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DIRECTORATE GENERAL FOR INTERNAL POLICIES  
POLICY DEPARTMENT A: ECONOMIC AND SCIENTIFIC POLICY

# Role and functioning of certain EU groups in the area of taxation

## IN-DEPTH ANALYSIS

### Abstract

This paper forms part of a series of analytical pieces on the absence of EU-coordination regarding aggressive tax planning and its effects, prepared by Policy Department A at the request of the ECON Committee of the European Parliament. It deals with recent EU initiatives on tax issues on the fight against tax avoidance and aggressive tax planning. Many EU Groups can contribute to the realisation of this work in progress, because of their different priorities. This paper overviews the history, set-up, working methods and results of three EU Groups, i.e. the Council Code of Conduct Group on Harmful Business Taxation, the EU Joint Transfer Pricing Forum Expert Group and the Commission Expert Group on Automatic Exchange of Financial Account Information. Finally, the interaction between these Groups is discussed.

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## EXECUTIVE SUMMARY

The Resolution on a Code of Conduct for Business Taxation that was adopted by the Council provided for the establishment of a Group within the framework of the Council to assess tax measures that may fall within the Code. The COUNCIL CODE OF CONDUCT GROUP ON HARMFUL BUSINESS TAXATION was set up by ECOFIN on 9 March 1998. The Code of Conduct Group reports on 66 harmful tax measures in its report of 1999. The Code of Conduct Group has been monitoring standstill and the implementation of rollback, and reported regularly to the Council. The ECOFIN Council agreed that work should be pursued. The Code of Conduct Group agreed on a Model Instruction in June 2014. This Model Instruction covers cross-border rulings and unilateral advance pricing agreements. The Code of Conduct Group emphasised the need to ensure an efficient implementation of the approved Model Instruction by the end of 2015. Regarding the scope of the mandate of the Code of Conduct Group, some Member States expressed interest in strengthening its role in order to better fight against harmful taxation and BEPS, whilst others would prefer to focus on its existing tasks. The Group decided to dedicate the next meeting of the Code of Conduct Group, preferably in July 2015, to the future of the Code of Conduct Group.

The EU JOINT TRANSFER PRICING FORUM held its first meeting on 3 October 2002. The JTPF continued to operate. On 26 January 2015 the Commission set up the EU JTPF Expert Group which extends the mandate of the JTPF until March 2019. The JTPF consists of representatives of Member States' tax administrations and 18 organisations. The JTPF works within the framework of the OECD Transfer Pricing Guidelines and operates 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 work of the JTPF is divided into two main areas: the Arbitration Convention (a specific dispute resolution mechanism for transfer pricing cases) and other transfer pricing issues identified by the JTPF. In June 2011 the JTPF adopted its 2011-2015 work programme, which covers the following topics: Cost contribution arrangements, risk assessment, compensating/year-end adjustments, secondary adjustments and monitoring of previous achievements. Monitoring covers the Codes of Conduct on the effective implementation of the Arbitration Convention and on transfer pricing documentation in the EU, respectively, and the EU Guidelines on advance pricing agreements.

The COMMISSION EXPERT GROUP ON AUTOMATIC EXCHANGE OF FINANCIAL ACCOUNT INFORMATION will assist the European Commission to assist the Council and Member States to ensure that EU legislation on automatic exchange of information in direct taxation is effectively aligned and fully compatible with the OECD Global Standard on automatic exchange of financial account information. The alignment will aim to limit the administrative burden of such legislation on financial sector businesses while preserving the specific needs of the EU internal market. The Commission launched a call for applications to take part in the work of the group on July 2014. All members are organizations, so no individuals or national administrations are appointed at this moment. The AEFI Group organized its first meeting on 30 October 2014, the second meeting was held on 9 February 2015. The meetings and the discussions of the Group have led to a first report, published on 16 March 2015. The first recommendation tackles the fact that substantial IT projects will have to be planned, budgeted, build and rolled out in a very short time. The second recommendation concerns data protection and privacy. The third recommendation stresses the correct implementation of guidelines in order to clarify procedures and provide definitions. The fourth recommendation states that the definitions of key concepts, in particular Investment Entity and Financial Account, must be clarified with a view to ensuring a consistent implementation of the CRS across all

Member States. Via the fifth recommendation the AEFI Group wants to adapt due diligence procedures for pre-existing accounts which are meant to create operational efficiencies for Participating Jurisdictions Financial Institutions in order to ensure that these operational efficiencies are achieved. The sixth recommendation stresses the need for harmonization of the lists of excluded accounts. In order to ease compliance of financial institutions and to minimize their administrative burdens, the AEFI Group calls in their seventh recommendation on Member States to harmonize the compliance regime starting with the introduction of a standard program of internal audit review requirements. The eighth recommendation handles the IT issues and the schema for reporting. Concurrently with the implementation of 'DAC2', some members of the AEFI Group would like to invite the Commission, the Council and the Member States as a ninth recommendation to consider implementing a standardized and harmonized tax relief at source system and simplified tax refund procedures simultaneously with the automatic exchange of information procedures. In the tenth recommendation the European institutions should provide developing countries with support for the automatic exchange of information. The eleventh recommendation discusses the way forward, by means of including third countries in the OECD's global standard on automatic exchange of information.

Today, there is no question of an interaction between the Code of Conduct Group on Harmful Business Taxation, the EU Joint Transfer Pricing Forum and the Commission Expert Group on Automatic Exchange of Financial Account Information. This does not mean that an interaction between these groups would not be useful; on the contrary, especially in the field of tax rulings would such an interaction pay off. The groups can learn from each other's research and complement each other.

## 1. INTRODUCTION

In line with the more recent request from the European Council on 18 December 2014, during the Latvian Presidency, the Council has focused its work on the fight against tax avoidance and aggressive tax planning, both at the global and EU levels. This has been done, in particular, on the basis of a roadmap on further work related to unfair tax competition, base erosion and profit shifting in the EU context. The Commission proposal for a Council Directive amending Directive 2011/16/EU (DAC) as regards mandatory automatic exchange of information in the field of taxation was presented to the Council in March of 2015. It has been submitted together with a proposal to repeal the Savings Directive, as well as a Commission communication outlining a number of other initiatives to advance tax transparency.

To fight against tax avoidance and tax fraud and to realize this goal, it is necessary that the EU is active on multiple fronts. Three Groups, among others, help the EU to achieve this goal. The Code of Conduct Group on Harmful Business Taxation was set up first. A few years later, the EU Joint Transfer Pricing Forum was set up. The Commission Expert Group on Automatic Exchange of Financial Account Information was only established last year. All three groups have realized much and useful work, both in the past and the present and will – hopefully – continue to do so in the future.



## 2. COUNCIL CODE OF CONDUCT GROUP ON HARMFUL BUSINESS TAXATION

### 2.1. History

The Code of Conduct for Business Taxation was set out in the conclusions of the Council of Economics and Finance Ministers (ECOFIN) of 1 December 1997.<sup>1</sup>

The EU Code of Conduct for Business Taxation is a voluntary political commitment taken by the Member States to comply with the principles of fair tax competition and to refrain from harmful tax measures.<sup>2</sup> The Code is not a legally binding instrument nor affects the individual Member States' competences.

However, it clearly does have political force. By adopting this Code, the Member States have undertaken to 'roll back' existing tax measures that constitute harmful tax competition and refrain from introducing any such measures in the future ('standstill').<sup>3</sup>

### 2.2. Set up

The Resolution that was adopted on a Code of Conduct for Business Taxation by the Council, provided for the establishment of a Group within the framework of the Council to assess tax measures that may fall within the Code.

The Code of Conduct Group was set up by ECOFIN on 9 March 1998, and had its first meeting on 8 May 1998.<sup>4</sup>

The British Paymaster General Mrs. Primarolo was elected president of the Group.<sup>5</sup> After her, both the Group and the report were not only called the 'Code of Conduct Group/Report', but also the 'Primarolo Group/Report'.

Two Vice-Chairs were designated from among the representatives of the Member States holding the current and subsequent Presidencies of the Council. They were Mr Nolz, Director General in the Ministry of Finance, Mr Hauser and Mrs Hendricks, Parliamentary Secretary of State to the Federal Ministry of Finances, Mr Arvela, Director General to the Ministry of Finances and Mr Carlos Santos, firstly as Secretary of State for Tax Affairs, and subsequently as personal representative of the Finance Minister.<sup>6</sup>

The Group is still active (infra 2.5).

### 2.3. Working methods

The Code of Conduct Group selects and reviews the tax measures which fall within the scope of the Code of Conduct for Business Taxation for assessment and oversees the provision of information on those measures.

<sup>1</sup> Council Conclusions of the ECOFIN Council Meeting of 1 December 1997 concerning taxation policy (98/C 2/01), *PBI. EG* 1998, no C-2/1-6, [http://ec.europa.eu/taxation\\_customs/resources/documents/coc\\_en.pdf](http://ec.europa.eu/taxation_customs/resources/documents/coc_en.pdf).

<sup>2</sup> Council Conclusions of the ECOFIN Council Meeting on 1 December 1997 concerning taxation policy (98/C 2/01), Communication from the Commission to the Council and the European Parliament, *A package to tackle harmful tax competition in the European Union*, COM(97) 564 final, 12 p.; Rainer, A., 'The E.C. Code of Conduct for Business Taxation', *Tax Planning International: European Union Focus* 1998, 15; Kiegebeld, B.J., *Harmful tax competition in the European Union: Code of Conduct, countermeasures and EU Law*, in EPS Brochure Series, Deventer, Kluwer, 2004, 160 p..

<sup>3</sup> Council Conclusions of the ECOFIN Council Meeting of 1 December 1997 concerning taxation policy (98/C 2/01), *PBI. EG* 1998, no C-2/1-6, [http://ec.europa.eu/taxation\\_customs/resources/documents/coc\\_en.pdf](http://ec.europa.eu/taxation_customs/resources/documents/coc_en.pdf), 2/4.

<sup>4</sup> *Code of Conduct for Business Taxation*, SN 4901/99, Brussels, 23 November 1999, [http://ec.europa.eu/taxation\\_customs/resources/documents/primarolo\\_en.pdf](http://ec.europa.eu/taxation_customs/resources/documents/primarolo_en.pdf).

<sup>5</sup> T. Villiers, *European Tax Harmonisation. The Impending Threat*, Center for Policy Studies, 2001, 21-22.

