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**SUMMARY RECORD OF THE TWENTY-EIGHTH MEETING OF
THE
EU JOINT TRANSFER PRICING FORUM
held in Brussels on 8th June 2010**

1. GENERAL INTRODUCTION

The minutes of the February meeting were dealt with under written procedure.

The agenda (doc.JTPF/005/2010/EN) was adopted.

Tom Neale commented that guidelines on low value adding intra-group services and, if it was to be adopted during the meeting, the report on non-EU transfer pricing triangular cases would form the basis of a Commission Communication. It was envisaged that the Council would adopt the Communication before the end of the year. As always some minor editorial changes might be required to agreed reports to align them with Commission and Council procedural requirements.

The Commission notes the success and continued relevance of the Forum and the working assumption is that the Forum would be renewed for a further period from 31 March 2011. Detail on the process of renewal and membership of the Forum would be given at the next meeting.

2. AN INITIAL DISCUSSION ON SMEs AS A CURRENT WORK PROGRAMME PROJECT

The subject of SMEs and the impact of transfer pricing on them was a current work programme item.

The chair outlined that the main purpose of this initial discussion was to identify some key issues of concern for SMEs in the area of transfer pricing and consider what pragmatic solutions may be worth exploring.

Several presentations, from different perspectives, would be given followed by a round table discussion. The Secretariat would then have some material to draw up a working paper to be discussed in the October meeting.

2 (i) PRESENTATIONS

Presentations were given by FEE (Federation of European Accountants) and CFE (Confederation Fiscale Europeene), who had been invited by the Commission, and Business Members, Tax Administration Members and the Commission. See the TAXUD transfer pricing website for copies of power points, where provided.

FEE

The FEE representative cautioned that the views represented were necessarily his own but he drew on his knowledge of his work with FEE. Particular attention was drawn to the following issues/observations:

- SMEs are different from each other and to MNEs. They had specific problems and needs in the practical implementation of transfer pricing rules.
- Given the diversity of SMEs, for example in size, type of ownership and commercial relationships with its market and owners, a "one-size fits all" approach for either defining or dealing with SMEs for transfer pricing purposes is not possible.
- Transfer pricing was not well understood and if encountered attracted high compliance costs.
- Functional analysis and value of functions was hindered by the amalgamation of roles undertaken by owners and as well as asset ownership issues.
- OECD methodologies were difficult to apply in particular CUPS because of lack of database detail.
- Access to appropriate and affordable professional advice was difficult.

Suggested improvements were:

- Improve relations between taxpayers and administrations and between administrations themselves. Special rules (e.g. accounting, financial reporting) already exist; could this not be extended to transfer pricing?
- Reduce the level of documentation requirements; establish safe haven rules and a simplified Arbitration Convention procedure.
- Reconsider Home State Taxation and/ or further introduction of CCCTB.
- Keep any recommendations simple in terms of requirement and implementation.

CFE

CFE endorsed comments of FEE and in addition observed:

- The drawback of the current EU definition (Commission Recommendation OJ L 124, 2003) lies in several seemingly arbitrary limits. Alternatives were the US Small Business Administration approach based on the number of employees but a 10 million euro threshold based on the group's revenue was a very practical SME definition.
- Some practical problems were illustrated in an example.
- Consideration of the Customs concept of a single European authority may provide some useful insights.

Business Members

A common EU SME definition for transfer pricing purposes was recommended. Specific transfer pricing recommendations for SMEs to be considered in the framework of before, during and after a tax audit were suggested. Simplified standards and procedures for SMEs in areas such as APAs, transfer pricing documentation, tax audits and MAPs were proposed. Whilst a main aim is to relieve SMEs from disproportionate burdens it was also necessary to guard against discriminatory treatment between MNEs and SMEs. The more immediate impact of transfer pricing audits on SME owners as opposed to the more remote impact on MNE shareholders should not be underestimated.

