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SUMMARY RECORD OF THE TWENTY-THIRD MEETING OF THE EU JOINT TRANSFER PRICING FORUM

held in Brussels on 27 - 28 November 2008

1. ADOPTION OF THE AGENDA (DOC. JTPF/017/REV2/2008/EN/FR/DE)

The Chair reminded members that a report on the work of the Forum, in particular the outcomes achieved, was due in March 2009. The first priority of this meeting was to finalise the paper on Recommendations related to the interpretation of some of the provisions of the Arbitration Convention (Doc: JTPF/002/Rev 4/EN). Any remaining time would be devoted to Intra-group services issues.

On a point of clarification the Chair explained that whilst the Forum has a mandate until 2011 renewal of Business Members` was required by March 2009 and the Secretariat was dealing with that process.

The agenda was adopted.

2. FINAL DISCUSSIONS ON DRAFT JTPF RECOMMENDATIONS RELATED TO THE INTERPRETATION OF SOME PROVISIONS OF THE ARBITRATION CONVENTION (DOC.JTPF/002/REV4/2008/EN INCLUDING THE COMMENTS RECEIVED AT THE END OF SEPTEMBER, AND DOC.JTPF/019/2008/EN REPORT FROM THE SUB-GROUP ON EU TP TRIANGULAR CASES.)

The Chair again emphasized the importance of finalizing this paper so that the conclusions could be incorporated in the report on the work of the forum.

The Chair gave some process information as follows: the Secretariat will prepare a draft report on the work of the Forum. The draft report will be circulated on or

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around end of December 2008 - beginning of January 2009 - with a deadline of one month. Any comments received will then be incorporated into a second revised draft and reissued by the middle of February for any further comment and if possible adoption under the written procedure.

The next stage of the process is that the Forum's agreed report is forwarded to the Commission who will consider the findings and prepare a Communication including a proposal from the Commission to the Council. The Council may then adopt that proposal and in turn any of the conclusions or recommendations of the Forum contained within it. The process could take a year in total.

The following discussion on DOC: JTPF/002/REV4/2008/EN then took place:

1. Introduction:

One tax administration expert (TA) sought clarification of the words "complementary paper" in the second paragraph and the status of the paper. Should it not be the case that any agreed recommendations be incorporated in the Code of Conduct itself?

The Chair reminded the Forum members they were an expert group charged to draft a report (including pragmatic solutions to TP problems) which the Forum adopts but then transmits to the Commission. It is then up to the Commission to decide on what elements of the Report it may wish to draw on it preparing its own communication on the work of the Forum.

The Business members Vice-Chair received confirmation from the Chair that the JTPF is an expert group not representing specific country policy or individual business interests and that the Commission has the power of not following the recommendations included in the report of the JTPF.

One TA suggested that the introduction be expanded to outline some of the explanations about process just discussed.

The Secretariat explained that the report is used in the preparation of the legal instrument that the Commission believes to be the most appropriate in the circumstances. Certainly one option available to the Commission in response to the present report is to draw up a second Code of Conduct. Alternatively, the existing Code of Conduct could be revised to incorporate recommendations proposed by the Forum.

For illustrative purposes a revised Code of Conduct will be sent at the same time as the draft report showing all the agreed recommendations and conclusions.

The UK comment to avoid the use of the word recommendation was not adopted as the word was already used in former reports.

2.1 Serious Penalties

The UK comment to delete the word "great" from the recommendation was accepted and the Forum adopted the recommendation.

2.2 Scope of the Arbitration Convention (AC).

2.2.1. Thin cap

The Chair introduced the agenda item by noting it was certainly a contentious issue for some TAs experts and TAs views were already included in the table, part of the June summary record. Contributions to the table were still awaited from Bulgaria, Greece, Luxembourg and Romania.

Additional written contributions had been received from Czech Republic, Italy and the Netherlands.

The TAs Vice-Chair informed the Forum that what is included within the scope of the Arbitration Convention had again been discussed by TA. For some TAs it was unclear what the proposed recommendation was intended to cover. Additionally, there was no agreement between TAs on the specific inclusion of thin cap issues within the scope of the Arbitration Convention when the issue centered on an adjustment related to the amount of the loan or the interaction with anti-abuse rules. The result was that it was felt the recommendation should be deleted from the paper.

The business Vice-Chair expressed disappointment at that outcome.

The Business Members expectation was that an expert group should be able to debate the issue. It was also noted that in previous exchanges several TAs did not face difficulties in accepting that thin cap issues related to either interest rate or quantum issues both fell within the scope of the Arbitration Convention.

