Whilst the horizontal rules for establishing a Commission expert group are regulated in a Commission decision no rules or guidance is provided to create a Commission co-ordinating or high-level group. However, it is considered good practice to apply by analogy the horizontal rules set for the expert groups and more in particular the rules regarding transparency.

The main tasks of these type of groups should not be to provide advice and assistance to the Commission but rather provide for a discussion forum, facilitate co-operation, co-ordinate and establish common approaches, discuss implementation of the common agreed approach and to ensure correct implementation by the Member States.

This type of group can be set-up in a similar way as expert groups, i.e. either by a Decision of the Commission ("**formal group**")³ or by a Commission department after having obtained the agreement of the responsible Commissioner and Vice-President and the Secretariat-General ("**informal group**").

B. COUNCIL WORKING PARTIES AND COMMITTEES

The Committee of Permanent Representatives of the Governments of the Member States (COREPER) is responsible for preparing the work of the Council and it is or may be supported as well by specialised working parties and committees, known as the "**Council preparatory bodies**".

The existing preparatory bodies can be divided into two main categories:

- (a) Committees **set up by treaties, intergovernmental decisions or by Council act** (e. g. EFC, FSC, COCG) – they are mostly permanent and often have an appointed or elected chairperson.
- (b) Committees and Working Parties **set up by COREPER** – these deal with very specific subjects and are chaired by the delegate of the country holding the rotating 6-month Presidency of the Council.

³ See for an example Commission Decision of 5 July 2024 (C(2024)4749 final).

According to Art. 19(3) of the Council rules of procedure⁴, Committees or Working Parties may be set up by, or with the approval of, COREPER with a view to carrying out certain preparatory work or studies defined in advance.

In principle, substantial and new technical proposals requiring specific expertise should, as a rule, be included within the remit of the competent existing Working Party. If necessary for practical reasons, a specific sub-area may be listed rather than creating a new permanent or ad hoc Working Party or subgroup⁵.

Currently, in the field of taxation there are two Council preparatory bodies:

1. The **Working Party on Tax Questions (WPTQ)** which, under the authority of COREPER, is responsible for the taxation files in the EU context. The WPTQ is mainly in charge of the work on Union legal acts (i.e. legislative acts and other legal acts) and policy preparation. The WPTQ is chaired by the rotating Council Presidency and has three subgroups:
 - a. High Level
 - b. Indirect Taxation
 - c. Direct Taxation
2. The **Code of Conduct Group on Business Taxation (COCG)** which was established in 1998⁶ as a consequence of the agreement of the EU Ministers of Finance expressed in the Council resolution of 1 December 1997⁷ providing for a Code of Conduct on Business Taxation. The Code of Conduct is an intergovernmental, legally non-binding instrument aiming at curbing harmful tax competition. The Code of Conduct forms the basis of the work of the Council Code of Conduct Group which was set up within the framework of the Council to assess tax measures that may fall within the scope of the Code of Conduct and monitoring possibly harmful tax measures.

The Code of Conduct Group is **composed** of high-level representatives of the member states and the European Commission. The **secretariat functions** are carried out by the General Secretariat of the Council with the support of the Commission services. It is **chaired** by an elected representative of a Member State, serving a mandate of two years.

⁴ COUNCIL DECISION of 1 December 2009 adopting the Council's Rules of Procedure (2009/937/EU).

⁵ Note of the General Secretariat of the Council 16975/23 (6).

⁶ COUNCIL CONCLUSIONS of 9 March 1998 concerning the establishment of the Code of Conduct Group (business taxation) (98/C 99/01)

⁷ RESOLUTION OF THE COUNCIL AND THE REPRESENTATIVES OF THE GOVERNMENTS OF THE MEMBER STATES, MEETING WITHIN THE COUNCIL of 1 December 1997 on a code of conduct for business taxation

2. POTENTIAL DESIGN OPTIONS FOR AN EU TP PLATFORM

The following paragraphs describe three potential design options for a new EU TP Platform Option 1A, Option 1B and Option 2.

