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DIRECTORATE-GENERAL
TAXATION AND CUSTOMS UNION
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Unit D1 Company Taxation Initiatives

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SUMMARY RECORD OF THE THIRTY FIRST MEETING OF THE EU JOINT TRANSFER PRICING FORUM

held in Brussels on 9th June 2011

1. WELCOME BY THE COMMISSION

Tom Neale, on behalf of the Commission, congratulated the JTPF on the renewal of its mandate as of 1 April 2011 and welcomed its members, Chair and Vice-Chairs.

2. INTRODUCTION/PRESENTATION OF CHAIR, VICE CHAIRS AND FORUM MEMBERS AND OBSERVERS

The Chair introduced himself and the newly elected Vice Chairs. He thanked the JTPF for its important work to date and encouraged members to continue their fruitful cooperation under the new mandate. JTPF Members, as well as the OECD Observer and members of the Secretariat were invited to present themselves in a 'tour de table'.

3. ADOPTION OF THE AGENDA

The agenda (doc JTPF/011/REV1/2011/EN) was adopted by consensus and the Chair reminded members that the minutes of the meeting of 10th February 2011 (doc JTPF/010/2011/EN) had been adopted under written procedure and published on the website.

4. ADOPTION OF RULES OF PROCEDURE OF THE JTPF

The draft Rules of Procedure of the JTPF (doc JTPF/012/2011/EN) presented to the Forum by the Secretariat are based on the standard Commission-wide model of Rules of Procedure of expert groups¹ amended as necessary. Four amendments to the draft Rules of Procedure were proposed, all by MS' tax administrations:

- in Article 11: change the period allowed for comments by members on the draft minutes from "twenty" to "thirty" calendar days;
- in Article 12(2): change "request a reservation" to "make a reservation";
- in Article 13 (two amendments): change the reference "Article 15" to "Article 17" and add the following formulation at the very end of the Article/paragraph "or unless the member presenting the document wishes to withdraw it".

Following a discussion and clarifications by the Commission the proposed amendments were accepted and the Rules of Procedure were adopted by consensus.

5. INFORMATION BY THE COMMISSION SERVICES ON CURRENT ONGOING ISSUES

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

(1.) Commission Communication COM/2011/16 (Communication from the Commission to the European Parliament, the Council 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): On 17 May 2011 the Council adopted conclusions on the Communication. The Council endorsed the guidelines on low value adding intra-group services and welcomed the report on potential approaches to non-EU triangular cases. The Council also welcomed the Commission decision of 25 January 2011 setting up the EU JTPF expert group.

(2.) Completion of the Report on Small and Medium Enterprises and Transfer Pricing (SME Report) and of its Annex: The Report was adopted by the JTPF at its meeting on 10 February 2011 and, together with the Annex, was published on 4 March 2011. It examines the specific issues of SMEs in the field of transfer pricing and suggests how to address them in the form of a series of recommendations concerning areas such as access to information, training, documentation requirements, audit, existing best practices and dispute resolution. The SME Report will form part of a future Commission Communication on the latest JTPF achievements. This will probably be prepared in 2012 – when the JTPF has made further progress and will, as usual, be forwarded to Council for endorsement. The SME Report and its annex are available on the JTPF webpage.

(3.) Adoption of the Proposal for a Council Directive on a Common Consolidated Corporate Tax Base (CCCTB) by the Commission: the proposal was adopted by the Commission on March 16 and is currently being discussed in the Council working groups. The European Parliament will also discuss the proposal at a later stage in order to give its formal opinion. The Committee of the Regions is also likely to present an opinion on it, as is the Economic and Social Committee. It is to be expected that the adoption of the CCCTB will take some time. Even after the adoption of the CCCTB,

¹ SEC(2010) 1360 final

however, the work of the Forum will remain relevant, as the system is optional. Following a question by a Forum member, Tom Neale clarified that the CCCTB will have an impact for transfer pricing of groups of enterprises within the EU, but will have no effect on members of such groups outside the EU. The Commission will keep Forum members updated on developments in relation with the CCCTB.

