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SUMMARY RECORD OF THE NINETEENTH MEETING OF THE EU JOINT TRANSFER PRICING FORUM

held in Brussels on 28th June 2007

1. OPENING OF THE MEETING

M. Mors, Principal advisor at the Commission opened the meeting by welcoming the members and introducing Mr. Bruno Gibert Chairman of the expert group.

2. ADOPTION OF THE AGENDA (DOC. JTPF/037/2006/EN/FR/DE)

The agenda was adopted by consensus with the Chair suggestions to examine points 4 and 9 on the agenda before points 3 and 7.

3. INTRODUCTION OF THE MEMBERS

Each Business member introduced himself.

4. ELECTION OF THE VICE-CHAIRMEN

Mr Roy Warden and Mr Theo Keijzer were elected as vice-chairman representing the tax administration's members and the business' members respectively.

5. THE CHAIRMAN EXPLAINED BRIEFLY THE ROLE OF THE BUREAU (AS STATED IN ARTICLE 5 OF THE RULES OF PROCEDURE) AND THE INFORMAL EXISTENCE OF TWO SUB-GROUPS (ONE OF THE TAX ADMINISTRATION'S MEMBERS AND ONE OF THE BUSINESS' MEMBERS). ADOPTION OF THE DRAFT RULES OF PROCEDURE (DOC. JTPF/003/2007/EN)

The Chair explained that, the JTPF being a Commission expert group, the draft rules of procedure have been drafted on the basis of the standard rules of procedures of Commission expert groups and the experience gained by the former Forum (as

explained in the document from the tax administration member sub-group meeting in Barcelona in 2006 - doc.JTPF/008/BACK/2007/EN).

However he suggested amending article 4 (opinions of the group) in order to take into consideration that up to now the decisions within the group were always taken by consensus and not by voting. Consensus does not mean unanimity but diverging opinions are included in the documents through footnotes/reservations.

All members supported that this approach should be kept in the future and therefore article 4 was amended by the following sentence: *“The Group shall aim to adopt its opinion or reports on the basis of a consensus. Where complete agreement cannot be reached the range of opinions should be reflected”*.

The JTPF agreed to have a written procedure on the rules of procedure and therefore all members are invited to send any minor drafting suggestion to the secretariat by the end of July.

Theo Keijzer expressed his hope that in the future fewer reservations will have to be included in the JTPF documents.

6. ORAL REPORT BY THE COUNCIL PRESIDENCY ON THE STATE OF PLAY OF THE FORUM'S THIRD REPORT ON APAS

The German delegate explained that the Council adopted on 5th June conclusions welcoming the new mandate of the JTPF and including the commitment of Member States to follow the EU APA Guidelines and implement them in their national administrative practices as far as legally possible..

The Chair stressed that these guidelines are the third JTPF achievement and thanked the Presidency for their quick endorsement.

7. DISCUSSION AND ADOPTION OF THE 2007-2009 JTPF WORK PROGRAM (DOC. JTPF/009/BACK/2007/EN)

The Chair explained that this issue had already been discussed by the former Forum on several occasions and that all contributions were included in one document (Doc.JTPF/009/BACK/2007/EN). Two key contributions are the June document from Business Europe and the November document from the tax administration sub-group meeting held in Barcelona. He considered it as obvious that monitoring and further improving the operation of the arbitration convention were two issues for the work programme. He invited the vice-chairmen to report what were the outcomes of the pre-meeting of the sub-groups.

Roy Warden explained that for some tax administrations the experience of discussing the issues of “Thin capitalization”, “Business Restructuring, Secret Comparables”, “alternative ways of dispute resolution” at the OECD suggested that it might be difficult for the JTPF to make constructive progress. The issues of HQ and centralised services, the so-called "triangular" MAP cases and SMEs might, however, usefully be examined by the Forum but it was not yet clear what form any outcome would take.

Theo Keijzer went through the different suggestions included in the document from Business Europe:

- 1) Monitoring is a priority but this task should not be limited to collect information but should lead to a better understanding of the situation and to improvements.
- 2) HQ should also cover shareholder/stewardship expenses.
- 3) AC: the topics of triangular cases and thin capitalization are part of the item. In particular, thin capitalization was seen as a very important issue. (The Chair noted that even identifying the status quo would be useful for taxpayers.)
- 4) Alternative ways of dispute resolution: it is a key issue for the smooth functioning of the Single market and tax authorities should not discuss only at the level of the top of the administration but also at the level of tax auditors. We should find a practical solution facilitating this dialogue.
- 5) Business restructuring: this issue is under discussion at the OECD level but it should not be forgotten that the EU is a single market and not all MS are member of the OECD. Europe and the United States have diverging interests: in Europe exit taxes should not exist and therefore the JTPF could try to find EU set of rules for this issue.
- 6) SMEs: this topic is important but it should not be forgotten that in some sectors of activities MNEs are mainly competing with SMEs. Therefore the JTPF should be very careful not to create discriminations leading to unfair competitiveness.

