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**MEETING DOCUMENT**

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**From:** Presidency

**To:** Delegations

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**Subject:** Transfer Pricing: Presidency steering note

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# STEERING NOTE

FOR THE WPTQ OF 10 JULY 2024

## 1. BACKGROUND

Transfer pricing is a central tenet of the international tax policy agenda. At the moment, transfer pricing rules are not harmonized at EU level and many differences still exist in national law and practices of the 27 EU Member States. This situation potentially increases the risk of litigation and double taxation as well as of profit shifting and double non - taxation.

In the past, the Commission tried to ensure a more coordinated approach to transfer pricing between Member States through the work of the Joint Transfer Pricing Forum (JTPF), an expert group set up by the Commission in 2002, whose mandate expired in March 2019 and was not renewed.

During the Council discussions on the proposal for a Directive on transfer pricing<sup>1</sup>, many Member States have supported the idea of re-establishing a platform to discuss transfer pricing matters at EU level.

This note, which is partly (on the experience with JTPF) prepared with the Commission services, is intended to:

- facilitate taking stock of the lessons learned from the experience of the JTPF;
- initiate exploring what should be done to guarantee that a possible new platform effectively contributes to delivering a more coordinated approach to transfer pricing issues among EU MS; and
- serve as a starting point for a discussion on key constitutive elements of the platform, such as its role (mandate), composition and output.

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<sup>1</sup> COM(2023) 529 final

## 2. THE JOINT TRANSFER PRICING FORUM –EXPERIENCE SINCE 2002

### 2.1. The composition of the JTPF

The JTPF was created in 2002 as a Commission Group of Experts and was one of the three leading international fora in the transfer pricing debate, the other two being the WP6 on the Taxation of Multinational Enterprises (under the Committee of Fiscal Affairs of the Organisation for Economic Co-operation and Development (OECD)) and the Transfer Pricing Subcommittee of the United Nations.

The JTPF was composed of **1 representative from each Member State's tax administration and 18 non-government organisation members** which had been selected, through a public call for interest, taking in consideration the background and expertise of the representatives as well as size, sector of activities and origins of the organisations.

During the last term of the JTPF, the 18 non-government members were composed by 6 organizations representing the business, 4 organizations representing the civil society, 3 academic organizations and 5 organizations representing tax practitioners.

**Representatives from candidate countries** (at that time - Albania, Republic of North Macedonia, Iceland, Montenegro, Serbia and Turkey) **and from the OECD** were also invited to the JTPF as **observers**.

The Group was **chaired by an independent chairperson**.

### 2.2. The mandate of the JTPF and programme of work.

The JTPF used to operate under a 4-years renewable term and on the basis of a 4-years rolling program of work.

The mandate of the JTPF was, while operating within the framework of the OECD transfer pricing guidelines and on the basis of consensus, to propose to the Commission pragmatic, non-legislative solutions to practical problems posed by transfer pricing practices in the EU.

The last mandate of the group expired in March 2019 and was not renewed.

### 2.3. Rule of functioning of the JTPF

The JTPF was structured to accommodate two groups: one of **government** and the other of **non-government** members. There were two vice-chairs, each in charge of one of the groups, and an elected Chair for the whole JTPF. The JTPF itself agreed the four-year rolling work programme.

The Commission performed the supporting role as secretariat of the JTPF. The key task of the secretariat was to prepare the reports of the JTPF using the expertise and contributions of the members.

The meetings of the JTPF took place on a **quarterly basis** and at the beginning of each mandate. The meetings lasted for a day and a half, with initially the two groups meeting separately in the afternoon of the first day followed by a full day meeting in plenary, the day after.

For each meeting, the secretariat provided an agenda, discussion papers, draft reports, minutes of the meeting and final report for the members' approval, which was – as a general principle – reached by consensus.

The final report(s) agreed by the JTPF was/were periodically transmitted by the Commission addressed to the Council and contained the recommendation to follow the conclusions of the report(s), for endorsement by the Council.

### 2.4. JTPF's past work

At the beginning, the focus of the JTPF was on the application of the Arbitration Convention (90/436/EEC)<sup>2</sup>. Over time, the JTPF worked also on numerous transfer pricing topics many of which explored common solutions for the implementation and application of the OECD Transfer Pricing Guidelines (TPG) in the EU.

Some JTPF reports laid the foundations for the OECD's BEPS-related guidance, e.g., guidance on transfer pricing documentation requirements and low value-adding intra-group services.