(4.) Follow-up to the Public Consultation on double taxation within the EU: the summary of responses is available on the website of DG TAXUD. Due to procedural delays within the Commission the Communication on the subject is to be expected in September 2011 instead of June 2011. An impact assessment will then be undertaken in assessing the options for action, including possible legislative action. In relation to some transfer pricing issues raised by respondents, they are already being addressed by the JTPF or covered by items proposed for inclusion in the next work programme of the group.

6. DISCUSSION ON THE FUTURE JTPF WORK PROGRAMME

The Chair opened the discussion by inviting the two Vice Chairs to present the issues considered relevant for the future JTPF work programme by MS' tax administrations and by private sector members, respectively.

Tom Neale indicated that the Future work programme would remain open for any future agreed item that the group might wish to include.

MS' tax administrations listed Cost Contribution Arrangements (CCAs) with a focus on services (rather than intangibles in order not to duplicate ongoing OECD work which focuses on intangibles), as well as compensating adjustments/ year-end adjustments and secondary adjustments as priority areas. Member States also considered for possible inclusion in the work programme risk assessment, possible revision of the Code of Conduct on AC (notably the potential impact of new Article 25.5 of OECD DTC model on the Arbitration Convention), as well as the monitoring of the EUTPD.

In relation with the interaction between Article 4(2) of the AC and new Article 7 of the DTC Model (doc JTPF/006/BACK/2011), TAs will first seek legal opinion internally in order to be able to decide on the most appropriate action.

Private sector members listed as items relevant for inclusion in the work programme CCAs with a focus on services not creating intangibles, risk assessment, improvement of the monitoring of the Arbitration Convention (AC) and a discussion on possible applications of the AC in areas where some uncertainty exists around its scope. Other issues of interest mentioned were safe harbours, business restructuring and APAs.

Based on the initial interventions of the two Vice Chairs, the Chair confirmed as a first item identified for inclusion in the new work programme: CCAs (centred on services).

On risk assessment, it was agreed that it would be useful to exchange information on best practices in this area and have an open discussion on the various approaches. It is unlikely that binding conclusions or recommendations would be formulated. The aim would rather be to gather information on avenues for the implementation of risk assessment tools. It was agreed that the Forum would hear 4 presentations on risk

assessment at its next meeting in October 2011: by the UK, the Netherlands, Austria and from private sector members. No confidential information would be released by presenters; the focus would rather be on rules and practices.

The discussion moved then on to secondary adjustments and compensating adjustments/year-end adjustments.

On secondary adjustments private sector members commented that these generally arise in the context of domestic law and may therefore not fall within the scope of the Forum. It was agreed that the Secretariat would draft a questionnaire on the legal and administrative/practical aspects in the different MS, including on whether these adjustments fall within the scope of the AC, to be presented at the next Forum meeting.

On compensating adjustments and year-end adjustments private sector members felt that their main problems were related to VAT and customs rather than to direct taxes. The Chair confirmed that the Forum would not discuss VAT or customs aspects of compensating/year end adjustments. A member expressed a concern that compensating/year end adjustments are being discussed in parallel by the OECD and taking these up by the JTPF could lead to a duplication of efforts. The OECD observer clarified that there is, indeed, ongoing work of the OECD on hindsight, but that JTPF's contribution would be welcome. It was agreed that it would be useful to start by taking stock of the current situation on the issue. A questionnaire will be drafted by the Secretariat and presented at the next JTPF meeting.

The Forum further discussed including in the new work programme several issues linked to the monitoring of JTPF achievements.

- (1) As regards the possible revision of the CoC on AC: (i) it was suggested to examine limitations to the access to the AC (e.g. whether secondary adjustments and compensating adjustments are covered by the AC provisions); (ii) TAs will set up before the next JTPF meeting a small working group to work on a new questionnaire on the pending cases under the AC in order to improve the monitoring; (iii) TAs suggested that MS already applying Article 25.5 in their DTCs should report to the JTPF on their practical experience, which might help the Forum improve arbitration under the AC.
- (2) The monitoring exercise on EUTPD should notably address the following issues: why MNEs apply the EUTPD provisions in practice but do not opt officially for them; use and common acceptance of pan-European vs domestic comparables. The Chair considered that it would be very interesting to analyse the evolution of the situation in MS before and after the incorporation of the EUTPD. Private sector members agreed to work on a future questionnaire on this issue for possible use in the framework of the next monitoring exercise in 2012.
- (3) On the APA Guidelines, it was suggested that the review of APA policy/programmes in MS would be useful to address some new aspects on monitoring.