TA's: France and the UK

- The UK explained their exemption based system which was established following a risk analysis.
- France approaches the issue by providing specific transfer pricing Guidance for SMEs, which includes a simplified APA procedure.

Commission

The Commission described the types of size indicators currently used for transfer pricing purposes in the different EU Member States (including the EU SME concept) and analysed approaches to SME transfer pricing documentation requirements. The findings were that no specific size indicator prevails within the EU, and that almost all EU Member States request no or less documentation requirements based on size of company or on transactions.

2 (ii) ROUND TABLE DISCUSSION TO IDENTIFY TRANSFER PRICING ISSUES THAT PARTICULARLY IMPACT ON SMES

A wider ranging discussion covered the following areas:

Definition

- A compulsory transfer pricing SME threshold may impact negatively on SMEs transition to MNE but alternatively the possibility of "electing in" may be positive for example in gaining certainty of treatment.

- Other issues around definition were: the impact on some TAs tax base that would be greater than others although that impact would be partly dependent on how a TA defined an SME; an SME definition should in fact be applied at group level; transaction size could be a determinative factor.
- The concept of a Single European Authority is a viable approach for customs given EU competency, unlike direct taxation. Additionally, customs levies are distributed on the basis of a predefined system: a non-arm's length approach.
- A common definition appeared attractive but may not be achievable and it may be better to focus on other areas. The BM presentation framework of impacts on SMEs pre, during and post audit could be a useful template.

Compliance burden

- Resource availability: compare an MNE tax department to an SME with say five employees in total
- Documentation was recognised as an issue and although referred to in the EUTPD that reference could be expanded upon
- One TA when examining issues around SMEs and compliance requirements faced discriminatory issues.
- The vice-chair of the BM emphasized the need for trust and to "keep it simple". An impact exercise to gauge the tax at stake might be feasible but for Member States the initial reaction was that the information would not be available.
- Access to timely, affordable and appropriate professional advice.
- Consistency of treatment by TAs particularly where there may be differing levels of experience.
- Application of OECD methodologies especially CUP.

Related issues

- Compile a state of play on SME and transfer pricing.
- The use of multilateral APAs for SMEs.
- MAP, A/C dispute resolution.

2 (iii) NEXT STEPS

It was clear from this initial discussion the Forum could usefully address some problem areas. The Chair recommended that the objective should be to establish best practices/guidelines working with the available options of the different Member States. The approach would be similar to that followed for the low value intra-group services.

The Commission will prepare a discussion document drawing on what has been said today and suggesting some issues to be discussed at the next Forum meeting.

3. OUTCOME OF THE WRITTEN PROCEDURE ON THE ADOPTION OF THE REPORT ON NON-EU TRANSFER PRICING TRIANGULAR CASES

This document has been largely discussed during previous meetings. The only unresolved point was the last paragraph on page 2 and a corresponding German footnote reservation. The Forum agreed to delete the paragraph, the German reservation was withdrawn and the document was adopted. The Commission would consider the report in its next communication.

As a separate point the vice-chair of the Business Members considered that the deleted paragraph merited stand alone discussion, so BM will prepare a document reflecting their views on this issue which may or may not form the basis of a future work programme item.

4. AN INITIAL DISCUSSION ON CCAs AS A CURRENT WORK PROGRAMME PROJECT

The chair outlined that the main purpose of this initial meeting was to have a first discussion on the scope of the work, if any, to be carried out by the Forum on CCAs.

4 (i) ROUND TABLE DISCUSSION TO IDENTIFY PRAGMATIC PROBLEMS ASSOCIATED WITH CCAs

The Forum identified several points for discussion on CCAs, such as the differences in accounting systems; a profit mark up or not; the differences between the economic and the legal ownership in common law and civil law Member States; and the valuation of contributions.

There was some concern voiced about possible overlap with an OECD project that was currently being scoped. The intended project was mainly focused on intangibles but there was a read across to CCAs.