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<sup>2</sup> Convention on the elimination of double taxation in connection with the adjustment of profits of associated enterprises OJ L 225, 20/08/1990, p. 10.

The following reports have been drafted and agreed by the JTPF<sup>3</sup>:

1. Code of conduct for the effective implementation of the Arbitration Convention
2. Code of conduct on transfer pricing documentation for associated enterprises in the EU
3. Guidelines for Advance Pricing Agreements (APAs) in the EU
4. Guidelines on low-value-adding intra-group services
5. Potential approaches to non-EU triangular cases
6. Report on Small and Medium Enterprises (SMEs) and Transfer Pricing
7. Report on Cost Contribution Arrangements on Services not creating Intangible Property (IP)
8. Report on Secondary Adjustments
9. Report on Transfer Pricing Risk Management
10. Report on Compensating Adjustments
11. Report on the Use of Comparable in the EU
12. Report on the Use of Economic Valuation Techniques in Transfer Pricing
13. Report on a Coordinated approach to transfer pricing controls within the EU
14. Report on the application of the profit split method within the EU

## **2.5. Main drawbacks of the JTPF**

**The first main drawback is that the past work of the JTPF was not effective in ensuring a common coordinated approach to transfer pricing issues within the EU.** The recommendations contained in many JTPF reports have in fact remained unheeded or have not proven suitable to provide binding or stable solutions for transfer pricing problems. As a consequence, limited progress was made as demonstrated by the fact that the number of transfer pricing controversies and MAP cases among Member States has not decreased.

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<sup>3</sup> These reports can be found on: [https://taxation-customs.ec.europa.eu/taxation/company-taxation/joint-transfer-pricing-forum\\_en](https://taxation-customs.ec.europa.eu/taxation/company-taxation/joint-transfer-pricing-forum_en)

Furthermore, the **structure and organization made the JTPF a rather slow-moving group** which, for example, did not facilitate the Commission making full use of its expertise when advice was needed within a short timeframe.

The past format of the group with the simultaneous participation of private sector and public administration showed advantages but also disadvantages. On the one hand, the various perspectives enriched the debate and gave a better understanding of the diverse views, which then prepared the ground for shared solutions. On the other hand, the **Member States have appeared sometimes to be reluctant to engage in a dialogue with the representatives of the private sector** which led to the meetings being often dominated by the latter.

**The rule of functioning of the JTPF did not foresee the possibility for Member States to meet alone to discuss more freely issues linked to policy decisions or exchange views on ongoing international discussions.**

It was also noted that in the early years, it was relatively easy to arrive to a consensus as most issues were practical and straightforward. However, in the following years **it was more difficult for Member States to reach consensus on a common approach**. Similarly, among the non-government representatives it became apparent that the business representatives, consultants and NGOs also had divergent views, aims and interests.

### **3. A NEW PLATFORM TO DISCUSS TRANSFER PRICING IN THE EU**

Many Member States seem to be in favour of establishing a new platform to discuss transfer pricing issues.

Most respondents to the Commission's call for feedback on the transfer pricing proposal, also called for the relaunch of the JTPF, whose past work was considered useful for companies and whose composition, like in the past, should not be limited to Member State representatives but comprise also other stakeholders<sup>4</sup>.

**However, it would be important to ensure that a potential new platform on Transfer Pricing is able to contribute effectively to achieving the objectives of, for example, increasing tax certainty and simplification for the taxpayers, thereby reducing the number of controversies in the area of transfer pricing and also overcomes the shortcomings of the JTPF.**

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<sup>4</sup> all submissions are publicly available here: [Transfer Pricing Directive – Head Office Tax system for SMEs – Business in Europe: Framework for Income Taxation \(europa.eu\)](https://ec.europa.eu/taxation/customs/transfer-pricing-directive/)

Against this background, Member States are invited to share their views on a number of general questions, with the purpose of finding a common basis that could lead to a more specific discussion and, possibly, establishment of a platform. The questions for discussion are set out in Part I and Part II further down in this note. The Annex of the note contains a list of points that might help answering the questions for discussion.