The Chair applauded the criteria expounded by one MS which had also echoed in the pre-meeting the previous day: in order for the Forum to look at an issue, it must be shown that there is a problem and the problem should be capable of resolution by the Forum. The Chair believed that this would be a useful guideline for considering the future work programme.

A first set of conclusions of the Chair was that the issue of Business restructuring was certainly important but it is probably too early to reach an outcome. On alternative ways of dispute resolution he stressed that the Commission in its communication on APAs also supported the idea to re-examine the issue of “prior consultation”. Therefore this issue should be examined in a later stage.

A tax administration member said that other issues were the “exchange of practical experiences” and “risk analysis and risk assessment”.

Other tax administration members stressed the importance to have a good representation of SMEs in the Forum itself.

Another tax administration member said that under the AC issue the independence of the “independent persons of standing” should be discussed.

The Chair invited all members to send information to the secretariat on any problem related to the AC that would need to be discussed by the end of September.

Some business members who are tax consultants explained that they had a daily experience with SMEs' problems and that Business Europe did not have only MNEs as member but also SMEs.

One Business member suggested that the procedure under article 9.2 of the OECD Model should be examined as a possible way to improve dispute avoidance procedures.

One tax administration member suggested discussing HQ and costs sharing contributions together.

The Chair concluded that no consensus was found on the topics of Business restructuring, impact analyses and standards for arm's length test. A short discussion took also place on the prioritization of the different topics. The following ranking was finally decided:

- 1) Monitoring with the aim to improve the situation.
- 2) Arbitration convention:
 - Interests
 - Improvement of its functioning (commissions and independent persons of standing)
 - Interaction with litigation
 - Triangular cases
 - Thin capitalization
- 3) HQ and stewardship
- 4) SMEs
- 5) CCAs

Additional topics (reserve list) are alternative dispute resolution and risk assessment.

As regards the exchange of practical experience it should take place when one of the listed topics is examined but always keeping in mind that the work should lead to solutions being developed.

Theo Keijzer said that Business members could agree with the ranking but would like that the issue of HQ is not discussed later than June next year.

Some members suggested examining several topics at the same time. In any case, the Chair noted that Monitoring and improving the effectiveness of the AC was ongoing work and therefore did not preclude looking at other topics simultaneously in the future. Monitoring could be on the agenda of every JTPF meeting.

Therefore he invited the members to be more pro-active by sending more contributions to the secretariat.

As regards the future proceedings the Chair said in 2007 only one more meeting will take place but three meetings will take place in 2008. It was agreed to avoid meetings at the end of the quarter and to provide as soon as possible provisional meeting dates for 2008.

The chair said that in October the JTPF will discuss the issue of the monitoring and the arbitration convention. However in order to prepare the future work he invited members to send by the end of September contributions on HQ/central services. Moreover the Secretariat will send a questionnaire on thin capitalization in order to determine which MS consider the topic as covered, partly covered or not covered by the AC.

Finally the Chair asked the secretariat to prepare a synthetic document on the work programme.

8. DISCUSSION OF THE SECRETARIAT TABLE ON SERIOUS PENALTIES (DOC.JTPF/007/2007/BACK/2007).

The chair explained that this topic was of major importance as the taxpayer can be penalized twice: once by a double taxation and secondly by having no right to access to the MAP procedure. Theo Keijzer noted that several MSs had not replied and that this was disappointing.

The Chair invited the EU 15 members to provide oral answers:

Belgium, Sweden and Greece have not imposed any penalties which could be considered as serious under the AC so far.

Spain is in the same situation as France: the access was suspended on several occasions until the penalty is final.

Luxembourg: no cases.

UK: no cases so far and it was difficult to imagine circumstances where the access would be denied.

France had two cases so far (in comparison with a total of 70 MAP pending).

It was agreed to amend the table by specifying that no request was received and all tax administrations are invited to amend it by the end of September. The chair invited Business members to send any anecdotic information (in contradiction with the table) to the Secretariat.

One Business member said that we should continue the examination of the topic. It would be interesting to know to what extent some companies do not present their case because they think the access to the AC will be denied.