The scope of Art 4 is clear in Business Members' opinion. Business Members also added that this is also the opinion of the ECJ and academics. The Business Members' Vice-Chair urged TAs to reconsider the deletion of the recommendation otherwise the only practical solution for taxpayers will be to go to court.

The Chair agreed with Business Members that in previous discussions there was some consensus amongst MS as to what was included within the scope of the Arbitration Convention.

The current wording in the recommendation was not intended to be opaque but rather encourage consensus. The wording accords with Art 4 covering financial relations and the second paragraph draws out that all the terms of a loan -amount, duration and interest rate- should be considered. On purpose the word thin cap was avoided as no agreed definition is available. To that extent the recommendation was, for the Chair, not ambiguous.

The Chair would like the Forum to discuss reinstating the recommendation and of course individual MS have the option of entering reservations.

One member felt that a majority TA view had been expressed in the sub-group and the recommendation did not need to be discussed further. The Chair observed that the work of sub-groups was useful but it could not bind the main plenary and those unable to attend sub-group meetings have a right to comment on any sub-group findings.

One TA felt the Forum had done all it could on this issue. Different positions had been identified wherein some felt all the terms of a loan were included in the scope and others felt just the interest rate was covered. The same TA felt that the rate of

interest fell within the scope of the Arbitration Convention but not questions on the quantum of the loan not least because it is very difficult to establish the at arm's length amount of a loan derived from free competition.

Some TAs felt that the relationship of anti-abuse rules to the scope of the Arbitration Convention was unclear. One TA felt that that particular aspect had not been debated extensively enough and that it was unclear whether the ECJ will consider that anti-abuse are covered by the AC. Other members of the Forum discerned a clear link between anti-abuse rules and the application of arm's length principle.

Business Members commented on the fact that the ultimate aim of Arbitration Convention and Double Taxation treaties was the avoidance of double taxation and that the majority of law-abiding taxpayers should not be disadvantaged by individual and divergininterpretations of the Arbitration Convention by TAs .

The Chair wanted to explore how a resolution of the subject may be achieved. He stressed that anti-abuse rules and the arm's length principle (ALP) are not two different worlds as these rules generally aim to come back to reflect an ALP situation.

One business member supported the chair's statement because an anti-abuse rule must make reference to a norm – the ALP.

One TA thought the answer might lie in accepting the recommendation as it is and to leave it for others to put in reservations as they saw fit.

One TA mentioned that the Arbitration Convention is not the only way to eliminate double taxation: thin cap issues and anti-abuse rules can be discussed under the standard provision of DTCs.

Another TA saw value in agreeing a wording that clearly communicated that all TAs agreed that interest rates undoubtedly fell within the scope of the Arbitration Convention. But the draft recommendation should then also indicate that differing views exist about the inclusion of a wording on anti-abuse and loan quantum issues measures.

One TA explained that following the ECJ decision the anti-abuse rules were abolished. Therefore they would not be able to agree in a Mutual Agreement Procedure (MAP) to any adjustment based on such rule. Only national courts could arbitrate. Another TA mentioned that they could only adjust the price (interest) and would not be allowed to eliminate the double taxation linked to an adjustment based on the amount of the loan.

The Chair wondered if a more explicit reference to the arm's length principle would assist those currently uncomfortable with the interaction of anti-abuse rules, the arm's length principle and the scope of Art 4 of the Arbitration Convention. But any proposal to include a second exclusion rule (i.e. other than serious penalties) based around anti-abuse rules could lead to attempts at re-writing or narrowing the scope of the Arbitration Convention which is not within the ambit of the Forum.

There was still no absolute consensus although one TA felt that reference to the arm's length principle alleviated some of their problems.

The Chair proposed the following:

> The recommendation first paragraph remains as is – ("concludes" amendment not taken- see UK withdrawal of comment at 1. introduction -deletion of "more" and "of" taken as drafting amendments).
>
> Second paragraph reads "In particular the JTPF considers that profit adjustments ***based on the arm's length principle*** arising from financial relations, including a loan and its terms, are within the scope of the AC."

The Czech Republic was disposed to accept this revision but wanted to register a scrutiny reservation. Similarly Germany, Latvia and Portugal wished to consult with their administration. The Chair commented that a scrutiny reservation was the right of each MS.

Italy and Netherlands signaled their intention to lodge substantive reservations. The Chair asked that any such reservations are worded as that and not by way of more extensive text. Ultimate deadline for any reservation was prior to adoption of the Forum report but the Chair said it would be helpful if substantive reservations could be submitted in time for inclusion in the draft report of the Forum and as such should be lodged by 23/12/2008.