<sup>6</sup> *Code of Conduct for Business Taxation*, SN 4901/99, Brussels, 23 November 1999, [http://ec.europa.eu/taxation\\_customs/resources/documents/primarolo\\_en.pdf](http://ec.europa.eu/taxation_customs/resources/documents/primarolo_en.pdf), 5.

The Code of Conduct Group reported regularly on the measures assessed. These reports were forwarded to the Council for deliberation.

On 16 July 1998, the Commission submitted to the Group an Initial Indicative List of Measures that might fall under the Scope of the Code of Conduct (Business Taxation). In order to draw up this list, the Commission used the information from Member States, material based on earlier discussions in the Taxation Policy Group and publicly available information. The Group agreed that the list provided a sensible starting point for its work, whilst noting that the list was not exhaustive and was without prejudice to its assessment of whether the measures were in fact harmful. As provided for under the Code, delegations could suggest the addition of further measures if they so wanted. Based on the information from Member States, the Commission circulated a revised list by 25 September 1998.<sup>7</sup>

The Council, when adopting the Code, acknowledged the positive effects of fair competition, which can indeed be beneficial.<sup>8</sup> The Code searched for those measures (including both laws or regulations and administrative practices) which affect, or may affect, in a significant way the location of business activity in the EU, by being targeted merely at non-residents. Therefore, the first investigation studied whether there was a significantly lower effective level of taxation, including zero taxation, than those levels which generally apply in the Member State in question.<sup>9</sup>

For the purpose of identifying such harmful measures, the Code sets out the criteria against which any potentially harmful measures are to be tested, inter alia:

- an effective level of taxation which is significantly lower than the general level of taxation in the country concerned;
- whether advantages are accorded only to non-residents or with respect to transactions carried out with non-residents;
- whether advantages are ring-fenced from the domestic market, so they do not have impact on the national tax base;
- whether advantages are granted even without any real economic activity and substantial economic presence within the Member State offering such tax advantages;
- whether the rules for profit determination in respect of activities within a multinational group of companies depart from internationally accepted principles, notably the rules agreed upon within the OECD;
- whether the tax measures lack transparency, including where legal provisions are relaxed at administrative level in a non-transparent way.<sup>10</sup>

According to Burgers a number of differences between factors indicating harmful tax measures can be detected.<sup>11</sup> In contrast to the OECD, the EU does not regard the exclusive granting of the tax facility as ring fencing. Furthermore, the OECD considers as ring fencing

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<sup>7</sup> *Code of Conduct for Business Taxation*, SN 4901/99, Brussels, 23 November 1999, [http://ec.europa.eu/taxation\\_customs/resources/documents/primarolo\\_en.pdf](http://ec.europa.eu/taxation_customs/resources/documents/primarolo_en.pdf), 6.

<sup>8</sup> [http://ec.europa.eu/taxation\\_customs/taxation/company\\_tax/harmful\\_tax\\_practices/index\\_en.htm#code\\_conduct](http://ec.europa.eu/taxation_customs/taxation/company_tax/harmful_tax_practices/index_en.htm#code_conduct)

<sup>9</sup> *Code of Conduct for Business Taxation*, SN 4901/99, Brussels, 23 November 1999, [http://ec.europa.eu/taxation\\_customs/resources/documents/primarolo\\_en.pdf](http://ec.europa.eu/taxation_customs/resources/documents/primarolo_en.pdf), 2; Rainer, A., 'The E.C. Code of Conduct for Business Taxation', *Tax Planning International: European Union Focus* 1998, 14.

<sup>10</sup> *Code of Conduct for Business Taxation*, SN 4901/99, Brussels, 23 November 1999, [http://ec.europa.eu/taxation\\_customs/resources/documents/primarolo\\_en.pdf](http://ec.europa.eu/taxation_customs/resources/documents/primarolo_en.pdf), 3.

<sup>11</sup> Burgers, I.J.J., 'Schadelijke belastingconcurrentie: het Nederlandse rulingbeleid exit?', in *LOF-Congress*, Groningen, 2000, 61.

tax facilities that are only granted to corporations which do not operate in the internal market when the reason for it is an implicit or explicit prohibition, while the EU criteria also consider it as ring fencing in the absence of such a prohibition. Moreover, it should be remarked that the EU Code of Conduct does not apply to the non-EU Member States which are covered by the OECD report. The report strongly emphasizes the exchange of information and the so-called tax havens, issues not discussed by the EU Code of Conduct.<sup>12</sup>

The Group decided to divide the initial list into the following five categories: intra group services, financial services and off-shore companies, other sector-specific regimes, regional incentives, and other measures. A further category covered dependent or associated territories.<sup>13</sup>

For each category, a separate sub-group was established, that studied whether the measures are actually harmful. These sub-groups were chaired by Mrs Primarolo and one of the Vice-Chairs to the Group: initially Mr Nolz, and then Mr Kieschke, Deputy Director General to the Federal Ministry of Finances, representing Mrs Hendricks, and Mr Arvela, respectively.

Guidance agreed by the Group stated for the sub-groups that:

- they would ensure that the list of measures under examination is as complete as possible;
- they would carry out an initial examination of the measures against the criteria in paragraph B of the Code of Conduct on a cross-country basis, in order to set out the facts and elements of evaluation;
- their workings shall be confidential.<sup>14</sup>

The Commission Services produced short summaries of the measures under consideration.<sup>15</sup> It also circulated a generic background paper for information which provided an overview of the typical features of preferential tax measures for intra-group and financial service activities. The Code of Conduct provides that any Member State may request the opportunity to discuss and comment on a tax measure of another Member State that may fall within the scope of the Code. Some Member States have made use of this provision accordingly.

Descriptions were agreed on as accurate and complete. An initial assessment was made against the criteria. Member States were invited, if they so wished, to submit reports on why in their opinion the measures do not provide for a significantly lower effective level of taxation, including zero taxation or why in their opinion their measures related to outermost regions and small islands should be considered in proportion to, and targeted at, the economic development sought.

The Group also discussed significant issues and themes, based on short discussion papers, prepared by the Chair and the Commission Services to assist the Group in the evaluation process.

The Group requested the Commission to provide two studies. The Commission presented a cross-country review of the tax treatment of holding companies in the Member States to assist the Group in the evaluation process. The Commission appointed consultants to

<sup>12</sup> Burgers, I.J.J., 'Schadelijke belastingconcurrentie: het Nederlandse rulingbeleid exit?', in *LOF-Congress*, Groningen, 2000, 61.

<sup>13</sup> *Code of Conduct for Business Taxation*, SN 4901/99, Brussels, 23 November 1999, [http://ec.europa.eu/taxation\\_customs/resources/documents/primarolo\\_en.pdf](http://ec.europa.eu/taxation_customs/resources/documents/primarolo_en.pdf), 6.

<sup>14</sup> *Code of Conduct for Business Taxation*, SN 4901/99, Brussels, 23 November 1999, [http://ec.europa.eu/taxation\\_customs/resources/documents/primarolo\\_en.pdf](http://ec.europa.eu/taxation_customs/resources/documents/primarolo_en.pdf), 6.

<sup>15</sup> This paragraph is based on the *Code of Conduct for Business Taxation*, SN 4901/99, Brussels, 23 November 1999, [http://ec.europa.eu/taxation\\_customs/resources/documents/primarolo\\_en.pdf](http://ec.europa.eu/taxation_customs/resources/documents/primarolo_en.pdf), 7ff.

undertake a comparative study across Member States of administrative practices in taxation. Member States presented a number of comments on that study.

The Group assessed a range of measures covering activities related to the provision of financial services to third parties, intra group financing, the provision or licensing of intangible property in return for royalty payments, the taxation of insurance activities, transfer pricing of intra group services. The Group considered that the assessment of measures relating to holding companies was particularly complex and difficult and also raised a number of wider issues. The Group considered a range of measures which provide for the partial or complete exemption from tax of corporate profits or certain categories of profits including those arising from offshore activities. The Group found that the remaining measures should be given a negative evaluation on the grounds that in its assessment they do not affect to a significant extent the location of business activity in the European Community.

## 2.4. Results

Two interim reports of the Code of Conduct Group were presented to the ECOFIN Council on 1 December 1998<sup>16</sup> and 25 May 1999<sup>17</sup> respectively.

On 23 November 1999, the Group sent its report on the code of conduct for business taxation to the ECOFIN Council of 29 November 1999.<sup>18</sup>

The criteria determining harmful tax measures have been conceived in a large sense by the Code of Conduct, which initially led to not less than 250 measures being considered potentially harmful.

Finally, the Group identified 66 tax measures with harmful features (40 in EU Member States, 3 in Gibraltar and 23 in dependent or associated territories) in the Report of 23 November 1999.

Member States and their dependent and associated territories have now introduced revised or replacement measures in substitution for the 66 measures. For beneficiaries of those regimes on or before 31 December 2000, a 'grand-fathering' clause has been provided under which benefits have to lapse no later than 31 December 2005, independently of whether or not they were granted for a fixed period. Some extensions of benefits for defined periods of time beyond 2005 have been agreed for measures in Member States and their dependent and associated territories. Since then, the Code of Conduct Group has been monitoring standstill and the implementation of rollback, and reported regularly to the Council.

In response to the Code of Conduct, the Netherlands for example have transformed their system of standard and non-standard rulings to the current ATR/APA-regulation in 2001, which has meanwhile been marked as not harmful by the OECD.<sup>19</sup> This led Dutch scholars to an interesting discussion on the publication and transparency of tax rulings.

Stevens did not agree with the judgment of the Code of Conduct. According to this author,

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<sup>16</sup> DOC 12530/98 FISC 164.

<sup>17</sup> DOC 8231/99 FISC 119.

<sup>18</sup> *Code of Conduct for Business Taxation*, SN 4901/99, Brussels, 23 November 1999, [http://ec.europa.eu/taxation\\_customs/resources/documents/primarolo\\_en.pdf](http://ec.europa.eu/taxation_customs/resources/documents/primarolo_en.pdf), 1. See also: Bidgland, N., 'The EU Code of Conduct to eliminate harmful business tax regimes: the future', *Tax Planning International: European Union Focus* 2006, no 1, 8-11; Maclachlan, J.E. & Chmiel, D., 'The Drive against 'Harmful' Tax Competition: the E.U. Commission's Code of Conduct on Direct Taxation and Related Developments', *Tax Planning International: European Union Focus* 2000, vol. 2, no 2, 3; Rainer, A., 'The E.C. Code of Conduct for Business Taxation', *Tax Planning International: European Union Focus* 1998, 13.

