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DIRECTORATE-GENERAL

TAXATION AND CUSTOMS UNION

Direct Taxation, Tax Coordination, Economic Analysis and Evaluation

Unit D1 Company Taxation Initiatives

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**SUMMARY RECORD OF THE THIRTY SECOND MEETING OF
THE EU JOINT TRANSFER PRICING FORUM**

held in Brussels on 26 October 2011

1. ADOPTION OF THE AGENDA

The agenda (doc JTPF/021/2011/EN) was adopted by consensus.

2. DOCUMENTS ADOPTED UNDER WRITTEN PROCEDURE

The Chair reminded members that the minutes of the meeting of 9 June 2011 (doc JTPF/015/2011/EN), as well as the JTPF rules of procedure (doc JTPF/012/2011/EN) and the JTPF work programme 2011–2015 (doc JTPF/016/2011/EN) had been adopted under written procedure.

3. INFORMATION BY THE COMMISSION SERVICES ON CURRENT ONGOING ISSUES

Maria Pastor provided information on the state of play on the following topics:

- A new Framework Agreement on relations between the European Parliament and the European Commission has come into force. According to it the EC needs to provide to the EP full information and documentation on meetings of Commission expert groups, including the JTPF. The EP can also request access to JTPF meetings.
- The Proposal for a Council Directive on a Common Consolidated Corporate Tax Base (CCCTB) is currently under consideration by the Council. Discussions have so far covered Chapter IV (Calculation of the tax base) - Articles 9-16 and are currently focused on Chapter V (Timing and quantification) – Articles 17-31.

Due to the fact that discussions are now at Council level, the Commission cannot disclose any information on their content at this stage.

- The Commission has published a study entitled "Transfer Pricing and Developing Countries". It was completed in July 2011 and contains case studies on selected developing countries (Ghana, Honduras, Kenya and Vietnam). It is available on the Commission website: http://ec.europa.eu/taxation_customs/common/publications/studies/index_en.htm.
- JTPF TA Members will be receiving shortly from the General Secretariat of the Council, through their Permanent Representations, a request to update the List and the CVs of the independent persons of standing eligible to become a member of the Advisory Commission.

4. COST CONTRIBUTION ARRANGEMENTS

After introducing documents JTPF/020/2011/EN, JTPF/022/BACK/2011EN and JTPF/023/BACK/2011EN the Chair opened the discussion by inviting the two Vice Chairs to present the issues discussed during the pre-meetings by MS' tax administrations and by private sector members, respectively.

Outcome of pre-meetings/structure of discussion

MS' tax administrations' discussion was focussed on the CCA paper. MS' tax administrations regarded the paper as a good starting point for the future report. Given their limited practical experience, MS prefer to have a separate and complete report building up on the Guidance in Chapter VIII of the OECD TPG rather than an addition to the JTPF report on low value adding services. Some MS requested adding some more examples to the report. For MS it is important that the paper is addressed to any reviewer (tax administration and tax payer).

Private sector members' discussion was also focussed on the CCA document. The topic was regarded as important and giving rise to disputes and double taxation in practice. The Vice Chair stressed that the paper had not been discussed line by line. Rather, the private sector members saw a need to first discuss with MS the general principles to be applied to the type of CCAs covered by this document with the aim of gaining a common understanding on such an agreement and to make clear that CCAs as well as other forms of arrangements in the context of services are a response to business challenges and not a construct for tax purposes. Private sector members stressed that the outcome of this work should not result in prescribing to business how to organise their activities. As key features private sector members mentioned that a CCA is a joint undertaking of several members of a MNE with different levels of participation for the purpose of gaining benefits and sharing the costs without a profit element.

As this general understanding of the general principle was already shared by MS' tax administrations, the Chair proposed to undertake the discussion on general principles following Section 2 of the document (Terminology), in particular the table in paragraph 15. Before moving to paragraph 15, there was a general discussion on the need for CCA participants to have influence, control or at least some kind of oversight on decisions relevant for the CCA, the differences in risk allocation between intra group

services (IGS) and a CCA and on how detailed a report can be without being considered by the reviewers as prescriptive.

