



Brussels, November 2010
TAXUD D1 D(2010)

Taxud.D1/JMVL/

Doc: JTPF/018/2010/EN

SUMMARY RECORD OF THE TWENTY NINTH MEETING OF THE EU JOINT TRANSFER PRICING FORUM

held in Brussels on 26th October 2010

1. ADOPTION OF THE AGENDA

The agenda was adopted by consensus and the Chair reminded members that the minutes of the meeting of 8TH June 2010 had been adopted under written procedure.

2. UPDATE BY COMMISSION:

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

1. Communication on low value adding intra-group services and non EU triangular cases: the inter service consultation procedure has been launched and it is anticipated that the Commission will adopt the Communication before the end of this year and will then submit it to the Council.

2. Renewal of JTPF mandate: the Commission intends to renew the JTPF (for another 4 years). This will be by means of a Commission decision which is expected to be adopted by the end of December 2010 or early January 2011.

3. Call for applications of business members of the Forum: after the adoption of the renewal decision a call for applications notice will be placed on the Commission website, anticipated to be in either January or February 2011. Applications in response to that call will need to be sent within 4 weeks of the notice date. The criteria to be applied for appointment will be similar as last time. The Selection

Board will be composed of one Commission representative, one Business Europe representative and one Presidency representative. There are vacancies for 16 experts to be appointed for a two year term. A reserve list will also be established.

4. Public consultation on double taxation within the EU: a considerable number of answers referred to transfer pricing. In those cases where the author has given prior authorization, a copy of the answers will be published on TAXUD website within the next 3 weeks. The Commission will analyse those answers in case some might be useful for the Forum to consider.

3. TRANSFER PRICING AND SMES

The Chair explained that the working document is based on June presentations and discussions. The aim of the discussion is to help the Secretariat to prepare a first draft report for consideration at the next meeting. The final report is scheduled for completion in 2011 though not necessarily within the current mandate period.

The present document is structured around a number of questions, and comments were requested.

The Vice-Chair of TAs reported on the pre-meeting discussions. TAs' overall feeling is that the document is a good working base. It was emphasized that a definition should be applied at consolidated group level rather than at individual company level. It might also be worthwhile to take into consideration the size and the complexity of the transaction in addition to the indicators in the existing EU SME definition.

There was some reluctance to develop a lighter touch audit approach because it was felt that the principle of proportionality covered the issue. A state of play table to include best practices and MS SME definitions both generally and for transfer pricing purposes would be welcomed.

Finally, it was suggested that the final format of the document be in the form of guidelines.

The BM Vice-Chair reported on their pre-meeting discussions. The paper was a good start and BMs are prepared to discuss all questions.

Care needed to be taken to avoid possible discrimination issues between larger and smaller MNEs. BMs would prefer one common definition but it is well understood from previous discussion that this might be an unrealistic expectation. At least, the EU definition should represent the maximum threshold. And any suggested approaches in agreeing a definition for transfer pricing purposes should be applied at consolidated group level and not to a specific company within a group.

BM suggested that one pragmatic outcome could be that SMEs need only provide generally available documentation (not specific to TP purposes) rather than, as it might be the case with an MNE, specifically commissioned documentation such as a transfer pricing study.

The Definition of SMEs for transfer pricing purposes

The Forum considered that a common definition of SMEs for all tax purposes is the optimal solution.. But realistically and bearing in mind the Forum's remit only, a contribution to that overall aim could be made by considering what might constitute a SMEs' definition for transfer pricing purposes. Such a definition would also assist in targeting the application of the outcomes of the finally agreed Forum report.

It was agreed that a definition for transfer pricing purposes should be applied at the group consolidated level and not at the level of an individual entity or group of entities within the group. The target audience of the report is the smaller groups amongst SMEs. Any SME definition should not be larger than that provided for by the existing EU definition.

A definition should recognize that it is appropriate to take account of the, generally, lower tax risk posed by the SMEs concerned. In that respect factors such as the size and the complexity of the transaction might be taken into consideration. It was accepted that a decision would need to be taken whether or not to aggregate transactions in considering tax at risk issues.

It was recommended that when, for transfer pricing purposes, TAs are considering a definition of SMEs they consider the definitions used already by other TAs for both SMEs generally and specifically for transfer pricing purposes. To assist in that exercise a state of play table of TAs existing definitions would be compiled.

SMEs: compliance and transfer pricing

The discussion paper posed some specific questions on pre audit issues (Q5 to Q 14) and the following comments were made.

On question 5 it was agreed only a broad reference to article 9 of OECD MTC was needed and in the last bullet the example was not necessary.

On question 6, it was agreed if the table were used in any final report it required some drafting and format revisions. In particular a system that may exempt SMEs from transfer pricing compliance requirements may be understood as in effect a practical example of the proportionality approach. On questions 7 and 8, BM said that they particularly favored an ongoing dialogue between TA and taxpayer. However, the Forum did not wish to undertake an exercise to rank best practices in order of preference. Proposals contained in questions 9 and 10, relating to the content of a state of play table and individual TAs websites to access to SME information in TAs, were agreed actions. Question 11, addressing what levels of pre-transaction certainty of tax treatment of transactions may be available, would also be part of the table to be compiled. Suggestions in questions 12 to 14, addressing the possible provision of formal training, were rejected. TAs felt they were already open to provide information and guidelines on a case by case basis so it was felt this aspect was covered. Regular general training sessions or seminars were considered by TAs to be too resource intensive. As they arise opportunities should be taken to communicate and build contacts with SMEs.

The OECD delegate observed that the emerging recommendations around the principle of proportionality were aligned with the commentary in chapters IV and V of the guidelines. It was also suggested that it would be useful when the word

exemption was used to clarify to what it specifically referred e.g. exemption to tax or documentation exemption?