<sup>19</sup> Meussen, G. & Velthuizen, E., 'APAs and ATRs: The new Dutch regime in a European perspective', *EC Tax Review* 2002, 7.

the group has misunderstood the Dutch ruling system, which on the contrary led to greater transparency and legal certainty.<sup>20</sup> Engelen did not agree either on the view that the Dutch ruling system would be harmful in the sense of the Code of Conduct.<sup>21</sup> The latter author expresses his reservations with the requirement of transparency. According to Engelen, the question can be asked whether the former ruling policy was sufficiently transparent. Even though the ruling policy is published and the parliament is informed about it, the requests that are under the jurisdiction of local inspectors (instead of the ruling team in Rotterdam) remain secret. These individual cases regarding, among other things, the arm's length principle are not published (anonymously). Wattel wonders whether the Code of Conduct demands that every individual ruling be published anonymously (so-called 'americanization').<sup>22</sup> Engelen agrees with the State Secretary of Finance of the Netherlands who thinks that the reluctance in individual cases does not compromise the disclosure and transparency of the Dutch ruling policy in general. He does concede that the individual cases that are treated by local inspectors and that remain outside of the communication and publication of the ruling policy are susceptible to the presumption of being a harmful tax measure in the sense of the Code of Conduct.<sup>23</sup>

Regarding the issues of improvements in the field of transparency of procedures, the Group agreed on the following guidance: 'To the extent that it accommodates the advance interpretation or application of a legal provision to a specific situation or transaction of an individual taxpayer, the underlying procedures should be embedded in a transparent legal and administrative framework. Where this advance interpretation or application is suitable for horizontal application in similar situations, this interpretation or application should be published or be reflected in update guidance, or be made otherwise publicly available'.<sup>24</sup>

## 2.5. Follow-up and future

In its report to the Feira European Council on 19 and 20 June 2000, the ECOFIN Council agreed that work should be pursued with a view to reaching an agreement on the tax package as a whole, according to a parallel timetable for the key parts of the tax package (taxation of savings, Code of Conduct (business taxation) and interest and royalties).<sup>25</sup> The Group continued its work on the rollback, on the standstill and on the various other aspects.

In 2012, the Code of Conduct Group reviewed developments in Member States' transparency of procedures for providing advance certainty and the publication of individual rulings suitable for horizontal application.<sup>26</sup> With a view to stimulating spontaneous exchange of information in relation to specific cross border rulings, the Group looked at the Member States' internal framework for the spontaneous exchange of information and suggested that the Commission's Committee on Administrative Cooperation for Taxation analyse this matter further, with a view to a possible development of a Model Instruction that could be used as a reference by the Member States for internal application and follow-

<sup>20</sup> Stevens, L., "Ruling policy increases administrative transparency", *EC Tax Review* 2001, no 2, 70-71.

<sup>21</sup> Engelen, F.A., "Belastingconcurrentie binnen de EU. Over fiscale beleidsconcurrentie, fiscale marktdistorsies en fiscale staatssteun", *MBB* 1999, no 1, 31.

<sup>22</sup> Wattel, P.J., "Belastingconcurrentie, staatssteun, de EG-gedragscode en de Nederlandse CFM", *Nederlands Tijdschrift voor Europees Recht* 1998, 24.

<sup>23</sup> Engelen, F.A., 'Belastingconcurrentie binnen de EU. Over fiscale beleidsconcurrentie, fiscale marktdistorsies en fiscale staatssteun', *MBB* 1999, no 1, 32.

<sup>24</sup> Document 10033/10 FISC 47, Brussels, 25 May 2010, 11.

<sup>25</sup> Report of the Code of Conduct Group (Business Taxation) to the Permanent Representatives Committee/Council, 11 June 2015, DOC 9620/15 FISC 60 ECOFIN 443, <http://data.consilium.europa.eu/doc/document/ST-9620-2015-INIT/en/pdf>, 1.

<sup>26</sup> Commission staff working document, SWD(2015) 60 final, [http://ec.europa.eu/taxation\\_customs/resources/documents/taxation/company\\_tax/transparency/swd\\_2015\\_60.pdf](http://ec.europa.eu/taxation_customs/resources/documents/taxation/company_tax/transparency/swd_2015_60.pdf), 8.

up.<sup>27</sup> The Code of Conduct Group agreed on the Model Instruction in its report of June 2014.<sup>28</sup> The Model Instruction covers cross-border rulings and unilateral advance pricing arrangements. Unfortunately, there is no public document available.

A questionnaire was circulated to the Member States to receive information on measures taken concerning the agreed Model Instruction for spontaneous exchange of cross-border rulings and unilateral APAs. The responses show that some Member States have not yet started the implementation of the Model Instruction. The Group emphasised the need to ensure effective implementation of the approved Model instruction by the end of 2015.<sup>29</sup>

On the basis of the Work Programme approved in 2011, the Code of Conduct Group met three times under the Latvian Presidency in 2015. On 4 February 2015, Dr. Wolfgang Nolz was reappointed as chair of the Code of Conduct group for a period of two years.<sup>30</sup>

At the end of 2014, the Group had agreed on a guidance on intra-EU hybrid entities. Under the Latvian Presidency technical work on mismatches in connection with hybrid permanent establishments was continued in a Code of Conduct sub-group, which met on 8 April 2015. The Group agreed on guidance notes with regard to hybrid permanent establishments. The Group invited the sub-group to continue its work regarding further cases of hybrid mismatches on 2 June 2015.

In 2014, the Commission presented a checklist as a basis for assessing the extent to which Member States rules comply with the agreed guidance on inbound profit transfers. Member States were invited to send their comments on the checklist. After the presentation of the Commission's analysis based on the toolbox approach in January 2015, it was agreed that further work is required.

The Code Group continued its efforts to promote the principles and criteria of the Code of Conduct towards third countries, concentrating on a dialogue with Liechtenstein and Switzerland. The dialogue with Switzerland was successfully closed in October 2014 and discussions with Liechtenstein have recently been restarted. The Commission informed the Group on the state of play of the dialogue with Liechtenstein.<sup>31</sup>

Regarding the scope of the mandate of the Code of Conduct Group, some Member States expressed interest in strengthening its role to better fight against harmful taxation and BEPS, whilst others would prefer to focus on its existing tasks.<sup>32</sup>

The Group agreed on contributing to the debate on the future of the Group, with the aim of enabling the ECOFIN to discuss strengthening the role of the Group. Up to now five proposals have been presented. The Chair reported on 16 April 2015. No agreement has been reached so far.

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<sup>27</sup> DOC 10903/12 FISC 77, Brussels, 11 June 2012, 6.

<sup>28</sup> DOC 10608/14 FISC 95.

<sup>29</sup> Report of the Code of Conduct Group (Business Taxation) to the Permanent Representatives Committee/Council, 11 June 2015, DOC 9620/15 FISC 60 ECOFIN 443, <http://data.consilium.europa.eu/doc/document/ST-9620-2015-INIT/en/pdf>, 4.

<sup>30</sup> Report of the Code of Conduct Group (Business Taxation) to the Permanent Representatives Committee/Council, 11 June 2015, DOC 9620/15 FISC 60 ECOFIN 443, <http://data.consilium.europa.eu/doc/document/ST-9620-2015-INIT/en/pdf> and ECOFIN Report to the European Council on Tax issues, Note from the General Secretariat of the Council to Delegations, FISC 81 ECOFIN 529 CO EUR-PREP 29, <http://data.consilium.europa.eu/doc/document/ST-10161-2015-INIT/en/pdf>, 15-18.

<sup>31</sup> ECOFIN Report to the European Council on Tax issues, Note from the General Secretariat of the Council to Delegations, FISC 81 ECOFIN 529 CO EUR-PREP 29, <http://data.consilium.europa.eu/doc/document/ST-10161-2015-INIT/en/pdf>, 17.

<sup>32</sup> ECOFIN Report to the European Council on Tax issues, Note from the General Secretariat of the Council to Delegations, FISC 81 ECOFIN 529 CO EUR-PREP 29, <http://data.consilium.europa.eu/doc/document/ST-10161-2015-INIT/en/pdf>, 27.

Further work will focus on making better use of the existing mandate of the Code, on examining the possibilities to extend the mandate and to update the criteria, and on the need to adjust the governance of the Code accordingly.

The Group decided to dedicate the next meeting of the Code of Conduct Group, preferably in July 2015, to the future of the Code of Conduct Group.<sup>33</sup>

In any case, it is certain that the report of the Code of Conduct Group of 1999 was watched closely and followed up by both the Member States (in eliminating harmful tax measures) and the European Commission (in ascertaining where an investigation into Fiscal State Aid should be done). This Group has set a lot in motion. It is conceivable that history repeats itself.

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<sup>33</sup> Report of the Code of Conduct Group (Business Taxation) to the Permanent Representatives Committee/Council, 11 June 2015, DOC 9620/15 FISC 60 ECOFIN 443, <http://data.consilium.europa.eu/doc/document/ST-9620-2015-INIT/en/pdf>, 5.

### 3. EU JOINT TRANSFER PRICING FORUM (EXPERT GROUP)<sup>34</sup>

#### 3.1. History

The EU Joint Transfer Pricing Forum (JTPF) was informally set up as a follow-up to Staff working paper SEC(2001) 1681 and Communication COM(2001) 582 on company taxation in the internal market 'Towards an Internal Market without tax obstacles – A strategy for providing companies with a consolidated corporate tax base for their EU-wide activities' in June 2002.<sup>35</sup>

It is surprising how topical the following quotation from this Commission Staff Working Paper introducing a Joint Forum on Transfer Pricing is. It reveals the 'raison d'être' for the establishment of this forum:

'This section has considered a variety of measures that could help to tackle compliance cost and double taxation problems in the area of transfer pricing. The Internal Market clearly requires stricter standards here than would otherwise be the case.

The practical application of the Arbitration Convention could certainly be improved and its provisions made subject to interpretation by the Court of Justice. Moreover, Member States could be encouraged to introduce or expand bilateral or multilateral Advance Pricing Agreement programmes; such instruments, although costly, are an effective means of dealing with the uncertainty relating to transfer pricing.

More ambitiously, and subject to safeguards to prevent aggressive tax planning, a framework for prior agreement or consultation before tax administrations enforce transfer pricing adjustments could be established.