Characteristics/principles of a CCA

Table in paragraph 15

It was agreed that the content of the left column would only refer to CCAs on services not creating any IP. The headline of the left column will be changed accordingly.

Column on CCAs

Box 1

The Chair asked members whether the key features of a CCA mentioned in this box, i.e. a contractual agreement, a share of costs and risks as well as a contribution by all participants are acceptable to them. The discussion which ensued had the following outcome:

Regarding the issue on whether the agreement underlying the CCA would need to be contractual, members mentioned that this question may differ in MS' domestic law. The Forum agreed that not having a written contract should not be a reason for not recognising a CCA agreement. However, a contractual agreement would contribute to having the CCA accepted or recognised by tax administrations and should therefore be highly recommended. Furthermore, it was regarded as key to have documentation available showing that there is actually an agreement between the parties, what the features of this agreement are and how it complies with the arm's length principle. The narrative that is intended to be developed in this project should form the basis for the documentation required for a CCA and may remedy the absence of a contract. It was agreed to delete the word "contractual".

On the aspect of sharing costs and risks it was first discussed whether risks arise in a CCA on services not creating any IP. It was acknowledged that there may be risks shared between participants and that sometimes those may even be significant. The term "risk" therefore should remain in the first box but not be discussed in detail. The private sector members offered to further develop this aspect in their examples. The Group further agreed on adding "benefits" to the text within the first box.

With respect to the requirement of all participants contributing, the Forum acknowledged that it is not necessary that every participant contributes actively as contributions may be in cash or in kind. There was also consensus that the level of influence in decision making will vary depending on the type of CCA, the expertise and the amount of costs being allocated to the respective participant.

Box 2

Private sector members shared the MS tax administrations' view that the long term character of the agreement - although often valid for CCAs - was not a criterion for

clearly distinguishing CCA from IGS. Based on this discussion it was decided to leave box 2 out but ensure that the relevant ideas behind it will be reflected somewhere in the text.

Box 3

As the terminology of buy-in and buy-out was regarded as being mainly related to CCA covering IP, the Forum decided to redraft the sentence in the box along the lines that shares are adjusted/re-balanced if participants join or leave the CCA.

Box 4

The issue on whether a formal contract is needed was already discussed in the context of box 1. The result of this discussion will be reflected here.

Box 5

With respect to whether a mark-up is possible in a CCA, the Forum concluded that there is no mark-up charged between participants in a CCA on services.

Box 6

While the Forum supported the text in box 6 for CCAs, some redrafting was deemed necessary with respect to the text in the column on IGS.

Column on IGS

Members decided to eliminate the reference to a cost oriented key in box 6. A question was raised on how to deal with the various terms used for describing arrangements in the context of services. The Forum recognised that although some of the terms used in the public domain may be mentioned in the paper (e.g. cost pools, US terminology) the paper should focus on the term CCA as defined in this report. However a sentence should attract reviewer's attention to the need to examine the criteria to decide whether the service provided is rather a CCA or an IGS. The Secretariat will do the appropriate changes to the part of the table dealing with IGS to improve consistency.

Documentation

The question of documentation was brought up again as this was regarded as a key feature of a CCA. MS tax administrations highlighted the need for providing the respective tax administration with information to enable them to understand the CCA in total, its background, purpose and functioning. Discussions moved on to whether a written contract should always be required. The importance of receiving an overview of the total CCA and the material underlying it was stressed, as this material should normally be available for business purposes other than taxes. Private sector members stressed in this context that the provision of this kind of information should not lead tax administrations to test/re-judge the business decision. Further it was underlined that the guidance to be developed in this project should not deviate from what had been agreed in

the past in this respect, e.g. the EUTPD. Documentation will be treated under a specific chapter of the document.

Example

The Forum recognised the usefulness of having examples in the document. Private sector members offered providing further examples by the end of November. Although welcoming the addition of examples and confirming their usefulness to facilitate the discussion, the Secretariat reminded the Forum about the requirement that the final document cannot exceed a certain size. Indeed, the final document must be shorter than this initial discussion draft. Therefore not all examples submitted might be included in the final document.

