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

held in Brussels on 14th September 2006

1. OPENING STATEMENTS

The Chair opened the plenary meeting by thanking the Austrian Presidency for the adoption of the Code of conduct on documentation. He welcomed also Mr Paul Farmer the new Head of Unit of Unit E1.

2. ADOPTION OF THE AGENDA (DOC. JTPF/025/2006/EN/FR/DE)

One member reminded that the issue of publication of statistics on APAs (document JTPF/029/BACK/2006/EN of 17th July 2006) was also on the agenda. With this addition, the proposed agenda was adopted by consensus.

3. FINALIZATION OF THE DRAFT JTPF REPORT ON ALTERNATIVE DISPUTE AVOIDANCE AND RESOLUTIONS (DOC. JTPF/001/REV3/2006/EN OF 28TH JULY) ON THE BASIS OF THE COMMENTS PROVIDED BY THE MEMBERS (DOC. JTPF/026 TO 029 AND 31, 33, 34/BACK/2006)

The Chair started by explaining the following points:

- The report (with the exception of the appendices) was considered as agreed in June and therefore the revised report was only sent to the members to check whether the changes from the previous document on paragraphs 66 to the end of

the main part of the document were those agreed by the Forum in June. Members had been invited to send comments on the appendices and to indicate if they believed the changes on the main part of the document did not reflect what was agreed. Several members submitted their comments, among them one Tax Administration Member who submitted several suggestions to amend the draft report stating that the present version of the draft report was not consistent with the JTPF conclusions, in particular because several amendments agreed by the Forum at the March meeting had still not been incorporated in the present version of the document.

- In order to avoid long discussions and to give a chance to the JTPF to see its report adopted in September, the Bureau had sent to the members an email wherein the suggestions of that Tax Administration Member were divided in two lists (a first list with suggestions considered as drafting and a second with suggestions considered as points of substance).
- Consequently the Bureau suggested amending the following paragraphs by adding the wording proposal by a tax administration member:

Paragraphs 2, 4, 5, 6, 21, 27, 41, 42, 46, 50, 52, 54, 55, 58, 59, 60, 78, 80, 84, 95, 96, 99, 109, 117 (by adding the word "simplified" before APA), 122, 123, 125, 133, 136, 137, 139.

- For all the other points (paragraphs 20, 43, 49, 53, 56, 62, 92, 102, 104 to 108 and 120) the Bureau suggested that every member had the right to ask for a footnote stating its disagreement with the text.

All JTPF Members except for one Tax Administration Member agreed with the Bureau proposal.

One Tax Administration member expressed his concern that most of its comments had already been submitted in writing a few days before the June meeting but could not be incorporated in the distributed version of the report. Therefore the Secretariat asked that member to raise only substantive points during the meeting. However, that tax administration considered its remaining suggestions should have been incorporated in the September version of the report.

The same Tax administration also stated that the Secretariat had ignored several amendments agreed by the Forum at its March meeting and had made substantive amendments to the report that had not been discussed or agreed by the Forum. Therefore, the report should not yet be considered as agreed.

The Chair, expressly supported by two members, repeated his trust in the Secretariat work. The Chair reminded that the JTPF gave in March a mandate to the Secretariat to make a judgement between the different suggestions to maintain a balance between the quality, the effectiveness and the consistency of the proposal. The Chair added that the Secretariat's choices (between the different proposals) had been confirmed by the Bureau before the draft report was submitted to all Forum members for comments.

The Tax Administration Member who had submitted several suggestions to amend the draft report withdrew the drafting proposals on paragraphs 20, 43, 49, 53, 56 and 62 but maintained its request for footnotes on paragraphs 92, 102, 104 to 108 and 120.

For paragraph 102, a consensus was found to change the word "impose" by "apply".

After this discussion on procedures the JTPF started to examine the annexes on the basis of the revised report (Doc JTPF/001/REV3/2006/EN of 28th July 2006).