More generally, compliance costs and uncertainty could be reduced by better coordination between Member States as regards documentation requirements and the application of the various methods, for example by developing best practices. Such co-ordination could take place in the context of an EU working group and should build upon and complement the OECD activities in this field.

Co-ordination in this area has already begun to some extent in the framework of the Code of Conduct group. It would be possible to develop that process further in order also to address the concerns of business. The establishment by the Commission of a Joint Forum on transfer pricing comprising representatives of tax authorities and business might allow the currently conflicting perspectives of the two sides to be reconciled.

While on the one hand tax administrations view transfer pricing as a common vehicle for tax avoidance or evasion by companies and as a source of harmful tax competition between Member States, business on the other hand considers that tax authorities are imposing disproportionate compliance costs.

<sup>34</sup> This part of the paper is based on the information provided on the website: [http://ec.europa.eu/taxation\\_customs/taxation/company\\_tax/transfer\\_pricing/forum/index\\_en.htm](http://ec.europa.eu/taxation_customs/taxation/company_tax/transfer_pricing/forum/index_en.htm).

<sup>35</sup> Commission Staff Working Document. Company Taxation in the Internal Market, {COM(2001)582 final}, SEC (2001) 1681 of 23 October 2001, [http://ec.europa.eu/taxation\\_customs/resources/documents/company\\_tax\\_study\\_en.pdf](http://ec.europa.eu/taxation_customs/resources/documents/company_tax_study_en.pdf).



This study finds that both sides have legitimate concerns to which it is necessary to seek a balanced solution through dialogue at EU level. A more uniform approach by EU Member States would also contribute to a stronger position in relation to third countries'.<sup>36</sup>

The JTPF works within the framework of the OECD Transfer Pricing Guidelines<sup>37</sup> and operates 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. Hence, the JTPF assists and advises the European Commission on transfer pricing tax matters.

### 3.2. Set up

The EU Joint Transfer Pricing Forum held its inaugural meeting on 3 October 2002.<sup>38</sup>

The JTPF was formally established by Decision 2007/75/EC setting up an expert group on transfer pricing, which expired on 31 March 2011.<sup>39</sup>

On 25 January 2011 the Commission adopted Decision 2011/175 setting up the EU Joint Transfer Pricing Forum Expert Group which extended the JTPF's mandate until March 2015.<sup>40</sup> Member States were invited to nominate experts to represent their national tax administrations in the group. In April 2011, 16 new private-sector members and the chairperson of the JTPF were appointed.

On 26 January 2015 the Commission adopted Decision 2015/247 setting up the EU Joint Transfer Pricing Forum Expert Group which extends the mandate of the JTPF until March 2019.<sup>41</sup> The JTPF consists of representatives of Member States' tax administrations and 18 organisations. The Commission published a call for applications for the selection of organisations for the EU Joint Transfer Pricing Forum.<sup>42</sup> Member States were invited separately to nominate experts to represent their national tax administrations in the JTPF. It is chaired by an independent chairperson appointed by the Director-General of DG Taxation and Customs Union. Representatives from candidate countries (Albania, FYR Macedonia, Iceland, Montenegro, Serbia and Turkey) and from the OECD may be invited to the JTPF as observers.

On 12 May 2015, the Director-General for Taxation and Customs Union appointed the members and the chairperson for a new mandate of two years starting on 1 April 2015 until 30 March 2017.<sup>43</sup>

<sup>36</sup> Commission Staff Working Document. Company Taxation in the Internal Market, {COM(2001)582 final}, SEC (2001) 1681 of 23 October 2001,

[http://ec.europa.eu/taxation\\_customs/resources/documents/company\\_tax\\_study\\_en.pdf](http://ec.europa.eu/taxation_customs/resources/documents/company_tax_study_en.pdf), 356-357.

<sup>37</sup> <http://www.oecd.org/tax/transfer-pricing/transfer-pricing-guidelines.htm>.

<sup>38</sup> [http://ec.europa.eu/taxation\\_customs/taxation/company\\_tax/transfer\\_pricing/forum/article\\_389\\_en.htm](http://ec.europa.eu/taxation_customs/taxation/company_tax/transfer_pricing/forum/article_389_en.htm);

Summary record of the first meeting of the EU Joint Transfer Pricing Forum, held in Brussels on 3rd October 2002, JTPF/004/2002/EN,

[http://ec.europa.eu/taxation\\_customs/resources/documents/forum1/minutesjtpf\\_en.pdf](http://ec.europa.eu/taxation_customs/resources/documents/forum1/minutesjtpf_en.pdf).

<sup>39</sup> Commission Decision of 22 December 2006 setting up an expert group on transfer pricing (2007/75/EC): <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2007:032:0189:0191:EN:PDF>.

<sup>40</sup> Commission Decision of 25 January 2011 setting up the EU Joint Transfer Pricing Forum expert group (2011/C 24/03): <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2011:024:0003:0004:EN:PDF>.

<sup>41</sup> Commission Decision of 26 January 2015 setting up the 'EU Joint Transfer Pricing Forum' expert group', C(2015) 247 final,

[http://ec.europa.eu/taxation\\_customs/resources/documents/taxation/company\\_tax/transfer\\_pricing/forum/decision\\_c\(2015\)247\\_en.pdf](http://ec.europa.eu/taxation_customs/resources/documents/taxation/company_tax/transfer_pricing/forum/decision_c(2015)247_en.pdf).

<sup>42</sup> Call for applications for the selection of organisations for the EU Joint Transfer Pricing Forum (JTPF), [http://ec.europa.eu/taxation\\_customs/resources/documents/taxation/company\\_tax/transfer\\_pricing/forum/call\\_applications\\_2015\\_en.pdf](http://ec.europa.eu/taxation_customs/resources/documents/taxation/company_tax/transfer_pricing/forum/call_applications_2015_en.pdf).

<sup>43</sup> [http://ec.europa.eu/taxation\\_customs/resources/documents/taxation/company\\_tax/transfer\\_pricing/forum/2015\\_05\\_12\\_decision\\_to\\_appoint\\_non\\_governmental\\_members.pdf](http://ec.europa.eu/taxation_customs/resources/documents/taxation/company_tax/transfer_pricing/forum/2015_05_12_decision_to_appoint_non_governmental_members.pdf).

Bruno Gibert is chairman of the JTPF of the CMS Bureau Francis Lefebvre.

The non-government Members are:

- BDI (Federation of German Industries)
- BEPS Monitoring Group
- Brose Fahrzeugteile GmbH & Co KG
- Deloitte
- EATLP (European Association of Tax Law Professors)
- Eurodad
- Financial Transparency Coalition
- Grant Thornton Société d'Avocats
- International Tax Center Leiden (Transfer Pricing Research Center)
- A.P. Moller Maersk
- NERA Economic Consulting
- Network of Member Firms of PwC
- Plansee Group
- Prysmian Group
- Repsol Group
- TPCA (Transfer Pricing Centre Association – Stowarzyszenie Centrum Cen Transferowych)
- AB Volvo

### **3.3. Working methods**

The executive summary of the first meeting of the EU JTPF of 3 October 2002 formulates the priorities as follows:

The FORUM adopted its rules of procedure agreeing that all working documents should be considered public unless the FORUM decided otherwise by consensus or a Member opposed the disclosure of its proprietary documents. Minutes of meetings should also be made public after approval by the FORUM.

Business experts elected Mr. Guy Kersch, Director European Taxes of Pharmacia S.A., Luxemburg, and Member States elected Mrs. Montserrat Trape Viladomat, Deputy Head of the International Taxation Unit from Spain as Vice-Chairpersons.

The FORUM held an exhaustive exchange of views on its working programme and the priorities for the next two years.

The discussion showed that most Members were of the opinion that the highest priority should be attributed to practical solutions for a more uniform application of the Arbitration Convention in order to achieve more certainty as regards the procedural issues of the Arbitration Convention. That included both the first phase of the Arbitration Convention, i.e. the

mutual agreement procedure, and the second phase, i.e. the arbitration itself.

The FORUM agreed to give more clarification and develop a common approach on the starting point of the three-year application period according to Article 6.1 of the Arbitration Convention and the two-year period provided for reaching an agreement, i.e. the first phase according to Article 7.1 of the Arbitration Convention.

There was also consensus that the FORUM should give more specific guidance as regards the proceedings during the Convention's arbitration phase and should seek a common view on a uniform, pragmatic and transparent solution on how to handle cases, both pending and new ones, during the interim period.

It was however decided not to address the issue of interpretation of definitions for the time being.

On more general transfer pricing issues, and despite some reservations from certain Members, the majority view was that the issue of documentation requirements on transfer prices should be addressed by the FORUM.

It was also concluded that despite the demand for APAs from businesses, APAs faced quite some scepticism and criticism because of the shortcomings linked to them. The FORUM should therefore in the first place study other procedural means to enable taxpayers to achieve greater certainty and in particular the possibility of prior consultation before making adjustments between tax administrations. Both issues should be examined together but were attributed low priority.

Simultaneous examination of transfer pricing cases by different tax administrations was to be dealt with only after further progress on the above was made.

On the establishment of a detailed calendar there was consensus that generally two topics should be discussed at each of the FORUM's meetings.

However, considering the high priority given to the issue, it was decided that at the next meeting of the FORUM only procedural improvements of the Arbitration Convention and related issues of the mutual agreement procedure, e.g. suspension of tax collection, interest charges etc., should be discussed. At the following meeting the FORUM will continue these discussions and will in addition deal with other transfer pricing aspects of dispute settlement'.<sup>44</sup>

Hence, the work of the JTPF is divided into two main areas: the Arbitration Convention (a specific dispute resolution mechanism for transfer pricing cases) and other transfer pricing issues identified by the JTPF.

The actual group's tasks are the following (article 2 of the Commission Decision of 26 January 2015 setting up the EU JTPF expert group):

- to create a platform where business, civil society and national tax administration experts can discuss transfer pricing problems which constitute obstacles to cross-border business activities within the Union;

<sup>44</sup> Summary Record of the First Meeting of the EU Joint Transfer Pricing Forum held in Brussels, 3 October 2002, TPF/004/2002/EN, [http://ec.europa.eu/taxation\\_customs/resources/documents/forum1/minutesjtpf\\_en.pdf](http://ec.europa.eu/taxation_customs/resources/documents/forum1/minutesjtpf_en.pdf).