Issues around auditing an SME were considered in questions 15 to 18.

TAs were opposed to develop specific audit recommendations for SMEs. TAs were of the opinion that in pre-audit activity the specific characteristics of SMEs could best be addressed. An audit process, differentiated only by the application of the principle of proportionality, is then applied equally to MNEs and SMEs.

BM's pointed out the risk of inconsistency of approach if SMEs were required to have in place a limited set of documents but if an audit took place there was then a requirement for more detailed documentation.

After a thorough discussion on the merits or otherwise of a lighter approach in audit the Chair concluded the Forum did not want to develop specific detailed recommendations when selecting an SME for an audit. More general recommendation could be made in that the risk and resources impact on TAs and SMEs should be considered when considering whether or not to commence an audit. SMEs should not be penalized for providing in audit only the limited documentation they were required to keep in pre audit. It should also be specified that the principle of proportionality should be taken into account for SMEs. Finally, he concluded this section of the discussion paper should perhaps be reviewed by the Secretariat in the preparation of any draft report to see if any general recommendations could be made but without contravening the conclusion that detailed audit processes should not be addressed. For example the differing format information required from an SME might be provided, e.g. like in the narrative adopted for intra-group services.

Post audit dispute resolution were addressed in questions 19 to 23

Competent Authorities have the option to resolve potential double taxation without recourse to a bilateral exchange by virtue of Art 9 and 25 of the OECD Model tax convention and Article 6(2) of the Arbitration Convention. Discussion indicated that this option was not widely used but may lend itself to resolution of the smaller less complex types of transfer pricing adjustment which may often involve SMEs. The discussions broadened out to other approaches that might be used in reaching resolution without going through the MAP or AC process. Some BM suggested that some sort of self-adjustment was an option between the concerned parties. MS rejected that approach. Another suggestion was that an exchange could take place at TA auditor level to ensure, at an early stage, there was agreement on the nature and amount of adjustment. It was also suggested that Competent Authorities may or may not be involved in such exchanges. This sparked a lively discussion about if such an action was appropriate and legal. It was pointed out that auditors already had avenues of exchange available for example exchange of information under tax treaties.

There was also a proposal that there may be a role for a de minimis limit in an overall consideration by Competent Authorities. There were mixed views on that approach.

The Chair concluded that there was a lack of clarity about what the legal status of auditor to auditor exchanges were and the potential impact of the setting-up of a relatively modest *de minimis* limit.

To assist further consideration of the issues it was agreed TAs would provide the Secretariat replies to the following questions:

On direct contact between tax auditors:

1. Is it legally possible and under which conditions to have direct auditor to auditor contact with other tax authorities (outside a simultaneous examination audit arrangement) in reaching agreement on the level of a transfer pricing adjustment?
2. If it is or could be legally possible to have such contact, is this an approach that you would wish to develop?

On the *de minimis* approach:

3. If a *de minimis* limit of 200 000 Euro of tax base per procedure (based on the initial transfer pricing adjustment requested) had been applied over the last two calendar years, do you consider it would have had a significant negative impact on your tax revenue?
4. If so, are you able to give any broad indication of the extent of that impact?
5. If you consider 200 000 Euro to be too high as a *de minimis* figure, what figure do you think is more appropriate?

Chair conclusion: Secretariat will prepare a first draft report which would be circulated for comment and then discussed at the next meeting. The anticipated final outcome is that of a set of guidelines.

4. CCAs

Due to time constraints, the discussion was postponed to the next meeting.

5. FUTURE WORK PROGRAMME

The Forum was reminded that suggested topics were welcome; the final future work programme will be adopted in the new mandate period.

BM suggestions were outlined in three short presentations:

- Secondary adjustments: two kind of problems can occur when the primary adjustment is re-characterized: legal (withholding tax) and economic (cost is not deductible). It was considered by all members to be an interesting and relevant topic.
- Compensating and end of year adjustments: considered by all members as an interesting and relevant topic but it should be limited to corporate tax issues rather than expanding into VAT or customs aspects. The OECD observer mentioned that there was some commentary on this topic covered in 3.69 and

3.71 of the guidelines. Briefly two approaches exist: ex-ante and ex-post. Double taxation may occur when each TA applies a different approach. But this is not a question related to the application of the ALP and therefore both approaches are valid but could lead to inconsistencies for the taxpayers.

- Analysis on whether and to what extent taxpayers could be denied access to the AC. This paper resulted from the discussion on non-EU triangular cases and set out in some detail BM's thoughts on the issue, which TAs noted but did not necessarily agree upon.
- BM might come back with some additional suggestions.

The Commission will publish BM's contributions on its website without prior discussion of its contents by the Forum.

TAs would submit a proposal, in time for the next meeting, regarding the application of the newly revised Article 7, the old Article 7 and the potential impact on the application of the Arbitration Convention.

6. INDEPENDENT PERSONS

CVs are still missing for France, Luxembourg and Portugal.

7. ANY OTHER BUSINESS:

NL announced to amend its reservation included in the current Code of Conduct on the AC and have asked the Commission to include the following revised text in the minutes of the meeting. "The Netherlands will not invoke this reservation for adjustments made to the deductibility of interest regarding an individual loan in case the adjustment is based on the arm's length principle".

At the request of the JTPF, the Secretariat will contact other TAs which had similar reservations to the NL to check whether they also want to amend their text.

BM were concerned to note in a Turkish tax case that the Amadeus data base was apparently not accepted by a Turkish court as evidence on which to base comparables for transfer pricing, as the database did not contain details of Turkish companies.

The Chairman announced that the next meeting shall be held on 10 February 2011.