2.2.2 EU Triangular cases DOC JTPF/019/2008/EN (See content of agenda item 2)

The Chair opened the discussions by emphasizing that the subject of discussion during this meeting was EU TP triangular cases rather than Non-EU triangular cases.

The sub-group document on EU triangular cases contained recommendations and, if those recommendations were accepted, an illustrative draft of how they may appear in a revised Code of Conduct (CoC) was also included in the report.

The Business Members Vice-Chair felt the paper may be better described as "procedural issues".

One TA had problems with the report on several counts. Firstly, the report seemed to be limited to Triangular cases but what if the number of countries involved were greater than that? No guidance was provided on stage one of the AC process and the guidance around a potential extension of the timeline to the second phase was too vague. The TA member felt that much more discussion was needed.

The Chair felt that the paper had been accessible to the Forum for some time before the meeting (since August). There had been presentations and written procedures. The paper was not intended to be a definitive solution to all AC clarification issues and new points could form the basis of future work.

Another TA felt there should be an emphasis in the draft report that the topic of triangular cases includes EU and non-EU. The report is related to EU triangular cases only. They felt the report should recognize there are two principles conflicting: the elimination of double taxation and the application of the arm's length principle. If it is recognized that the elimination of double taxation will prevail for EU triangular cases, for non-EU the application of the ALP should generally override the elimination of the double taxation.

Business Members also felt that the report should make reference to ongoing work relating to NON-EU TP Triangular cases.

The Chair said that the main thrust of the EU Triangular report was on procedural issues. There may be linkages to the outcome of Non-EU Triangular cases but that could not be predicted as those discussions had yet to take place. The Chair would not like to lose the opportunity of making recommendations now rather than waiting in the hope of things yet to come. A chapel now may be better than a potential cathedral later!

The Chair outlined three options:

(1) Put the EU Triangular report in the draft forum report as no more than a state of play statement.

(2) Adopt the EU Triangular report and draft Code of Conduct amendments and say it will be followed up after a resolution of the Non-EU Triangular cases work.

(3) Nothing goes in the report until a resolution of Non-EU Triangular cases which may involve an overall time lag of two years.

The Chair will look for a majority view.

Sweden reiterated concerns and indicated that a reservation may need to be lodged by them.

Chair prefers option 2 what is Business Members view?

The Business Members Vice-Chair was content for the EU triangular cases report to be included in the Forum report with a reference to the work in progress on Non-EU Triangular cases.

Germany observed that the necessary link could be made after next meeting on Non-EU triangular cases.

It was accordingly agreed that the EU Triangular cases report would form part of the Forum report and its recommendations together with an emphasis that it was an initial report subject to future monitoring. The possibility of Sweden entering a substantive reservation was noted.

2.3 Interest Charges during MAP negotiations

One TA had submitted drafting changes to the recommendation currently in front of the Forum and requested "should normally" replace " shall " and "will" in the original text.

Another TA suggested the wording: include a further reference to national law in the second sentence; recognize that an advantage could arise and refer to a wider concept of mismatches other than timing issues.

As the debate developed the issue of contravening national law in achieving the aim of not disadvantaging a taxpayer because of the time taken to complete the MAP process emerged.

The debate then began to widen to encompass issues of other potential mismatches, including interest rates, which could disadvantage or benefit a taxpayer as a result of the MAP process.

The Chair refocused the debate by reminding the Forum that the overall aim of this recommendation was to put in place a process by which during the MAP phase a taxpayer would not be disadvantaged on interest charges or interest refunds because of different TAs` approaches. The recommendation was not to try to address a wider remit than that.

One TA reminded the Forum that the recommendation sought to provide a broader menu of options than the current status quo.

The Chair added that in many cases national law would be sufficient to resolve any adverse outcomes but if national law fell short of the objective, the recommendation aimed to bridge that gap through a legal or administrative solution. He reminded the members that the same approach was already adopted for the recommendation related to the suspension of tax collection.

The debate had now raised the question of whether or not the overall aim was agreed i.e. in the context of interest charges and refunds (as opposed to mismatches arising from other issues). Did the Forum wish to adopt a recommendation that would facilitate the elimination of the adverse effects on charges and refunds that arose during the time it takes to run and complete the MAP process?

One TA mentioned that the main point was not the legal aspect of the recommendation but the political commitment.