- to advise the Commission on transfer pricing tax issues;
- to assist the Commission in finding practical solutions, compatible with the OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations.<sup>45</sup>

The Commission may consult the Forum on any matter relating to transfer pricing. The Chairperson of the Forum may advise the Commission to consult the Forum on a specific question (article 3).

Article 4 of the Commission Decision of 26 January 2015 setting up the EU JTPF expert group explains the working methods:<sup>46</sup>

Meeting documents shall be prepared under the responsibility of the Chairperson, in consultation with the Commission's representative.

In agreement with the Commission's representative, the Forum may set up sub-groups to examine specific questions on the basis of terms of reference defined by the Forum. Such sub-groups shall be disbanded as soon as their mandate is fulfilled.

The Commission's representative may invite on an ad hoc basis experts from outside the Forum with specific competence in a subject on the agenda to participate in the work of the Forum or subgroup. In addition, the Commission's representative may give observer status to individuals, organisations, candidate countries, and the OECD.

Members of the Forum and their representatives, as well as invited experts and observers, shall comply with the obligations of professional secrecy laid down by the Treaties and their implementing rules, as well as with the Commission's rules on security regarding the protection of EU classified information. Should they fail to respect these obligations, the Commission may take all appropriate measures.

In principle, the meetings of the Forum and its sub-groups shall be held on Commission premises. Other Commission officials with an interest in the proceedings may attend meetings of the Forum and its sub-groups.

The Forum shall adopt its rules of procedure on the basis of the standard rules of procedure for expert groups.

The Commission shall publish all relevant documents on the activities carried out by the Forum such as agendas, minutes and participants' submissions, either in the Register or via a link from the Register to a dedicated website where information can be found. Exceptions to publication are possible where disclosure of a document would undermine the protection of a public or private interest.

The JTPF publishes its work programmes and meeting reports (3-4 times a year) on the website.<sup>47</sup>

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<sup>45</sup> Commission Decision of 26 January 2015 setting up the 'EU Joint Transfer Pricing Forum' expert group, C(2015) 247 final, [http://ec.europa.eu/taxation\\_customs/resources/documents/taxation/company\\_tax/transfer\\_pricing/forum/decision\\_c\(2015\)247\\_en.pdf](http://ec.europa.eu/taxation_customs/resources/documents/taxation/company_tax/transfer_pricing/forum/decision_c(2015)247_en.pdf).

<sup>46</sup> Commission Decision of 26 January 2015 setting up the 'EU Joint Transfer Pricing Forum' expert group, C(2015) 247 final, [http://ec.europa.eu/taxation\\_customs/resources/documents/taxation/company\\_tax/transfer\\_pricing/forum/decision\\_c\(2015\)247\\_en.pdf](http://ec.europa.eu/taxation_customs/resources/documents/taxation/company_tax/transfer_pricing/forum/decision_c(2015)247_en.pdf).

<sup>47</sup> [http://ec.europa.eu/taxation\\_customs/taxation/company\\_tax/transfer\\_pricing/forum/index\\_en.htm#programme](http://ec.europa.eu/taxation_customs/taxation/company_tax/transfer_pricing/forum/index_en.htm#programme);  
[http://ec.europa.eu/taxation\\_customs/taxation/company\\_tax/transfer\\_pricing/forum/index\\_en.htm#meetings](http://ec.europa.eu/taxation_customs/taxation/company_tax/transfer_pricing/forum/index_en.htm#meetings).

### 3.4. Results

In June 2011 the JTPF adopted its 2011-2015 work programme, which covers the following topics: cost contribution arrangements, risk assessment, compensating/year-end adjustments, secondary adjustments and monitoring of previous achievements.<sup>48</sup>

Monitoring will cover the Codes of Conduct on the effective implementation of the Arbitration Convention and on transfer pricing documentation in the EU, respectively, and the Guidelines on APAs in the EU. Monitoring will be conducted with the aim of establishing to what extent the previous works of the JTPF are implemented, to evaluate their effectiveness and to consider how improvements might be made. This means for the APA Guidelines a review of APA policy/programmes in the Member States (based on private sector practical experience).

The JTPF monitors regularly the number of pending Mutual Agreement Procedures (MAPs) under the Arbitration Convention<sup>49</sup> and the number of Advance Pricing Agreements (APA).<sup>50</sup> Data is collected from Member States on an annual basis after each year end.

The staff working document of the European Commission accompanying the Proposal for a Council Directive amending Directive 2011/16/EU as regards exchange of information in the field of taxation<sup>51</sup> mentions that according to this information, at the end of 2013, 9 Member States did not have any advance pricing arrangements in force, 10 Member States had between 1 and 25, 6 Member States between 30 and 75, and 1 Member State more than 100 advance pricing arrangements. Across the EU, 2 out of 3 advance pricing arrangements are unilateral arrangements, 1 out of 3 is bi- or multilateral. It is interesting to note that where cross-border transactions include non-EU countries, advance pricing arrangements appear more likely to be bi- or multilateral than transactions within the EU. For advance pricing arrangements only within the EU, out of the 370 arrangements in force around 310 are unilateral and 60 bi- or multilateral. In contrast, the 180 arrangements in force which include non-EU countries are split almost evenly between unilateral (90) and bi- and multilateral arrangements (87).

On 23 April 2004, the Commission adopted Communication 2004/297 on the Work of the JTPF in business taxation (October 2002 - December 2003) and on a Code of Conduct for the effective implementation of the Arbitration Convention.<sup>52</sup> On 7 December 2004 the Council adopted the proposed code of conduct.

<sup>48</sup> EU Joint Transfer Pricing Forum work programme 2011-2015, JTPF/016/2011/EN, June 2011, [http://ec.europa.eu/taxation\\_customs/resources/documents/taxation/company\\_tax/transfer\\_pricing/forum/jtpf\\_work\\_programme\\_2011-2015.pdf](http://ec.europa.eu/taxation_customs/resources/documents/taxation/company_tax/transfer_pricing/forum/jtpf_work_programme_2011-2015.pdf).

<sup>49</sup> EU Joint Transfer Pricing Forum Statistics on Pending Mutual Agreement Procedures (MAPs) under the Arbitration Convention at the end of 2012, JTPF/012/REV1/2013/EN, December 2013, [http://ec.europa.eu/taxation\\_customs/resources/documents/taxation/company\\_tax/transfer\\_pricing/forum/jtpf/2013/jtpf\\_013\\_2013\\_en.pdf](http://ec.europa.eu/taxation_customs/resources/documents/taxation/company_tax/transfer_pricing/forum/jtpf/2013/jtpf_013_2013_en.pdf); EU Joint Transfer Pricing Forum Statistics on Pending Mutual Agreement Procedures (MAPs) under the Arbitration Convention at the end of 2013, JTPF/008/2014/EN, October 2014, [http://ec.europa.eu/taxation\\_customs/resources/documents/taxation/company\\_tax/transfer\\_pricing/forum/jtpf/2014/jtpf\\_008\\_2014\\_en.pdf](http://ec.europa.eu/taxation_customs/resources/documents/taxation/company_tax/transfer_pricing/forum/jtpf/2014/jtpf_008_2014_en.pdf).

<sup>50</sup> EU Joint Transfer Pricing Forum Statistics on APAs at the end of 2012, JTPF/013/2013/EN, August 2013, [http://ec.europa.eu/taxation\\_customs/resources/documents/taxation/company\\_tax/transfer\\_pricing/forum/fin\\_al\\_apas\\_statistics\\_2012\\_en.pdf](http://ec.europa.eu/taxation_customs/resources/documents/taxation/company_tax/transfer_pricing/forum/fin_al_apas_statistics_2012_en.pdf); EU Joint Transfer Pricing Forum Statistics on APAs at the end of 2013, JTPF/007/2014/EN, October 2014, [http://ec.europa.eu/taxation\\_customs/resources/documents/taxation/company\\_tax/transfer\\_pricing/forum/fin\\_al\\_apas\\_statistics\\_2013\\_en.pdf](http://ec.europa.eu/taxation_customs/resources/documents/taxation/company_tax/transfer_pricing/forum/fin_al_apas_statistics_2013_en.pdf).

<sup>51</sup> Commission staff working document. Technical analysis of focus and scope of the legal proposal, accompanying the Proposal for a Council Directive amending Directive 2011/16/EU as regards exchange of information in the field of taxation, {COM(2015) 135 final}, SWD(2015) 60 final, [http://ec.europa.eu/taxation\\_customs/resources/documents/taxation/company\\_tax/transparency/swd\\_2015\\_60.pdf](http://ec.europa.eu/taxation_customs/resources/documents/taxation/company_tax/transparency/swd_2015_60.pdf), 7.

<sup>52</sup> <http://eur-lex.europa.eu/procedure/EN/190613>.

On 14 September 2009, the Commission adopted Communication 2009/472 on the work of the JTPF from March 2007 to March 2009 and a related proposal for a revised Code of Conduct for the effective implementation of the Arbitration Convention.<sup>53</sup> On 22 December 2009, the Council adopted the proposal. The revised Code of Conduct is the result of a monitoring exercise carried out by the JTPF to improve the functioning of the Arbitration Convention.<sup>54</sup> In April 2015 the Forum agreed on a Report on Improving the Functioning of the Arbitration Convention which includes a revised Code of Conduct for the effective implementation of the Arbitration Convention.<sup>55</sup>

On 27th June 2006, the Council adopted a Code of Conduct on transfer pricing documentation for associated enterprises in the European Union (EU TPD).<sup>56</sup> This was part of a Communication of the European Commission adopted on 10 November 2005.

The Code of Conduct aims to standardise the documentation that multinationals must provide to tax authorities on their pricing of cross-border intra-group transactions ('transfer pricing' documentation).

The Code aims to reduce significantly the tax complications that companies face when trading with associated enterprises in other Member States. Companies frequently complain about the onerous and divergent documentation obligations with which they have to comply in such cases in the different Member States involved.

The Code is a political commitment. It will **not** affect Member States' rights and obligations or the respective spheres of competence of the Member States and the EU.