Discussion of the working document (JTPF/020/2011/EN)

Following the Chair's proposal, the working document was discussed paragraph by paragraph.

Preliminary remarks and Introduction (par. 1 – 7)

Given the limited experience of MS' tax administrations it was agreed to change "frequently" to "may" in the first sentence of par. 4. With respect to the ongoing OECD project on intangibles the question was raised whether a discussion makes sense when the respective Chapter on CCA may change. In referring to the timeline envisaged for a final revision of Chapter VIII of the OECD TPG, the Observer for the OECD supported continuing the JTPF's work on CCA based on the existing 1995 TPG, July 2010 version.

The Forum recognised that, for clarity, in the final document it would be advisable to express already in the title and from the start that the report is limited to CCA on services (not creating IP).

Terminology (par. 8-16)

It was decided to delete the last sentence in paragraph 8 as well as the footnote referring explicitly to the US terminology as other terms and kinds of arrangements used in the context of services were not considered relevant. Further it was concluded to mention explicitly that services may be provided from related or unrelated parties to a Group of related companies constituting a CCA. Based on this it should also be stressed that an IGS and a CCA are not incompatible. Paragraph 15 will be redrafted to clarify that the IGS concept includes cost pools.

The Secretariat was invited to add a sentence in paragraph 15 on sharing skills and knowledge through participation in a CCA.

Scope (par. 17 – 20)

In paragraph 18 the term "intangible" was added before "property" in the penultimate sentence in order not to limit the scope of the report too much. Further the term IGS in paragraph 19 was added before "cost pool", resulting in "by way of IGS (including a cost pool)".

With respect to the structure of the document as proposed in paragraph 20 it was decided to move the bullet point on general features determining whether a CCA is consistent with the arm's length principle at the beginning and restructure the document accordingly.

CCA and the ALP (par. 26 – 29)

It was decided to move this sub-section before the sub-section containing the narrative (par. 21-25). On paragraph 26 sub-item iii. the terminology "beginning of the activity" should be redrafted in a way that this does not mean that the service could not have been rendered before. On sub-item iv., "entry into the arrangement" should be changed to "entry into force of the arrangement" and sub-item vii. could be rephrased into "Reasonable expected benefits can be assessed in terms of efficiency or effectiveness in quantitative or qualitative terms". As regards sub-item ix. it should be clarified that this simply means that services purchased or rendered through the CCA should be in line with the arm's length principle. Sub-item x. should be amended in line with the changes suggested in box 3 above, saying "If participants join or leave the CCA, shares should be adjusted/re-balanced in accordance with the arm's length principle.". On paragraph 27, it was agreed to delete the end "and not a period of years". The rest of this sub-section will be discussed at the next meeting.

Way forward

Due to time constraints, the rest of the document was not discussed.. The Chair concluded on the following way forward: Private sector members will send additional examples to the Secretariat by the end of November. Ahead of the next JTPF meeting in March 2012 the Secretariat will work on improving the working document and send it to the members in January with an invitation for written comments. The revised working document including members' comments on the specific topics will be discussed at the meeting in March.

5. SECONDARY ADJUSTMENTS AND COMPENSATING/YEAR-END ADJUSTMENTS

In line with the newly adopted 2011-2015 JTPF work programme and as agreed in the 9 June meeting, in July 2011 the Secretariat circulated for input questionnaires on secondary and compensating/year-end adjustments among EU Member States' tax administrations, in particular on the legal and administrative or practical aspects in the different MS, including on whether these adjustments fall within the scope of the AC. The purpose of this exercise was to take stock of the situation prevailing across the EU as on 1 July 2011 and to serve as a basis for possible further work of the Forum in this area. Contributions were received from most MS. The Secretariat prepared compilations of members' responses (docs JTPF/018/2011/EN and JTPF/019/2011/EN), as well as a

summary/analysis for each type of adjustment. Both documents were presented at the meeting.