DESIGN OPTION 1

(A) – EU TP Platform as Commission co-ordinating group

As already described above, the main task of an expert group is to advise and assist the Commission, which would not be the main role of the EU TP Platform. Therefore, only a Commission co-ordinating group is being presented as a possible design option.

a. Political commitment

It was acknowledged that the outcomes of the previous JTPF were not effective as they were not always taken into due consideration.

To overcome shortcomings of the JTPF and guarantee that the work of the new platform can effectively deliver on more tax certainty, it is necessary to foresee a possibility that Member States express their political commitment to follow (or use as a source of interpretation) the conclusions (outcomes, recommendations, reports) of the EU TP Platform.

Member States could also commit to amend their transfer pricing domestic legislations to refer to the reports of the EU TP Platform endorsed by political level as a source of interpretation.

b. Set up, composition and functioning of the Commission co-ordinating group

The Commission co-ordinating group would be established by a **Commission decision**.

The main group should consist of Member State representatives only. While a subgroup, similar to the past JTPF, could consist of:

- 1 representative from each Member State;
- a number of representatives (10 to 18) from the private sector selected with a call of interest.

This EU TP Platform would work on the basis of a consensus to deliver non-legislative solutions to practical transfer pricing problems mentioned in the possible building blocks of the draft mandate set out further in this note.

The EU TP platform could be chaired **either by a representative of the Commission or by an elected chairperson** from the representatives of the Member States for a minimum period of time, still to be decided.

The Commission will provide the necessary secretarial and managerial services for the Platform.

The Commission/Chair will communicate the results of the work of the Platform on a regular basis to the Council.

Once received by the Council, the documents could then follow the usual preparatory track (WPTQ [Direct Taxation/High Level], COREPER, Council) to assess the work of the Platform when deciding whether to endorse (poss. at a political level) the conclusions of the co-ordinating group. This will ensure that the final policy decision is taken by Member States. The current mandate of the WPTQ (see doc. ST 8728/21, pages 26–28) seems to cover transfer pricing issues, as these technically fall under the broad concept of matters in the field of direct taxation.

c. Peer review process

A peer review process shall be put in place to ensure Member States follow their political commitments. This peer review, would be carried out by the main group made up of Member State representatives only. As one of the governing principles, a “broad consensus” (all except the MS concerned) approach could be considered.

It should be highlighted that subject of the peer review would be only the reports endorsed by the Council by consensus (this applies to all possible design options).

To be noted, however, the current mandate of the WPTQ does not contain a possibility for a peer review process.

d. Mandate

The EU TP Platform, set up as a Commission co-ordinating group, should operate on the basis of an agreed mandate.

This note sets out a number of possible building blocks (only for the purposes of setting a framework for an initial (“brainstorming”) discussion, and being only a theoretical list).

Possible Objectives of the EU TP Platform

- the effective realisation of a more uniform application of profits allocation tax rules within the EU both in relation to transfer pricing between associated enterprises as well as to profits attribution to permanent establishment.
- the development of pragmatic solutions to improve the functioning of the dispute resolution mechanisms.

The primary aim of the EU TP Platform is to increase tax certainty and reduce transfer pricing litigations within the EU.

The work of the EU TP Platform shall be consistent with the OECD framework and in particular with the “Transfer Pricing Guidelines for Multinational Enterprises and Tax Administration” and the “2010 Report on the attribution of profits to permanent establishments”.

Working methods:

To achieve the objectives, the EU TP Platform shall:

- provide a platform where business, civil society and national tax administration experts can discuss transfer pricing problems which may constitute obstacles to cross-border business activities within the Union.
- provide inputs on transfer pricing and profits allocation matters related to changes of the modern economy including the digitalization of the economy and the mobility of workers.
- develop practical solutions, compatible with the OECD Transfer Pricing Guidelines, to problems posed by transfer pricing practices in the EU.
- develop practical solutions, compatible with the OECD Authorized Approach, to problems posed by profit attribution to permanent establishments in the EU.
- develop pragmatic solutions to improve the practical functioning of the Dispute Resolution mechanisms.
- monitor the number of Advance Pricing Agreements (APA) in the EU as well as the number of pending Mutual Agreement Procedures (MAPs) both under the Arbitration Convention and under the Directive on Tax Dispute Resolution Mechanisms.
- review Member State’s transfer pricing policies and practices with the view to ensuring a more uniform application of the transfer pricing and profit allocation rules within the EU.