The European Commission adopted a Communication on the work of the JTPF in the field of dispute avoidance and resolution procedures including guidelines for Advance Pricing Agreements (APAs) within the EU on 26 February 2007.<sup>57</sup> The Guidelines set out the framework for the overall procedure and provide details of how some specific problems could be resolved. They also provide examples of the necessary time frame and the types of areas which would need to be covered by the APA. The Council noted the commitment of

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<sup>53</sup> Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee on the work of the EU Joint Transfer Pricing Forum in the period March 2007 to March 2009 and a related proposal for a revised Code of Conduct for the effective implementation of the Arbitration Convention (90/436/EEC of 23 July 1990), {SEC(2009) 1168} / {SEC(2009) 1169}, COM(2009) 472 final, 14 September 2009, [http://ec.europa.eu/taxation\\_customs/resources/documents/taxation/company\\_tax/transfer\\_pricing/com\(2009\)472\\_en.pdf](http://ec.europa.eu/taxation_customs/resources/documents/taxation/company_tax/transfer_pricing/com(2009)472_en.pdf).

<sup>54</sup> For the key documents: [http://ec.europa.eu/taxation\\_customs/taxation/company\\_tax/transfer\\_pricing/forum/index\\_en.htm#achievements](http://ec.europa.eu/taxation_customs/taxation/company_tax/transfer_pricing/forum/index_en.htm#achievements)

<sup>55</sup> Final Report on Improving the Functioning of the Arbitration Convention, Meeting of 12 March 2015, [http://ec.europa.eu/taxation\\_customs/resources/documents/taxation/company\\_tax/transfer\\_pricing/forum/final\\_report\\_ac\\_jtpf\\_002\\_2015\\_en\\_final\\_clean.pdf](http://ec.europa.eu/taxation_customs/resources/documents/taxation/company_tax/transfer_pricing/forum/final_report_ac_jtpf_002_2015_en_final_clean.pdf).

<sup>56</sup> MEMO/05/414 Brussels, 10 November 2005 Code of Conduct on transfer pricing documentation in the EU - Frequently Asked Questions, [http://ec.europa.eu/taxation\\_customs/resources/documents/taxation/company\\_tax/transfer\\_pricing/forum/memo-05-414\\_en.pdf](http://ec.europa.eu/taxation_customs/resources/documents/taxation/company_tax/transfer_pricing/forum/memo-05-414_en.pdf); For the key documents: [http://ec.europa.eu/taxation\\_customs/taxation/company\\_tax/transfer\\_pricing/forum/index\\_en.htm#achievements](http://ec.europa.eu/taxation_customs/taxation/company_tax/transfer_pricing/forum/index_en.htm#achievements)

<sup>57</sup> Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee on the work of the EU Joint Transfer Pricing Forum in the field of dispute avoidance and resolution procedures and on Guidelines for Advance Pricing Agreements within the EU, {SEC(2007) 246}, 26 February 2007, COM(2007) 71 final, [http://ec.europa.eu/taxation\\_customs/resources/documents/taxation/company\\_tax/transfer\\_pricing/com\(2007\)71\\_en.pdf](http://ec.europa.eu/taxation_customs/resources/documents/taxation/company_tax/transfer_pricing/com(2007)71_en.pdf); Commission Staff Working Document - Report prepared by the EU Joint Transfer Pricing Forum accompanying document to the Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee on the work of the EU Joint Transfer Pricing Forum in the field of dispute avoidance and resolution procedures and on Guidelines for Advance Pricing Agreements within the EU, {COM(2007) 71 final}, 26 February 2007, SEC(2007) 246, [http://ec.europa.eu/taxation\\_customs/resources/documents/taxation/company\\_tax/transfer\\_pricing/sec\(2007\)246\\_en.pdf](http://ec.europa.eu/taxation_customs/resources/documents/taxation/company_tax/transfer_pricing/sec(2007)246_en.pdf).

Member States to follow the Guidelines and to implement them in their national administrative practices as far as legally possible.

On 25 January 2011 the Commission adopted Communication 2011/16 on the work of the JTPF from April 2009 to June 2010 including proposed guidelines on low-value-adding intra-group services.<sup>58</sup> In January 2011, the Forum defined non-EU triangular cases as cases where 2 states in a Mutual Agreement Procedure cannot fully resolve any double taxation arising in a transfer pricing case when applying the arm's length principle, because an associated enterprise situated in a third state is identified as being the source of non-arm's-length results in a chain of relevant transactions or commercial/financial relations. Different approaches to resolving such disputes were suggested.<sup>59</sup> In March 2011, the Forum adopted the Report on Small and Medium Enterprises and Transfer Pricing, which examines challenges faced by SMEs and offers concrete recommendations.<sup>60</sup>

On 7 June 2012 the Forum adopted a Report on Cost Contribution Arrangements on Services not creating Intangibles Property (IP).<sup>61</sup> The report elaborates on the different concepts underlying Cost Contribution Arrangements (CCAs) on services and Intra Group Services (IGS). It describes the general features for determining whether the arm's length principle has been applied to CCAs on services not creating IP and gives concrete recommendations to achieve a uniform treatment within the EU. On 19 September 2012 the Commission adopted a Communication on the work of the JTPF in the period July 2010 to June 2012 and related proposals (Report on Small and Medium Enterprises and Transfer Pricing and Report on Cost Contribution Arrangements on services not creating Intangible Property (IP)).<sup>62</sup>

In January 2013, the JTPF adopted a Report on Secondary Adjustments. The report addresses the issue of secondary adjustments in general and puts it in the context of the EU Parent Subsidiary Directive. It includes several recommendations aiming to avoid double

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[http://ec.europa.eu/taxation\\_customs/resources/documents/taxation/company\\_tax/transfer\\_pricing/forum/c\\_2011\\_16\\_en.pdf](http://ec.europa.eu/taxation_customs/resources/documents/taxation/company_tax/transfer_pricing/forum/c_2011_16_en.pdf). See also Council conclusions on the communication from the Commission on the work of the EU Joint Transfer Pricing Forum in the period April 2009 to June 2010 and related proposals: 1. Guidelines on low value adding intra-group services and 2. Potential approaches to non-EU triangular cases, 3088th ECONOMIC and FINANCIAL AFFAIRS Council meeting Brussels, 17 May 2011, [http://ec.europa.eu/taxation\\_customs/resources/documents/taxation/company\\_tax/transfer\\_pricing/forum/jtpf/2011/council\\_conclusions\\_jtpf.pdf](http://ec.europa.eu/taxation_customs/resources/documents/taxation/company_tax/transfer_pricing/forum/jtpf/2011/council_conclusions_jtpf.pdf).

<sup>59</sup> Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee on the work of the EU Joint Transfer Pricing Forum in the period April 2009 to June 2010 and related proposals 1. Guidelines on low value adding intra-group services and 2. Potential approaches to non-EU triangular cases, 25 January 2011, COM(2011) 16 final, [http://ec.europa.eu/taxation\\_customs/resources/documents/taxation/company\\_tax/transfer\\_pricing/forum/jtpf/2011/16\\_en.pdf](http://ec.europa.eu/taxation_customs/resources/documents/taxation/company_tax/transfer_pricing/forum/jtpf/2011/16_en.pdf). See also Council conclusions on the communication from the Commission on the work of the EU Joint Transfer Pricing Forum in the period April 2009 to June 2010 and related proposals: 1. Guidelines on low value adding intra-group services and 2. Potential approaches to non-EU triangular cases, 3088th ECONOMIC and FINANCIAL AFFAIRS Council meeting Brussels, 17 May 2011, [http://ec.europa.eu/taxation\\_customs/resources/documents/taxation/company\\_tax/transfer\\_pricing/forum/jtpf/2011/council\\_conclusions\\_jtpf.pdf](http://ec.europa.eu/taxation_customs/resources/documents/taxation/company_tax/transfer_pricing/forum/jtpf/2011/council_conclusions_jtpf.pdf).

<sup>60</sup> JTPF/001/FINAL/2011/EN, [http://ec.europa.eu/taxation\\_customs/resources/documents/taxation/company\\_tax/transfer\\_pricing/forum/jtpf/2011/jtpf\\_001\\_final\\_2011\\_en.pdf](http://ec.europa.eu/taxation_customs/resources/documents/taxation/company_tax/transfer_pricing/forum/jtpf/2011/jtpf_001_final_2011_en.pdf).

<sup>61</sup> JTPF/008/FINAL/2012/EN of 7 June 2012, [http://ec.europa.eu/taxation\\_customs/resources/documents/taxation/company\\_tax/transfer\\_pricing/forum/jtpf/2012/jtpf\\_cca\\_report\\_en.pdf](http://ec.europa.eu/taxation_customs/resources/documents/taxation/company_tax/transfer_pricing/forum/jtpf/2012/jtpf_cca_report_en.pdf).

<sup>62</sup> Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee on the work of the EU Joint Transfer Pricing Forum in the period July 2010 to June 2012 and related proposals (1. Report on Small and Medium Enterprises and Transfer Pricing and 2. Report on Cost Contribution Arrangements on Services not creating Intangible Property (IP)), COM(2012) 516 final, [http://ec.europa.eu/taxation\\_customs/resources/documents/taxation/company\\_tax/transfer\\_pricing/forum/jtpf/2012/2012-09\\_com516\\_en.pdf](http://ec.europa.eu/taxation_customs/resources/documents/taxation/company_tax/transfer_pricing/forum/jtpf/2012/2012-09_com516_en.pdf) and Council conclusions on the EU Joint Transfer Pricing Forum 3205th ECONOMIC and FINANCIAL AFFAIRE Council meeting Brussels, 4 December 2012, [http://ec.europa.eu/taxation\\_customs/resources/documents/taxation/company\\_tax/transfer\\_pricing/forum/council\\_conclusions\\_2012.pdf](http://ec.europa.eu/taxation_customs/resources/documents/taxation/company_tax/transfer_pricing/forum/council_conclusions_2012.pdf).

taxation and to solve disputes.<sup>63</sup> In June 2013, the JTPF adopted a Report on TP Risk Management. The report recognises the need for tax administrations and taxpayers to allocate their transfer pricing resources effectively. It makes recommendations on managing transfer pricing risk in each of the three phases of examining a transfer pricing file. The report also contains an example of a work plan for a transfer pricing audit.<sup>64</sup>

In January 2014, the JTPF adopted a Report on Compensating Adjustments.<sup>65</sup> Member States have different practices with respect to compensating adjustments and the report provides practical guidance on avoiding double taxation and double non-taxation in the application of compensating adjustments in spite of the different practices of MS. The guidance is applicable to compensating adjustments which are made in the taxpayer's accounts and explained in the taxpayer's transfer pricing documentation. In April 2014, the JTPF published Transfer Pricing Profiles of all EU Member States which contain information about domestic transfer pricing frameworks, Competent Authorities' contact details and other useful information for taxpayers and tax authorities.<sup>66</sup> On 4 June the Commission adopted a Communication on the work of the JTPF in the period July 2012 to January 2014 which includes the JTPF reports on secondary adjustments, transfer pricing risk management and compensating adjustments.<sup>67</sup>

In its Conclusions from 10 March 2015, the Council of the European Union welcomed the Commission Communication on the work of the EU JTPF in the period of July 2012 to January 2014 and the Reports on Secondary Adjustments, on Transfer Pricing Risk Management and on Compensation Adjustments, endorsed the three Reports and invited Member States to implement the recommendations they include as soon as possible.<sup>68</sup> In April 2015 the Forum agreed on a Report on Improving the Functioning of the Arbitration Convention which includes a revised Code of Conduct for the effective implementation of the Arbitration Convention.<sup>69</sup> The report and the revised Code of Conduct are the result of a monitoring exercise carried out by the JTPF and provide clarification on several topics, such as the application of the Arbitration Convention in certain cases, implications of the new Article 7 OECD Model Tax Convention (2010), transparency in cases where access to the Arbitration Convention is denied, the functioning of the Arbitration Convention or the deadline for requesting a procedure under the Arbitration Convention.