The existing text was considered and a suggested revision was tabled as follows:

> **Considering that during MAP negotiations a taxpayer should not be adversely affected by the existence of different approaches on interest charges and refunds during the time it takes to run and complete the MAP process.**
>
> **JTPF recommends that MS *involved* should apply one of the following approaches:**
>
> - **Tax to be released for collection and repaid without attracting any interest, or**
> - **Tax to be released for collection and repaid with interest, or**
> - **Each case to be dealt with on its merits in terms of charging or repaying interest (possibly during the MAP process).**

Reactions were taken to the revised text.

One TA felt that this wording resolved issues for them about the application of national law. However, for another MS the precedence of national law application remained paramount a position from which they could not defer.

The Chair discerned two issues: firstly was the aim of recommendation agreed – to ultimately relieve those taxpayers adversely affected by interest charges and refunds as a result of the length of time a MAP process took to complete. Secondly, if that was agreed was the text of the recommendation acceptable in achieving that aim.

Italy queried if the question needed to be decided now. The Chair recognized that scrutiny reservations may be required but he was concerned about substantive reservations on the aim of the recommendation. The Chair preferred the wording of the revised text as it defined more clearly the aim of the recommendation and gave a wider range of options than the status quo in resolving the issue.

One TA suggested moving to proposing the text and taking reservations.

Building on that the Chair proposed that **any substantive reservations on the aim of the recommendation was lodged with the Secretariat by 23/12/2008** so that they could be incorporated in the draft report of the Forum. In the absence of such reservations the only issue remaining would be the drafting of the text.

Some TAs expressed a preference for the original text on the basis that it had been in front of the Forum for some time. Others felt that the revised text more clearly illustrated the aim and the alternative approaches.

Italy mentioned that the recommendation could be acceptable if the word "involved" could be deleted.

France needs to consider the new text.

The Chair concluded that substantive reservations to the aim should be lodged with the Secretariat by 23/12/2008 and that draft report would contain the revised text as the wording of the recommendation.

2.4 The setting up of the advisory commission

Recommendation agreed at the June 2008 meeting

2.5 Independent persons of standing

Recommendation agreed at the June 2008 meeting.

However it was agreed that the statement of independence would be revised to include the word "counsel" in all relevant paragraphs.

2.6 Date of admissibility for a case

Recommendation agreed at the June 2008 meeting

2.7 Interaction between MAP and judicial appeals

A table outlining the TAs` positions would be included in the draft report and made available for comment under the written procedure.

3. TAs` suggestions from the report on the implementation of the Code of Conduct.

The Chair suggested, given the time constraints, that this item was not to be dealt with on a point by point basis. However the Chair did identify an issue that may be capable of a swift resolution and that other issues that may would best be considered in the March 2009 meeting as potential future work items.

The item the Chair thought capable of resolution now was:

The appointment by a MS of anon-national to its list of Independent Persons did not contravene the AC procedure and in fact a MS had already taken that action. The Forum concurred with this view.

With regard to the other issues in item three the Chair suggested that they form the basis of an agenda item for the next meeting on future work. Some thought could also be given to Small and Medium Sized Enterprises (SME) and Cost Contribution Agreements (CCA). The Chair felt though priority must be given to intra-group services at the next meeting.

The Business Member Vice-Chair proposed that some reference to the work done so far on services should form part of the final report of this mandate. The Chair felt that, in his experience, the Commission would prefer a self-contained report on services. The Business Member Vice-Chair would reflect on this further when the draft report was issued.

3. DISCUSSION PAPER ON CENTRALIZED INTRA-GROUP SERVICES ((REFERENCE DOCUMENTS:

DOC.JTPF/001/2008/EN AND DOC. JTPF/014/REV2/BACK/2007/EN , DOC. JTPF/022/BACK/2007/EN , DOC. JTPF/012/BACK/2008/EN, SECRETARIAT WORKING DOCUMENT PREPARED FOR THE TAX ADMINISTRATION SUB-GROUP MEETING DOC.JTPF/021/2008/EN, SUMMARY RECORD OF THE MALTA SUB-GROUP MEETING DOC. JTPF/022/BACK/2008/EN, BUSINESS CONTRIBUTION ON COSTS ALLOCATION DOC. JTPF/023/BACK/2008/EN, PROF. MAISTO DRAFT REPORT ON SHAREHOLDER COSTS DOC. JTPF/024/BACK/2008/EN – IN PDF FORMAT))

Three presentations were made;

a) Prof. Maisto presented a draft Report on shareholder costs docJTPF/024/BACK/2008/EN

Prof. Maisto thanked the contributors to his report. The Forum was guided through the report by means of a PowerPoint presentation.

b) Stefaan De Baets, the TAs` Vice-Chair, presented a summary of the work and views of TAs based on the Summary Record of the Malta sub-group meeting doc JTPF/012/BACK/2008/EN.

c) Theo Keijzer, the Business Members Vice-Chair, wanted to take the opportunity of addressing concerns he felt were emerging as a result of the business paper JTPF/023/BACK/2008/EN.