- evaluate through peer review process Member States' compliance with the conclusions of the EU TP Platform endorsed by the EU Council which could include previous work of the JTPF.

e. Advantages and disadvantages

Advantages:

- **Unique format:** the simultaneous participation of private sector and public administrations ensure the discussion being more up to date with respect to actual practical issues in the TP area.
- **Specialized expertise:** provides high-level technical and practical knowledge from experts in the field of transfer pricing.
- **Diverse stakeholder representation:** includes experts from member states, industry, academia, and civil society, offering a broad range of perspectives. This diversity can lead to more well-rounded and innovative policies.

Disadvantages:

- **Risk of external expertise being biased:** there is a risk of certain interest groups dominating the discussions, which could lead to biased recommendations.
- **Less political visibility:** the work of a co-ordinating group may risk being perceived as overly technical, and could fail to grasp the political attention.
- **Absence of connection to the general policy agenda:** experts in the Commission co-ordinating group might be more focused on theoretical or technical aspects.

(B) – Two-group approach: an EU TP Platform as Commission co-ordinating group coupled with the follow-up within a Council framework

Under this scenario, the EU TP Platform could be established as a **Commission co-ordinating group**, consisting of both members of the private sector and MS representatives. Whilst the meetings with only the Member State representatives would take place in **an adjusted Council preparatory framework, which could be set up either as a Working Party or a committee (e.g. a committee similar to the Code of Conduct)**.

This solution would pursue a two-layered approach with the Commission co-ordinating group being used to collect technical inputs to feed a more informed policy discussion between Member States within Council framework, which could then lead to, if so desired by Member States, to the political endorsement of the outcomes (and possibly – political commitment or even peer review, if so agreed by the MS).

a. Political commitment

Similarly to the previous case set out above under 1A, it is necessary to foresee a possibility that Member States express their political commitment to follow (or use as a source of interpretation) the conclusions (outcomes, recommendations, reports) of the EU TP Platform once these are endorsed at the political level.

b. Set up, composition and functioning of the two-layer approach

The Commission co-ordinating group

Similar to Option 1A, the Commission co-ordinating group would be established by a **Commission decision** but only meet in one composition: representatives of Member States with external stakeholders. It would be tasked with delivering pragmatic solutions to practical transfer pricing issues in the EU.

The Commission co-ordinating group will follow largely the same rules of functioning already highlighted under Option 1A.

The work of the Commission co-ordinating group will then be transmitted by the Commission to the second (Council) layer to continue the work.

The “Council / MS layer”

This layer would review more in depth and eventually amend the conclusions of the work of the Commission co-ordinating group regarding transfer pricing policy issues, in addition to exchanging views on the ongoing international debate related to transfer pricing (e.g. Amount B) and more in general profit allocation issues.

In order to ensure stability and expertise, given the need to elect the chair, and also given the limited number of the possible meetings of the WPTQ, the establishment of a new WP or a COCG-like committee or preparatory body could be considered. The exact choice of the form would depend on a number of factors, and most notably on the desired mandate and chairmanship arrangement.

This committee could be chaired by an elected representative of the Member States serving a longer period (e.g. 2 years). As usual, it would be up to MS and Commission to appoint their delegates.