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<sup>63</sup> JTPF/017/FINAL/2012/EN, 18 January 2013, [http://ec.europa.eu/taxation\\_customs/resources/documents/taxation/company\\_tax/transfer\\_pricing/forum/final\\_report\\_secondary\\_adjustments\\_en.pdf](http://ec.europa.eu/taxation_customs/resources/documents/taxation/company_tax/transfer_pricing/forum/final_report_secondary_adjustments_en.pdf).

<sup>64</sup> JTPF/007/FINAL/2013/EN, Meeting of 6 June 2013, [http://ec.europa.eu/taxation\\_customs/resources/documents/taxation/company\\_tax/transfer\\_pricing/forum/jtpf/2013/jtpf\\_007\\_2013\\_en.pdf](http://ec.europa.eu/taxation_customs/resources/documents/taxation/company_tax/transfer_pricing/forum/jtpf/2013/jtpf_007_2013_en.pdf).

<sup>65</sup> JTPF/009/FINAL/2013/EN, Meeting of 5 November 2013 (DOC January 2014), [http://ec.europa.eu/taxation\\_customs/resources/documents/taxation/company\\_tax/transfer\\_pricing/forum/jtpf/2013/jtpf\\_009\\_final\\_2013\\_en.pdf](http://ec.europa.eu/taxation_customs/resources/documents/taxation/company_tax/transfer_pricing/forum/jtpf/2013/jtpf_009_final_2013_en.pdf).

<sup>66</sup> [http://ec.europa.eu/taxation\\_customs/taxation/company\\_tax/transfer\\_pricing/forum/index\\_en.htm#tpprofiles](http://ec.europa.eu/taxation_customs/taxation/company_tax/transfer_pricing/forum/index_en.htm#tpprofiles).

<sup>67</sup> Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee on the work of the EU Joint Transfer Pricing Forum in the period July 2012 to January 2014, 4 June 2014, COM(2014) 315 final, [http://ec.europa.eu/taxation\\_customs/resources/documents/taxation/company\\_tax/transfer\\_pricing/forum/com\(2014\)315\\_en.pdf](http://ec.europa.eu/taxation_customs/resources/documents/taxation/company_tax/transfer_pricing/forum/com(2014)315_en.pdf).

<sup>68</sup> 5967/15 FISC 14 ECOFIN 76 of 16 March 2015, [http://ec.europa.eu/taxation\\_customs/resources/documents/taxation/company\\_tax/transfer\\_pricing/forum/council\\_conclusions\\_jtpf\\_07\\_2012\\_01\\_2014\\_en.pdf](http://ec.europa.eu/taxation_customs/resources/documents/taxation/company_tax/transfer_pricing/forum/council_conclusions_jtpf_07_2012_01_2014_en.pdf).

<sup>69</sup> Final Report on Improving the Functioning of the Arbitration Convention, Meeting of 12 March 2015, [http://ec.europa.eu/taxation\\_customs/resources/documents/taxation/company\\_tax/transfer\\_pricing/forum/final\\_report\\_ac\\_jtpf\\_002\\_2015\\_en\\_final\\_clean.pdf](http://ec.europa.eu/taxation_customs/resources/documents/taxation/company_tax/transfer_pricing/forum/final_report_ac_jtpf_002_2015_en_final_clean.pdf).



## 4. COMMISSION EXPERT GROUP ON AUTOMATIC EXCHANGE OF FINANCIAL ACCOUNT INFORMATION (AEFI GROUP)<sup>70</sup>

### 4.1. History

The cooperation systems between EU Member States ensure information exchange between tax authorities of EU Member States for a range of income categories paid across borders to individuals. Currently the European Union has two pieces of legislation which provide automatic exchange of information for direct taxation purposes: the Savings Taxation Directive<sup>71</sup> and Directive 2011/16/EU on Administrative Co-operation in Direct Taxation (referred to hereinafter as 'DAC1').

The Commission Expert Group on Automatic Exchange of Financial Account Information will assist the European Commission to assist the Council and Member States to ensure that EU legislation on automatic exchange of information in direct taxation is effectively aligned and fully compatible with the OECD Global Standard on automatic exchange of financial account information. The alignment will aim to limit the administrative burden of such legislation on financial sector businesses while preserving the specific needs of the EU internal market.

### 4.2. Set up

The Commission launched a call for applications to take part in the work of the group on July 2014. Applications were expected before 8 August 2014. The provisional number of members was 25. Members are appointed for a mandate starting on 1 October 2014 and ending on 30 June 2017.

All members are organizations, so no individuals or national administrations are appointed at this moment.<sup>72</sup> The organizations represent financial sector businesses which will be required to implement the aligned EU legislation in their business operations; others are involved in good governance in tax matters, and with promoting better tax compliance with the aims of fighting tax evasion and tax avoidance, for example civil society organizations (association (Law (taxation), audit, banking, finance, insurance), NGO (law (taxation), economy, banking, finance, consumer affairs), financial institution (banking, finance)).<sup>73</sup>

<sup>70</sup> This part of the paper is based on the information provided on the website: [http://ec.europa.eu/taxation\\_customs/taxation/tax\\_cooperation/mutual\\_assistance/financial\\_account\\_information/index\\_en.htm](http://ec.europa.eu/taxation_customs/taxation/tax_cooperation/mutual_assistance/financial_account_information/index_en.htm).

<sup>71</sup> However, the Commission has suggested on 18 March 2015 the repealing of the Savings directive. The Savings directive would be repealed with effect from January 1, 2016.

<sup>72</sup> For an overview of the members, <http://ec.europa.eu/transparency/regexpert/index.cfm?do=groupDetail.groupDetail&groupID=3187&NewSearch=1&NewSearch=1>.

<sup>73</sup> <http://ec.europa.eu/transparency/regexpert/index.cfm?do=groupDetail.groupDetail&groupID=3187&NewSearch=1&NewSearch=1>.

Name of Organisation	Category	Countries/Areas represented	Membership Status
<a href="#">Association of Chartered Certified Accountants</a>	Association	European International	Member
<a href="#">Association of Financial Markets in Europe</a>	Association	European	Member
<a href="#">Association of Life Offices</a>	Association	European International	Member
<a href="#">Better Finance (The European Federation of Financial Services Users)</a>	NGO	European	Member
<a href="#">British Bankers Association</a>	Association	United Kingdom	Member
<a href="#">Christian aid and Tax Justice Network</a>	NGO	European International	Member
<a href="#">Euroclear SA/NV</a>	Financial Institution	European International	Member
<a href="#">European Association of Co-operative Banks</a>	Association	European	Member
<a href="#">European Association of Public Banks</a>	Association	European	Member
<a href="#">European Banking Federation</a>	Association	European	Member
<a href="#">European Citizen Action Service</a>	NGO	European	Member
<a href="#">European Fund and Asset Management Association</a>	Association	European	Member
<a href="#">European Savings Bank Group</a>	Association	European	Member
<a href="#">European Structured Investment Products Association</a>	Association	European International	Member
<a href="#">Fédération Européenne des Conseils et Intermédiaires Financiers</a>	Association	European	Member
<a href="#">Financial Transparency Coalition</a>	NGO	European International	Member
<a href="#">French Banking Federation</a>	Association	France	Member
<a href="#">Insurance Europe</a>	Association	European	Member
<a href="#">International Swaps and Derivatives Association</a>	Association	European International	Member
<a href="#">Investment Management Association</a>	Association	European International	Member
<a href="#">Luxembourg Bankers Association</a>	Association	European International	Member
<a href="#">Oxfam International</a>	NGO	European International	Member
<a href="#">Pensions Europe</a>	Association	European	Member
<a href="#">The Alternative Investment Management Association</a>	Association	European International	Member
<a href="#">The Association of the Luxembourg Fund Industry</a>	Association	Luxembourg	Member

**Source:**

<http://ec.europa.eu/transparency/regexpert/index.cfm?do=groupDetail.groupDetail&groupID=3187&NewSearch=1&NewSearch=1>

Detailed rules of procedure can be found on the website.<sup>74</sup> A representative of the Commission acts as Chair of the group. The group may set up sub-groups to examine specific questions on the basis of terms of reference defined by the group. To date, no subgroups are assigned to this group.

### 4.3. Working methods

The AEFI Group organized its first meeting on 30 October 2014.<sup>75</sup> They referred to the political agreement that was reached in ECOFIN on 14 October 2014 on the adoption of a Council Directive amending Directive 2011/16/EU (referred hereinafter as 'DAC2') as regards the mandatory automatic exchange of information. 'DAC2' introduces categories of financial information which will be subject to automatic exchange of information which will not, as is now the case for 'DAC1', depend on availability of the data. As already mentioned, one of the main objectives of this group is to assist the Council and Member States to ensure that EU legislation on automatic exchange of financial account information is effectively aligned and fully compatible with the OECD global standard on automatic exchange of financial information, with a view to minimizing the administrative burden for financial intermediaries while preserving the specific needs of the EU Internal Market. The members of the group had to discuss that day the main features of 'DAC2', and of the main differences between 'DAC2' and the Global standard of the OECD. Furthermore, the members were asked to reflect on the work plan of the group taking into account the foreseen adoption of 'DAC2'.