The Chair concluded that several topics are linked: the crisis and its impact on available resources force all stakeholders to work on risk assessment tools in order to dedicate the right amount of resources to audits, APAs, MAPs, etc.

As regards the paper on specific issues related to the Arbitration Convention (doc JTPF/008/BACK/2011), it was concluded that the analysis contained in the document was incomplete. Therefore, the private sector vice-Chair proposed and the group agreed to withdraw the paper from the Forum.

The Chair summarised the items identified by JTPF members as most relevant for the current mandate of the Forum:

- CCAs
- risk assessment (fact-finding discussion)
- secondary adjustments
- compensating/ year-end adjustments
- monitoring of former and ongoing JTPF work (AC, EUTPD, APAs).

These items will be included in the agenda for the next JTPF meeting.

Alternative dispute resolution will remain on the new work programme as a reserve item.

7. COST CONTRIBUTION ARRANGEMENTS

The Chair presented the Secretariat discussion paper on CCAs (doc JTPF/16/2010/EN) and clarified the new timeframe (the JTPF report is to be expected in 2012) as well as the agreed scope (initially services excluding intangibles).

Some TAs confirmed that CCAs are part of their daily life in audits, MAPs or APAs.

The following issues were identified as requiring further work:

- (1) Terminology aspects: distinction between low value adding intra-group services and CCAs; distinction between CCAs and CSAs; etc.
- (2) What aspects of the report on low value adding intra-group services are also valid for CCAs?
- (3) How to demonstrate the application of the ALP?
- (4) How to address the risk of duplication of costs?
- (5) What kind of documentation should be provided?

The following topics would not be addressed in principle:

- Legal versus economic ownership;
- Buy in/buy out.

Private sector members recognised that the example previously submitted to the Forum (doc JTPF/14/2010/EN) could be better adapted to the scope and agreed to submit example(s) of CCAs on services to the Secretariat by 29 July 2011.

The Chair invited TAs to provide a general overview of national rules and administrative practices on CCAs. In order to facilitate TAs' work it was suggested that the Secretariat will circulate information obtained for last year's Fiscalis seminar on CCAs and ask TAs

to complete/revise their former contributions. TAs will also be requested to authorise its release.

The Forum invited the Secretariat to prepare a document for the next meeting in October. It would take stock of the present discussion paper on CCAs, and would be based on the example(s) to be provided by the private sector and on the contributions from TAs to the questionnaire for last year's Fiscalis seminar, as well as on the previous JTPF report on low-value adding intra group services.

8. MONITORING

8. (i) As regards the statistics on the number of pending cases under the Arbitration Convention, it was reminded that the table for 2009 (doc JTPF/004/2011/EN) has already been published on the JTPF website, although France has not yet provided data. The update for 2010 will be launched shortly based on the current format. TAs agreed to set up before the next meeting a small group to work with the Secretariat on its improvement for future use.
8. (ii) Concerning the table on the availability of an APA procedure for 2009 and 2010 (JTPF/013/BACK/2011/EN) Member States were invited to complete their answers. As some TAs suggested that the questionnaire could be improved for future years, the Chair invited the working group on AC questionnaire to also deal with the revision of the APA one.
8. (iii) As regards the list of independent persons of standing eligible to become a member of the advisory commission (doc JTPF/010/BACK/REV15/2005/EN), an update from Estonia had been received. Cyprus, Latvia, Lithuania, Romania and Slovenia were reminded that they had not responded and were urged to supply names and CVs.

9. ANY OTHER BUSINESS

Next JTPF meeting: 26 October 2011.