JTPF work and OECD work were not mutually exclusive for each had differing influences and drivers but there was certainly no value in overlapping work. Even a brief reflection on work proposed by the OECD identified certain issues that that would not be addressed, for example, services and CCAs.

Certain members of the Forum had attended a Fiscalis seminar on CCAs and noted that issues identified there may usefully be explored or at least flagged up as part of an examination of the issues by the Forum.

4 (ii) NEXT STEPS

The chair considered that the mood of the Forum was to build on the earlier Fiscalis event in Prague identifying problems with CCA's and proposed a further round of discussion from a general perspective being mindful of developments at the OECD. For this purpose a paper would be drafted by the Secretariat.

5. FUTURE JTPF WORK PROGRAMME

The Forum discussed about the possibility of including in the future work program the following items:

Arbitration Convention:

- Some TA's felt that the transparency of the Arbitration Convention could be improved by providing either more statistical information or a brief description of the bottlenecks resulting from its application.
- The new article 7 on permanent establishments of the OECD Model Convention has an impact on article 4 of the Arbitration Convention. Presently this is not yet an issue. However, in the future juridical problems might arise from stakeholders interpreting the article differently, either under the old or the new approach.

Compensating adjustments:

In this area, Member States apply significantly different rules, such as:

- No adjustments are possible after year-end. This is also considered a customs or VAT issue as the adjustment may require the VAT/Customs filing to be revisited.
- Adjustments are possible, but a pre-existing contract authorizing this is needed.
- Adjustments may be carried out before the last month of the year.

Therefore, according to the vice-chair of the Business Members, it would be advisable to analyse the specific requirements in each Member State as a starting point for discussion.

Secondary adjustments:

When a primary transfer pricing adjustment is carried out, the adjustment amount may be characterized, for example, as a constructive dividend, interest or equity contribution (secondary adjustment). The treatment of these secondary adjustments is different in the Member States. Where they are applied, they can be, for example:

- Legally binding.
- Settled on a case by case basis through administrative practice.
- A negotiated solution between the tax administration and the tax payer might be sought for before the primary adjustment is carried out.

According to the Business Members, these different treatments might create a risk of double taxation. However, the vice-chair of the Tax Administration Members was of the opinion that a higher taxation might be possible, but not double taxation.

According to the OECD representative, there is still room for improvement both in compensating adjustments (based on an OECD paper issued in 1984 on the topic)

and secondary adjustments (based on Paragraph 4.69 of the OECD Transfer Pricing Guidelines).

The vice-chair of the Business Members announced that they will submit a paper on these two topics by the end of September 2010.

The Commission thanked the group for sharing its views on potential future work programme items. This would be useful in preparing the request for a renewal of the mandate.

6. EUTPD MONITORING: UPDATE OF DOCUMENTS

Some amendments were required in the summary report (JTPF/015/BACK/REV/3/2009).

7. 2009 APA TABLE

Several TAs had still to update the 2008 APA table. Those TAs were requested to send the information to the Secretariat by the end of June after which date the table would be published.

It was clarified that an updated table was to be prepared for each year so information relating to 2009 will be formally requested as soon as 2008 is completed.

8. TABLE ON THE NUMBER OF PENDING CASES UNDER THE ARBITRATION CONVENTION

Different suggestions to improve the Arbitration Convention were discussed under point 5 of the Agenda. Some work would be done to suggest what improvements to the current format could be made to this and other tables together with shorter the timescales for publishing.

9. INDEPENDENT PERSONS LIST & CVS

Several Member States had still to send in the CVs of the independent persons eligible to become a Member of the advisory commission, and were requested to do so.

10. ANY OTHER BUSINESS:

10 (i) ARBITRATION CONVENTION / ADDITIONAL INFORMATION ON PENDING CASES

This issue had been already discussed during the meeting.

10 (ii) NEXT MEETING DATES 26 OCTOBER 2010 AND PROVISIONALLY 15 FEBRUARY 2011.