The second meeting of the AEFI Group on automatic exchange of financial account information was on 9 February 2015. Since the first meeting of the group, 'DAC2' was adopted by Council on 9 December 2014 and is aligned with the Global Standard of the OECD on automatic exchange of financial information. The date for implementation will be 1 January 2016, with the first reporting by Member States by September 2017. Discussions are now beginning with Member States regarding the master plan for the IT infrastructure, including formats and communication channels, to be used between Member States to report information under 'DAC2'. The master plan will not deal with the national reporting requirements to be developed at Member State level for reporting by their FI's.

The group also referred to the – at that moment still forthcoming – Proposal for a Council directive amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation of 18 March 2015 (referred hereinafter as 'DAC3').<sup>76</sup> 'DAC3' builds upon 'DAC2' by including information exchange on tax rulings.

### 4.4. Results

The meetings and the aforementioned discussions of the AEFI Group has led to a first report, that was published on 16 March 2015.<sup>77</sup> The report includes a list of the major outstanding issues regarding the implementation of 'DAC2' and provides recommendations or comments by the AEFI Group in respect of these issues. The report may be updated later on in order to help Member States with respect to their obligations under 'DAC2'. The AEFI Group has made eleven main report recommendations. We will describe them in the following paragraphs.

The first recommendation tackles the fact that substantial IT projects will have to be planned, budgeted, build and rolled out in a very short time.

<sup>74</sup> <http://ec.europa.eu/transparency/regexpert/index.cfm?do=groupDetail.groupDetailDoc&id=18071&no=1>.

<sup>75</sup> <http://ec.europa.eu/transparency/regexpert/index.cfm?do=groupDetail.groupDetailDoc&id=17739&no=3>.

<sup>76</sup> The proposal was launched on 18 March 2015, COM(2015) 135 final, 2015/0068.

<sup>77</sup> [http://ec.europa.eu/taxation\\_customs/resources/documents/taxation/tax\\_cooperation/mutual\\_assistance/financial\\_account/first\\_report\\_expert\\_group\\_automatic\\_exchange\\_financial\\_information.pdf](http://ec.europa.eu/taxation_customs/resources/documents/taxation/tax_cooperation/mutual_assistance/financial_account/first_report_expert_group_automatic_exchange_financial_information.pdf).

According to the AEFI Group, financial institutions require a lead time of at least 18 months in advance of the effective date, starting from the time the final guidance has been released. With respect to the entry into force of the 'DAC2' provisions in Member States, and thus for 'new accounts', that 18-month deadline has already passed. Therefore the group suggested a few measurements. For example, the Directive should include a requirement which sets a date not only for effective transposition of the Directive within the Member States' domestic law, but also for the corresponding amendments of domestic law that would ease this implementation burden. Furthermore, the EU should provide consolidated information on how, where and when the local law becomes applicable in each Member State, so that there is clarity on the legal framework for each Member State for financial institutions that have operations in multiple Member States. Therefore, in the event that Member States are unable to have the necessary legislation in place within the timeframes in the Directive, reporting should be pushed back by 1 year, with the first reporting to be made in 2018 and to include data with respect to both 2016 and 2017.

The second recommendation concerns data protection and privacy.

This is one of the biggest challenges for the European Union and the Member States. The AEFI Group highlights that it is crucial to ensure that 'DAC2' is fully compatible with privacy and data protection rules which are fundamental rights under EU law.

It has serious concerns as regards data protection and privacy aspects that could jeopardize the implementation of 'DAC2'.

'DAC2' must respect the principle of proportionality according to which any data transfer is only allowed in case it is appropriate and not redundant. In order not to violate the proportionality principle, it is necessary to prove the necessity of the foreseen processing and to demonstrate that the required data are the minimum necessity for attaining the stated purpose and thus avoid an indiscriminate, massive collection and transfer of the data. A problem might arise there, because of the magnitude of the data to be collected and to be reported under 'DAC2'.

Furthermore, the Directive does not guarantee taxpayers a permanent access to their data and a mandatory notification in case of breach. 'DAC2' does not provide effective mechanisms to assess whether a third country's legal framework provides an appropriate protection of the data transferred under AEOI. This may pose a great threat to the rights of the taxpayer, as confidentiality cannot be guaranteed in such cases.

Finally, the AEFI Group is concerned that information exchanged may happen to be irrelevant for taxation purposes in the receiving jurisdiction under domestic law and that reporting in such cases might be considered as being in breach of data protection law.

The issue of the data protection and privacy will have to be developed in further reports in order to guarantee a sufficient level of protection.

The third recommendation stresses the correct implementation of guidelines in order to clarify procedures and provide definitions.

This practice has to be developed with a view to achieving a level playing field notably in the definitions of financial income. It is quite clear that the commentary of the Common Reporting Standard (referred hereinafter as CRS) is not sufficient in terms of guidance and that according to the group more detailed guidelines are necessary.

The fourth recommendation states that the definitions of key concepts, in particular Investment Entity and Financial Account, must be clarified with a view to ensuring a consistent implementation of the CRS across all Member States.

The OECD commentary of the CRS is therefore also applicable to 'DAC2'. Any divergent interpretation should be identified and resolved by appropriate consultation between EU Member States as early as possible in order to provide certainty for financial institutions implementing the CRS. The definition of Investment Entity shall be interpreted in a manner consistent with similar language set forth in the FATF Recommendations.

Via the fifth recommendation the AEFI Group wants to adapt due diligence procedures for pre-existing accounts which are meant to create operational efficiencies for Participating Jurisdictions Financial Institutions in order to ensure that these operational efficiencies are achieved.

For example, collection of the TIN, date and place of birth means that financial institutions need to contact pre-existing individual customers in any event. The group therefore suggests that a 'Best Practice' model of self-certification form according to the type of business and lines of business may be developed for suggested use across all Member States. Only mandatory fields of such a self-certification should be validated under the reasonableness test.

The sixth recommendation stresses the need for harmonization of the lists of excluded accounts.

It is therefore crucial that the list established for purposes of 'DAC2' can also be applied for the purpose of the CRS on a global basis. This would ensure a level playing field. The list must however be monitored on a regular basis, considering the lack of experience on how the rules will be applied.

In order to ease compliance of financial institutions and to minimize their administrative burdens, the AEFI Group calls in their seventh recommendation on Member States to harmonize the compliance regime starting with the introduction of a standard program of internal audit review requirements.

For example a financial institution should just be able to demonstrate that it has followed its relevant policies and control procedures. FI's should not be expected to have to employ external auditors to review the activities of the various jurisdictions in scope. According to the group it will take 2 to 3 years for FI's to fully address these system issues. Therefore, there should be a 'soft landing' period of 2 years for financial institutions located in the EU or Early Adopters during which tax administrations and financial institutions would both seek to achieve a fully operational system. Financial institutions confirm that they will remain committed to making best endeavours to implement the regulations during such a period.

The eighth recommendation handles the IT issues and the schema for reporting.

The OECD has developed a technical solution to support the CRS which comprises the 'CRS XML Schema' and a User Guide. The CRS XML Schema must be used between Competent Authorities to automatically exchange the requested information pursuant to the Global Standard. 'DAC2' states that the automatic exchange of information shall be sent using a standard computerized format aimed at facilitating such automatic exchange and based on the existing computerized format pursuant to the 'Savings Directive'. The schema for reporting should be further developed in close consultation with the financial industry. The most important factor is the uniformity. Financial institutions must be able to implement global reporting IT solutions within the EU, with third countries and domestically. The report provides a number of technical recommendations in this respect.

Concurrently with the implementation of 'DAC2', some members of the AEFI Group would like to invite the Commission, the Council and the Member States as a ninth recommendation to consider implementing a standardized and harmonized tax relief at

source system and simplified tax refund procedures simultaneously with the automatic exchange of information procedures.

The transparency of tax information should also serve the interests of savers and investors across the EU to be able to access the treaty benefits to which they are entitled.

The tenth recommendation will prove to be important in the near future. The European institutions should provide developing countries with support for the automatic exchange of information.

The stakes are high, as potential loopholes in the global system could be devastating. Creating a system where developing countries are effectively excluded, risks the creation of new tax havens, as well as depriving these countries of the information they need to effectively enforce their tax systems. Capacity building is one of the primary needs for developing countries and any technical barriers to taking part in the system of automatic exchange of information should be overcome as soon as possible. Furthermore, technical assistance and side-by-side instruction for developing country tax authorities and investigative/prosecutorial personnel should be geared towards demonstrating how automatic exchange of information can be used to identify trends.

The eleventh recommendation discusses the way forward, by means of including third countries in the OECD's global standard on automatic exchange of information.

The exchange will be more efficient if all countries are brought together within a single global system, governed by one multilateral agreement. This action greatly reduces the risks of inconsistency and of unnecessary administrative burdens. It also prevents developing countries from having to negotiate several bilateral treaties to implement automatic exchange of information. With regard to the inclusion of third countries, the AEFI Group distinguishes three categories of countries: non-EU jurisdictions that function as regional or global financial centers, non-EU jurisdictions that are not financial centers and developing countries that are currently unable to implement the Multilateral Competent Authority Agreements requirements by the OECD. The latter are holding the key to creating the global fabric of the automatic exchange of information.

## **5. INTERACTION BETWEEN THESE GROUPS**

Today, there is no question of an interaction between the Code of Conduct Group on Harmful Business Taxation, the EU Joint Transfer Pricing Forum and the Commission Expert Group on Automatic Exchange of Financial Account Information.

This does not mean that an interaction between these groups would not be useful; on the contrary, especially in the field of tax rulings would such an interaction pay off. The groups can learn from each other's research and complement each other.

The Code of Conduct Group, for example, already indicated in the past when tax rulings procedures met the condition of sufficient transparency and at which point harmful tax measures occur. The EU JTPF in its turn set up the Guidelines on advance pricing arrangements, which among other things pay attention to a transparent procedure, the publication of statistics and the exchange of information between the Member States. Similar Guidelines could be proposed within the Code of Conduct Group (if its role would be strengthened in order to better fight against harmful taxation and BEPS) with regard to advance tax rulings procedures. In order to guarantee both maximal transparency and optimal protection of the taxpayers' rights, it is useful to involve the Expert Group on Automatic Exchange of Financial Account Information in these activities.

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