The Chair confirmed that the issue will be examined again with the AC issue. Serious penalties remained a serious issue because of the "double jeopardy" aspect – a serious penalty on top of a tax adjustment then denied the possibility of double taxation relief under the AC.

9. DISCUSSION AND ADOPTION OF THE DRAFT SUMMARY REPORT ON PENALTIES (DOC. JTPF/002/2007/EN)

The Chair explained that the report had been subject already to various written procedures.

The first one took place in December where members were invited to comment Annex C. After it, Annex C was incorporated into the draft report and the report was sent out under written procedure to tax administration members only beginning of May and at the end of the procedure (25th of May).

The Chair asked the JTPF if the report could now be formally adopted and this was agreed by consensus.

The Chair explained that it will be inserted in a Commission Communication at a later stage with some future appropriate JTPF outcomes. However in the meantime it will be published on the website.

10. MONITORING OF JTPF WORK ON THE BASIS OF DOC. JTPF/024 AND 038/BACK/2006:

Mr. Mors stressed the importance of monitoring and more specifically the monitoring of the functioning of the Arbitration Convention as the number of pending cases is still quite important. He reminded the commitment taken by all tax administration members during the December meeting to have a discussion on the reasons of this situation.

He also said that a letter will be sent by the Commission Services to all tax administrations inviting them to send their reports on the practical functioning of the Code of conduct on the AC as mentioned in its final provision.

On the basis of these reports and the conclusions of the JTPF, the Commission intends to report to the Council and, where appropriate, propose a review of the provisions of the Code.

Business made the point that there were different kinds of monitoring. Monitoring merely to note information, monitoring to make sure things that should be happening were happening and monitoring to identify problems and suggest improvements. It was agreed that by monitoring the JTPF should be aiming for the third definition.

- 1) Draft 2007 table on the number of pending cases under the Arbitration Convention which were reported as of 31/12/2006 (doc. JTPF/005/BACK/2007/EN). Version of 26th June.

A revised document with the final figures will be put on Circa.

It was agreed that the report should explain the reasons behind the delays (e.g. lack of resources, taxpayer agreement to postpone the setting-up of the commission, judicial appeal, etc).

- 2) Discussion on the implementation of the Code of Conduct on the Arbitration Convention (doc. JTPF/006/BACK/REV4/2006) and the suspension of tax collection.

Again this topic should be covered by the Member State reports.

Each MS was invited to update its information:

Portugal: in 2008 a new legislative procedure will provide for the suspension.

Germany, Hungary and Slovenia have said that they will provide a written contribution.

Malta and the Czech Republic have requested an update of the document in order to reflect the ratification of the AC.

- 3) List of independent persons of standing eligible to become a member of the advisory commission (doc.JTPF/010/BACK/REV7/2005/EN): lists from new Member States and availability of CVs.

All members were invited to send updated versions of the CVs and new MS were invited to send their list of independent persons by the end of September. The Chair explained that the CVs will be put on Circa but will not be published on the website.

One Business member raised the point that Caroline Silberztein from the OECD was inserted in the list of the Netherlands.

The Netherlands explained their belief that the criteria to be used was to be a citizen of an EU MS.

Theo Keijzer raised the importance of having CVs.

- 4) Tax administrations' comments on the state of play of the ratification process of the accession convention to the AC.

In the case of Austria, Spain, France, Italy and Slovenia the procedure is in the hands of the national Parliaments and some quick progress is expected.

Belgium will send written information.

A Business member raised the question of the date into force of the AC and the question of fiscal years prior to it. The Chair said that the issue will be discussed during the examination of the AC.

- 5) Draft 2007 APA table on the availability of an APA procedure (doc. JTPF/006/2007/EN) Version of 26th June.

The document was drafted on the basis of the information available by the Secretariat.

MS validated the format of the table and were invited to complete the table by the end of September. It was noted that the JTPF did agree that MS were only compelled to provide information for APAs within the EU. However MS can also provide information on non EU cases.

The Chair said that the first column in the table states that APA is available under tax treaties as in the Guidelines everybody agreed that this was the legal framework for APAs

- 6) Information from the new business members on how they will provide feedback on the implementation on JTPF achievements (Codes of conduct and Guidelines) as agreed in December 2006

Theo Keijzer said that Business Europe could collect information through its network of companies and business associations. The issue will be raised in the Fiscal affairs group next week. The aim would also be to collect anecdotal information on practical experiences.

One Business member said that he would use its own network to collect information on the number of companies applying the EUTPD.

The Chair invited them to send information by the end of September.

11. OTHER ISSUES

All members were invited to register on Circa.

The next JTPF meeting should take place on Tuesday 23rd October.