Annex A: list of information

Point 2: a consensus was found to replace the word "*date*" by "*period*".

Point 3: a consensus was found to refer only to the need to provide a functional analysis. Therefore under point 3 the following sentence will be added: "*a functional analysis (see appendix B) of the parties and transactions to be covered by the APA*".

Point 4: the consensus found by the Forum was to delete the second sentence and to change in the first sentence the word "*necessary*" by "*appropriate*".

Point 6: this point was largely debated. The observer from the OECD intervened to remind the Forum conclusions by reminding the members that according to the wording of the OECD Guidelines on Transfer Pricing, instead of requesting economic data it would be more relevant to make reference to the review of the five comparability factors. The consensus finally found was a deletion of (1), a modification of (2) by including a reference to the five comparability factors as suggested by the OECD observer and by rephrasing (3) in a positive sentence.

For (4) one Tax Administration Member explained that a detailed calculation scheme for the proposed transfer pricing method was fundamental to help tax administrations to understand the consequences of the APA on the transfer pricing policy. It was finally agreed to replace the text in (4) by "*a demonstration by reference to financial information how the proposed method is going to be implemented*".

Point 7: The suggestion presented by a Business member was agreed and therefore this point will completely be deleted by adding 7.i to point 6 (3) and 7.i.i to point 8. However in 7.ii, the words "*if available*" will not be included in the text.

Point 9: a consensus for the deletion of this point was found.

Point 11: It was agreed to replace the words "*brief details*" by "*list*" and the Business suggestion was rejected.

Point 12: a long and controversial debate took place on the need to mention or not the existence of any transfer pricing audits in the application. It was finally agreed to delete this point of the annex.

Point 13: the JTPF agreed on the following modifications: In the first sentence replace "*accounting*" by "*financial*" and add the words "*this could embody*". In (b) the sentence should start by "*where available and useful*" and (c) will be deleted.

Point 14: It was agreed to request a list of any legal agreements instead of copies.

Point 16: One Tax administration suggested adding a point 16 on specific information in case of APAs related to Cost Contribution Agreement. This suggestion was not considered as relevant by the Forum.

The same Tax administration suggested changing the chronology of the different points. The JTPF agreed with this proposal and consequently the new order will be: paragraphs 1, 10, 8, 2, 3, etc.

Annex B: Functional analysis

Introduction: The JTPF agreed to replace the introduction with the text suggested by the one Tax administration. The OECD observer suggested amending it by replacing the word "entities" with "transactions".

Activities and functions: The JTPF agreed on the suggestion by a tax administration member to add "etc." at the end of the first sentence, because the list in brackets is not enumerative. It was also agreed to move the second paragraph to sub-title "Assets employed" and to modify the beginning of the last sentence by starting with the words "*the IPR should provide an explanation*" instead of "valuation".

Risks: It was agreed to replace the words "*risks taken*" by "*risks assumed*" and the German proposal to delete the words "*in importance*" was accepted.

Assets employed: the JTPF agreed with the Business suggestion to limit this section to the assets used in the APA.

Annex C: time frame

Title and introduction:

The JTPF agreed by consensus to add the word "*tentative*" in the title. In the introduction, the word "*efficiently*" will be replaced by "*completely*" and in the last sentence of the first paragraph to stop the second sentence of the second paragraph after the words "*found in APAs*".

Pre-filing stage:

By consensus the JTPF agreed to add the word "*whether*" in the second sentence and in the last sentence, the end of the sentence will become "and explore what methodology will be appropriate".

Months 1-3:

By consensus the JTPF agreed to add the words "*if necessary*" at the end of the last sentence.

Months 4-12:

It was agreed not to add the German suggestion.

Months 18:

The Forum agreed to replace the last paragraph by the one suggested by a Business member.

Annex E: details necessary in an APA agreement

By consensus the JTPF agreed to change the title by "*details likely to be necessary*".