The final texts (outcomes of this work) would then be transmitted to COREPER and Council for endorsement. To be noted, if preparatory work at the level of the Commission coordinating group would be technically advanced and complete, the work at the “Council layer” might be fairly limited, and serve mainly the formal preparatory function for possible endorsement at political level.

c. Peer review process

Similarly to the previous case set out above, a peer review process could be put in place to ensure that Member States respect their political commitments, especially once these are made at Council level. This peer review would be carried out at the “Council” layer, on the basis of the “broad consensus” (all MS without the MS concerned).

d. Mandate

Ultimately, if the set-up and chairmanship arrangement would be other than those for a Council WP / rotating Council Presidency, an amendment would be required of the Annex III to the Council Decision of 1 December 2009 laying down measures for the implementation of the European Council Decision on the exercise of the Presidency of the Council, and on the chairmanship of preparatory bodies of the Council (2009/908/EU).⁸

While the objectives of both layers should broadly be the same to Option 1A, **the mandates of the two groups would be formally separate.**

This note sets out a number of possible building blocks (only for the purposes of setting a framework for an initial (“brainstorming”) discussion, and being only a theoretical list):

⁸ <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A02009D0908-20211213>

For the Commission co-ordinating group:

The Commission co-ordinating group on transfer pricing shall:

- provide a platform where business, civil society and national tax administration experts can discuss transfer pricing problems which may constitute obstacles to cross-border business activities within the Union.
- advise the Commission on transfer pricing and profits allocation matters related to changes of the modern economy including the digitalization of the economy and the mobility of workers.
- assist the Commission in developing practical solutions, compatible with the OECD Transfer Pricing Guidelines, to problems posed by transfer pricing practices in the EU.
- assist the Commission in developing practical solutions, compatible with the OECD Authorized Approach, to problems posed by profit attribution to permanent establishments in the EU.
- assist the Commission in developing pragmatic solutions to improve the practical functioning of the Dispute Resolution mechanisms.

For the Council / MS “layer”:

It is likely that an adjustment to the current mandate of the WPTQ is necessary to allow for peer review and in case the chairmanship would not remain with the rotating Presidency).

Purely for the purposes of initial discussion and further reflection, it could be considered that at the WP and/or Committee level the following building blocks are covered:

- determine the areas of transfer pricing and challenges of the Member States which should be discussed by the Platform in order to find pragmatic solutions.
- review and discuss the reports of the Commission co-ordinating Group and assess whether to propose to the Council their endorsement.
- monitor the number of Advance Pricing Agreements (APA) in the EU as well as the number of pending Mutual Agreement Procedures (MAPs) both under the Arbitration Convention and under the Directive on Tax Dispute Resolution Mechanisms.
- evaluate through peer reviews process Member States’ compliance with the conclusions of the subgroup endorsed by the EU Council by consensus.

e. Advantages and disadvantages

Although both options 1A and 1B have similar advantages and disadvantages, compared to 1A the following is specific for option 1B:

Advantages:

- **Political legitimacy:** Combines the specialized knowledge and practical implementation insights with the political legitimacy.

Disadvantages:

- **Poss. more time-consuming coordination and slightly higher administrative costs:** Managing the interactions and coordination between the co-ordinating group and the Council layer can be more challenging administratively and potentially somewhat more resource intensive.
- **MS experts' mission expenses regarding the Council group** covered from the MS "envelopes".

DESIGN OPTION 2

EU TP Platform established by the Council and functioning within the framework of the Council (WP, COCG or another similar model)

As an alternative option, the EU TP Platform could be designed to function exclusively in the framework of the Council (as a Working Party or a Committee). The exact choice of the form would depend on the desired mandate and chairmanship arrangement.

a. Political commitment

Also in this case, it is important to maintain an option that Member States, by consensus, express, if they deem appropriate, their political commitment to follow the conclusions and recommendations contained in the reports or guidance agreed by the EU TP Platform.

b. Set up, composition and functioning

Should the design, chairmanship and peer review arrangement similar to or loosely based on the COCG model be desired, the necessary act on establishment of the Platform would possibly have to be adopted at Council level.

Participation of 3rd party representatives would be similar to the current arrangement as for the WPTQ: on the basis of the permission (one-off, or of a specific duration) granted by COREPER.