Based on the information available, as regards secondary adjustments (doc JTPF/018/2011/EN) the Chair listed 3 possible options for moving forward: i) recognize the value of the results of the survey carried out, but not take the topic any further; ii) issue a recommendation that as very few MS apply secondary adjustments, it is better not to apply them at all within the EU; iii) agree that secondary adjustments can be dealt with under the AC as they are the direct consequence of a TP adjustment.

Some Member States expressed preliminary views as to what option might be most suitable. A TA representative pointed out that the issue of secondary adjustments is currently¹ under consideration by WP6 of the OECD referred to WP6 (on the Taxation of Multinational Enterprises) by WP1 (on Tax Conventions and Related Questions) and therefore a fourth option could be envisaged: to deal with the issue only after the OECD has completed its work. Private sector members expressed their preference for the second option and proposed a period of reflection on the options available before a decision is taken. They suggested taking a look at the OECD MEMAP as the recommendations there might form the minimum agreement on how to deal with secondary adjustments. The Chair commented that this issue may lead to a lot of double taxation cases and therefore requests attention. He concluded that the options would be stated in the meeting report for further consideration by the members, and for discussion at the next meeting. The Secretariat was asked to make research on the OECD MEMAP to eventually provide additional background.

With respect to compensating/year-end adjustments private sector members stated that taxpayers are often faced with year-end adjustments and really look forward to a straightforward set of guidelines/recommendations to draw on. According to them it would be useful to have an established mechanism that would allow them to report results in accordance with the arm's length principle and to know what the rules are. In this context some Member States' representatives took the view that what is needed is a discussion on principles and therefore the OECD would be best placed to address this issue. Moreover they expressed concern over the concept of "hindsight" not being clarified in the OECD guidelines and stated that agreements for retroactive adjustments would never be found in contracts between independent parties. The OECD representative informed the Forum that a discussion on the concept of "hindsight" is foreseen very soon in WP 6. However, he believed there was room for the JTPF to make progress in this area. The Chair was positive that finding a practical solution is clearly within the mandate of the JTPF and the Forum should take the issue forward.

It was decided that the Secretariat would prepare a draft discussion paper on compensating/year-end adjustments for the next meeting.

6. RISK ASSESSMENT – PRESENTATIONS BY MEMBERS

The topic of risk assessment was included in the 2011-2015 JTPF work programme so as to allow for an exchange of information on best practices and for an open general discussion on the various approaches applied by members. At this meeting the Forum

¹ Subsequent to the JTPF meeting OECD WP1 agreed to refer the issue to WP6.

heard the first two of a total of four presentations by members on risk assessment aimed to inform the discussion (by private sector members and by the Netherlands). At the next JTPF meeting in March 2012 the presentations by Austria and the United Kingdom will follow.

7. IMPROVEMENTS IN THE COLLECTION OF STATISTICS ON MAPS

The informal JTPF working group on improvements in the collection of statistics on pending MAPs under the EU Arbitration Convention composed of 5 MS (BE, DE, IT, NL and UK) and the Commission, which was formed following the June meeting, presented a proposal for an alternative questionnaire on MAPs. The Commission presented an improved version of the existing questionnaire on MAPs emphasizing the importance of collecting bilateral data. TA members estimated that they needed more time to review the proposals.

Ahead of the next JTPF meeting the Secretariat will work on further improving the presentation of the proposals. The two proposals, plus an additional option based on minimal improvements of the present questionnaire, will be circulated for comments and will be presented again in a new document for discussion at the next JTPF meeting in March 2012.

8. MONITORING

The Secretariat presented to the Forum updates on:

8. (i) *Pending mutual agreement procedures (MAPs) under the EU Arbitration Convention at the end of 2010 (doc JTPF/024/2011/EN)*

Missing information has been provided just before the meeting and a revised document will be circulated for final comments before publication on the website.

8. (ii) *List of independent persons of standing eligible to become a member of the advisory commission (doc JTPF/010/BACK/REV16/2005/EN)*

See information provided by the Commission (section 3 above).

9. ANY OTHER BUSINESS

The Chair thanked members for their participation and announced that the dates of the JTPF meetings in 2012 are: 8 March, 7 June and 18 October.