Point 2:

The JTPF agreed by consensus to include in the document the proposal for a list of critical assumptions. This list will be part of an annex F and the title of it will be "*examples of critical assumption*". A new point in appendix E will make reference to annex F and §98 of the report will refer to annex F.

Point 3:

The Forum could agree with the suggestions to delete the word "*legally*" and to add the words "*on the tax administrations involved*".

A Tax administration suggested for consistency reasons to amend also paragraphs 24 and 46.

Point 5:

It was agreed to include the proposal of a Tax administration.

Publication of statistics: potential annex and § 103.

The Chair explained that there was a direct link between this issue and the document on monitoring: in absence of statistics no monitoring of the APA work of the JTPF will be possible. He strongly disagreed with the statement of several members that they would need more time to think about it: indeed this document was already available for the meeting in March.

To sum up the debates, the JTPF was divided between delegates reluctant to provide this information for confidentiality reasons and delegates referring to US and Japanese experiences and the need for transparency. The Chair strongly supported the option to publish at least factual information (figures with the number of APAs, etc) in order to promote the use of APAs within the EU.

It was finally agreed to add in paragraph 103 the following sentence: "*the JTPF agreed, in principle, that the publication of statistics is useful*". **One Tax administration requested a provisional reservation on this suggestion.**

The Chair concluded by inviting all Forum members to send by the end of October written contributions on the monitoring document (Doc.JTPF/024/BACK/2006) and insisted that the JTPF should come to an agreement on the issue of APAs' statistics during the December meeting.

The Chair congratulated the members for having reached a final agreement on this report which is considered as adopted by consensus. JTPF members were invited to send the drafting of their reservations to the Secretariat.

4. STATE OF PLAY OF THE IMPLEMENTATION OF THE CODE OF CONDUCT ON THE ARBITRATION CONVENTION (DOC. JTPF/006/BACK/REV1/2006)

Denmark and Germany explained that they are still checking how the issue of the suspension of tax collection should be implemented in their national legislations. Therefore they requested to include for their situation a question mark in the table.

The Chair explained that this document had to be considered as part of the monitoring item included in the work programme. He invited the delegates to provide the Secretariat with **the legal reference allowing the suspension of tax collection by the end of September**. The revised document will be published on the website.

France and the Netherlands explained that they have ratified a "code of conduct" on the way to implement Article 27 of the tax treaty convention between themselves. They will send this document for information to the Secretariat. They also invited other member states to adhere to this initiative.

5. UPDATED NUMBER OF PENDING CASES UNDER THE ARBITRATION CONVENTION WHICH WERE REPORTED AS OF 31/12/2005 (DOC.JTPF/009/BACK/REV2/2006/EN)

The Chair explained that this document is an important and useful tool for monitoring the implementation of the Arbitration convention and to ensure that progress is realised in the elimination of double taxation.

In the present document most of the discrepancies can probably be explained by the lack of common criteria to consider a case as open or closed. Therefore France took the initiative to provide a letter to the Secretariat including suggestions for criteria (Doc.JTPF/032/BACK/2006) This initiative was welcomed by all members and the Forum agreed to examine this issue in December.

6. OTHER TOPICS ON THE AGENDA

Due to time constraints the other topics on the agenda were postponed to the next meeting.

Paul Farmer explained that the Commission wished to renew the Forum and was taking administrative action for its prolongation. In the renewed forum the number of Business member will be increased from 10 to 15 to better fit with the post-accession situation and former Business members will have the possibility to apply again.

The Chair gave the last number of member states having ratified the accession convention to the arbitration convention: 11 MS. In Poland the ratification should take place in October.

The Chair with the agreement of the Council's Secretariat invited MS **to send updated versions of the CVs of the independent persons** of standing eligible to become members of an arbitration commission. He suggested that the CVs could where possible be sent in national language and in a commonly understood language. A letter on this topic will be issued by the Council but a copy of the CVs should also be sent to the JTPF Secretariat.

The next meeting will take place on **THURSDAY 07th December** and the points on the agenda will be the monitoring issue, the future work programme and the penalty paper.