The chair would be an elected chair (an expert representative of a Member State), serving a mandate of two years.

The secretariat functions for the Platform in this case would be assumed by the General Secretariat of the Council. Similarly to the COCG, the platform would function with indispensable assistance by the Commission.

The Platform could be tasked to discuss transfer pricing policy and could work on the basis of consensus to deliver non-legislative solutions to the transfer pricing challenges in practice, on the basis of its mandate. Should the peer review process be agreed in certain cases, the decision making could then be based on the “broad consensus”, as in the COCG.

The conclusions of the Platform would be forwarded for political endorsement, and this would then follow the usual preparatory track (WPTQ [Direct Taxation/High Level] / COCG style committee, COREPER, Council) to assess the work of the Platform when endorsing the conclusions of the platform, giving then the value of “soft law”.

c. Peer review process

Also in this case, it will be important to foresee a peer review process to ensure that Member States’ adhere to the results of the EU TP platform once these are endorsed at political level.

d. Mandate

The mandate could be similar to the previous options.

The current mandate of the WPTQ (see doc. ST 8728/21, pages 26–28) seems to cover transfer pricing issues, as these technically fall under the broad concept of matters in the field of direct taxation. WPTQ (meeting in the formats [subgroups] of High Level and Direct taxation) covers broad scope of work, including policy preparation and policy documents in this area. Therefore, it seems that no immediate specific adjustment to the existing mandate of the WPTQ would be required if the WPTQ would discuss the issues of transfer pricing.

Notably, the current mandate of the WPTQ does not contain a possibility for a peer review process.

If it was considered that an adjustment to the mandate of the WPTQ is required, the current mandate of the WPTQ could be amended by COREPER. At this stage, it is too early to confirm that there would be a need to create a new working party. The first step in the process would be to reflect whether an amendment to the current mandate of the WPTQ is necessary, depending on the objectives set for the new transfer pricing platform.

e. **Advantages and disadvantages**

Advantages:

- **Political legitimacy:** Composed of representatives from Member States, with a possibility of a political commitment to the outcomes by MS.
- **Policy coherence:** Promotes coordination and coherence in the positions of Member States, leading to more unified and consistent policies across the EU.
- **Structured decision-making:** Operates within a well-defined procedural framework, ensuring thorough and structured deliberations.

Disadvantages

- **Limited meeting space in the Council premises:** in case the Platform would have to meet rather often, and in particular in the extend format (MS + 10 to 18 third-party experts), limited meeting space in the Council and poss. desire of the MS to use full interpretation regime (instead of “on demand”, for example), may present a particular challenge, as the meetings of the Platform would have to be factored into the overall balance and calendar of the meetings during Council Presidency terms.
- **MS experts’ mission expenses** covered from the MS “envelopes”.
- **Calendar:** More difficult to be convened at a short notice and less adaptable to changes in calendar.

3. DISCUSSION OF THE DESIGN OPTIONS

Question 1: *Taking into account:*

- *the need to ensure that the objective of a more common approach to transfer pricing issues is achieved while making sure that the main transfer pricing policy decisions remain with Member States without creating additional administrative burden;*
- *the main pros and cons of the different options;*
- *the legacy and shortcomings of the previous JTPF;*
- *the inputs received from the MS in the course of the previous discussions, for a potential new EU Transfer Pricing Platform; and*
- *the administrative process needed to set it up*

the preferred way forward seems to be within the boundaries of the design option 1. Do Member States agree? Do Member States prefer a structure described under option 1A or 1B?

Question 2: *We would also invite Member States to share their views on the above listed specificities of the preferred option, especially in relation to:*

- *the proposed design of the mandate as proposed above with a focus on practical solutions;*
- *the selection of the chair (eligibility conditions, term, vice-chairs etc.);*
- *OECD and UN should be invited as observers;*
- *the political commitment, its necessity, its process;*
- *the peer review process as a substantial element to enforce the political commitment.*