### **Part I – MANDATE (SCOPE OF WORK, DELIVERABLES)**

1. What should be the mandate (scope of work) of the platform? Could you identify specific transfer pricing issues (of substance or process) that the Platform could discuss?
2. What could be the deliverables of the platform? Elements which can be considered include, but are not limited to:
  - a. Discussion of relevant TP issues, exchange of views, best practices and experiences without adopting any deliverables;
  - b. Based on the discussions, the Platform could adopt and, if so decided, publish outcome documents, in order to ensure certainty and simplification for taxpayers / tax authorities;
  - c. Based on the discussions, the Platform could formulate an opinion or identify potential areas where coordination may be envisaged by MS in the future or identify, without prejudice to the right of initiative of the Commission, areas where harmonisation is required or could be desirable.
  - d. Other, please, specify.
3. In case written deliverables would be expected from the Platform, what type would you support? (see Annex for examples)
4. If the deliverables were non-binding, how can it be ensured that all Member States commit to implement the developed texts (rules or guidelines) to enhance certainty and simplification for taxpayers?

## **Part II – ESTABLISHMENT AND FUNCTIONING**

5. What are your views about the probable structure of the possible future platform (poss. subgroups, if any), and its governance (role and appointment of chairperson, decision taking etc.) (see Annex)
6. Do you have any suggestion on how could the platform be organised in order to be agile and take decisions effectively?
7. How should the platform interact with other work done or initiatives in the area of transfer pricing (i.e. OECD WP6 or UN Transfer Pricing Subcommittee)?
8. Are there any other aspects you deem important?

## **Part III – A possible way forward: two-layer approach**

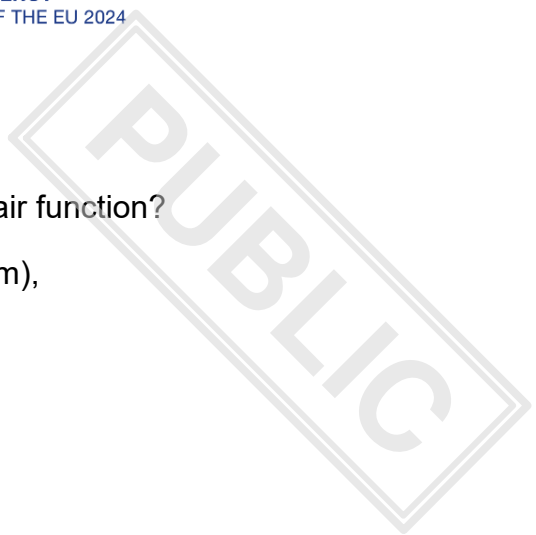
In the frame of the new EU TP Platform there could also be a possibility to set up a two-layer (double-format) structure which could incorporate a layer (format) with MS + third parties, with the role of the Commission (to be defined), to discuss technical matters but adopts no final deliverables, and an additional format/layer, without 3<sup>rd</sup> parties, which adopts final or conclusive deliverables (the nature thereof depending on the contents of the mandate [for example, as the COCG does]).

This approach could be further developed depending on the Member States' views regarding Part I and II and it could also build on the working method and structure of existing solutions (for example the Code of Conduct Group).



*Annex - Potential options to facilitate brain-storming*

1. Potential deliverables
  - a) Council conclusions / Council resolution,
  - b) COM document,
  - c) Guidance (as COCG),
  - d) Reports of the platform,
  - e) other
2. Type of platform
  - a) COCG-type (similar to),
  - b) COM advisory (Commission Group of Experts, like JTPF),
  - c) Two-layer (double-format) approach, where a layer (format) with MS + third parties + COM (role to be defined) discusses technical matters but adopts no final deliverables, and the format/layer without 3<sup>rd</sup> parties adopts final or conclusive deliverables (the nature thereof depending on the contents of the mandate [for example as COCG]),
  - d) other
3. Should the Platform have a mandate for a fixed time period? If yes, how long?  
Renewable or not?
4. Potential participants (besides the MSs and (assistance by) COM) in the discussions:
  - a) businesses,
  - b) tax advisers/lawyers,
  - c) professional associations of tax advisers,
  - d) academics,
  - e) NGOs,
  - f) other



5. What are your preferences with regard to chair function?
  - a) an elected Chair for 2 years (or other term),
  - b) Council PRES delegate,
  - c) same Chair as COCG,
  - d) the COM delegate,
  - e) other
6. Provision of secretarial services
  - a) COM,
  - b) GSC,
  - c) other
7. Type of decision making
  - a) consensus/unanimity by the MSs (only MS vote)
  - b) consensus/unanimity by all its members (if platform includes other voting members than MS delegates),
  - c) majority vote
  - d) other
8. Meeting frequency
  - a) fixed number of meetings per year,
  - b) as COCG (minimal number of meetings (e. g. at least twice) per year, and otherwise – agenda/necessity driven),
  - c) other