The concerns articulated were around proving that a benefit had been provided by the intra-group services and around the confidence in the amount of their costs put forward.

Confidence in the quantum of costs should be based on fact MNE had those costs audited. In turn that audit was carried out by externally qualified bodies and based on the accounting and control framework within an MNE; the tax control framework is a sub-set of the general control framework. Such costs are included in externally published annual accounts prepared for shareholders and other stakeholders of publicly held companies and in statutory accounts as filed in a publicly accessible register.

The benefit test is complied with and documented by the existence of contracts between service provider and recipient and signed by the appropriate company officers who were obliged to act in the interests of their company and could not attest to a benefit that did not in fact occur.

Excluding non allowable costs, as opposed to allocable costs, was a practical problem as costs were amalgamated and as a result lost their original identity.

At the conclusion of the presentations a first round of exchanges took place on the Secretariat document JTPF/025/2008/EN and the presentations just made.

Some exchanges took place to clarify the nature of audits in larger MNEs and at different levels of an MNE. Business Members confirmed that in practice audits took place at all levels of an MNE, not just at the consolidated level. One business Member also drew attention to the fact that transfer pricing policies were also subject to external audit.

It was felt that the Secretariat paper and presentations presented many questions but how were they to be ordered and answered?

One TA felt the Secretariat paper did not assist in providing order and structure. Others, both TAs and Business Members, felt that in fact the paper gave both a structure and an initial sift on the issues to be addressed and should form the basis of future work on the subject.

The point was made that adopting the approach suggested in the paper should recognize that discussion of a later stage issue may provide further insight into earlier stages. As such final conclusions could only be reached at the conclusion of the whole stage process.

One TA mentioned that it should be discussed and agreed whether for the allocation of costs the bottom-up approach is not also appropriate.

The Forum was content to make use of the Secretariat paper and agreed on the 6 stages approach. This meeting should in particular discuss stages one and two.

Denmark registered their view that they were not in a position to take any decisions on the proposed structure or potential proposals in the paper. They felt that intra-group services were essentially an OECD issue and that two sets of guidance on the same subject could lead to confusion.

The Chair believed that it was a given that the work of the Forum was always to supplement guidance of OECD. Indeed using Prof. Maisto`s paper as an example one could see areas that were highlighted where supplementary practical guidance could be offered. Perhaps Denmark could recognize it worth of continuing the discussions whilst retaining a scrutiny reservation.

The discussion of Stage One of the process commenced. One business member felt that more definition was required of the term "provision" in the phrase " provision of a service" to distinguish between a "call-off contract" type scenario and “direct service provided” scenario.

The Chair invited members' views on conclusions on page 5 and 6.

A TA felt that in itself the potential conclusion on page 6, taken in isolation, was not a problem. They would however prefer the inclusion of a reference to the arm's length principle perhaps after the word "incurred". This would make it clear that no secondary tests were proposed over and above that required in applying the arm's length principle.

Some alternative drafting to draw on was offered along the lines of "taking into account the various functional profiles of the companies involved and the main transfer pricing methodology applied".

One TA mentioned that profits are allocated between TAs by the use of a methodology and that therefore for TAs the methodology is the starting point of an audit not the cost. The TA considered it as a major difference to the MNE approach.

The Chair felt that the first stage conclusion proposed may be more or less agreed subject to some drafting points.

The Forum now lacked the time in this meeting to discuss at length the second stage. In an attempt however to keep things moving and based on a working assumption that a supplementary list of share holder costs was a useful guideline development the Chair suggested:

Members review the submitted material relevant to this as contained in stage two in the Secretariat document and submit written comment by 15/2/2009.

At the March 2009 meeting comments would be taken on the value of a supplementary list.

4. DRAFT 2008 APA TABLE ON THE AVAILABILITY OF AN APA PROCEDURE (DOC. 020/2008/EN)

Postponed to next meeting

5. ANY OTHER BUSINESS:

5.1 Monitoring of the work programme: to be discussed in March

5.2 EUTPD questionnaire: to be discussed in March

5.3 2009 meetings: **24th March, 3rd June (changed by the Secretariat) and 27 October**