



Brussels, 31st January 2008
TAXUD E1 D(2006)

Taxud.E1/JMVL/EM

Doc: JTPF/023/2007/REV1/EN

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

held in Brussels on 23rd October 2007

1. ADOPTION OF THE AGENDA (DOC. JTPF/017REV1/2007/EN/FR/DE)

The revised agenda was adopted by consensus.

2. ADOPTION OF THE RULES OF PROCEDURE (DOC. JTPF/003/REV1/2007/EN)

One tax administration expert stressed the differences between Art. 4 (Opinions of the Group) and Art. 15 (Transparency) as regards how Group decisions can be reached. All JTPF members could agree with the proposal of the Secretariat presented during the pre-meeting of the Member States to put in the summary record of the meeting the following clarification on the website policy:

From the past experience of the JTPF we can conclude that we will apply the following policy for the publication of documents

- (1) Summary records were only published after their adoption by all members and thus can be considered as evidence of what was said and agreed by the members.
- (2) Secretariat papers, working documents were always published including all relevant (part of) contributions. Adopted documents (final doc) reflected the consensus reached (it was never the case before but they could include reservations).
- (3) Members could always ask to have their own contribution not published.
- (4) As regards reports, final reports were always published including all reservations.

3. PRESENTATION AND DISCUSSION OF THE DOCUMENT FROM THE SUB-GROUP ON TRIANGULAR CASES. (DOC.JTPF/019/BACK/2007/EN)

During the last meeting of the JTPF it was agreed to set up a sub-group to tackle with the issue of triangular cases.

Stefaan De Baets who hosted and chaired the sub group meeting held in Brussels on 13th September made a PowerPoint presentation.

He presented an example, explained the legal framework of the problem and described some outcomes from the discussions. (See the slides)

The scenario outlined covered a circumstance where companies in countries A,B and X were all part of the same group. B traded directly with A. A traded with B and X. An adjustment to the profits of B would, if a corresponding adjustment was given in A, result in a loss: due to the trading relationship between A and X not being arm's length.

Some Business members explained that for them there is no specific definition of triangular case as each transaction can be considered as triangular. As A and B are EU Member States there is no doubt possible that when B makes an adjustment (considering the flow of transaction of the case) A must make a corresponding adjustment under the Arbitration Convention (AC). There is of course a procedural issue on how to get X (third party) on board: audits deadlines can be over. But it should be possible to reopen the issue and time limits by considering the legal provision for “new events”. The taxpayer should also probably inform as soon as possible the Competent Authorities (CA) that a third party is involved. In the absence of a complete Treaty network the States involved could also decide to apply Tax treaty’s provision through a separate convention. One Business member reminded that it’s always the MNE Group that sets the policy.

The MS Vice-Chair summarized the problem by identifying two sorts of issues: legal issues (AC, DTC) and political issues (objectives/goals). He expressed the opinion that we should adopt a wide view about the transaction (the arm’s length principle goes beyond two transactions) and about the AC (the aim of the AC is to resolve double taxation related to TP and therefore we should not try to find arguments to prevent its application).

The Chair confirmed that the implementation of the AC leads to a lot of legal problems as regards the interpretation of its provisions but as the supreme goal is the elimination of the double taxation we should always assume a wide interpretation.

He summarised the debates by the following statements:

- When it is amongst 3 EU MS the AC applies to all. Should it be solved through a bilateral or multilateral MAP is probably not important and the CA could decide on a case by case basis (even if for the setting-up of an advisory commission it could be more difficult but certainly not impossible).

Let's stick to the results to be achieved: a quick elimination of the double taxation.

- When X is outside the EU each transaction requires a separate procedure under the relevant treaty
- The role of the taxpayer is important to speed up the process: he should provide information as quickly as possible.
- He invited the sub-group to try to present to the JTPF some draft recommendations based on the three first statements on how we could apply the AC between 3 MS; when X is outside EU how we could use the new OECD text on mandatory arbitration.
- The JTPF would try to issue guidelines on the basis of the recommendations.

The next sub group meeting is scheduled on 15th January in Brussels. Any JTPF member who wants to participate is welcomed. Isabel Verlinden offered her expertise on the new clauses for binding arbitration in the US/DE and US/BE conventions.

4. DISCUSSION PAPER ON INTEREST CHARGES IN THE CONTEXT OF A MAP (DOC. JTPF/016/2007/EN). SEE ALSO FOR FACTUAL INFORMATION BACKGROUND DOCUMENT (DOC. JTPF/008/2003/EN).

The MS Vice-Chair explained that no conclusions were reached during the pre-meeting because in all MS interest and penalties are part of the general administration rules governing the tax policy of a country. Therefore it is questionable whether specific rules for TP adjustments should be taken. However MS are aware that MAP procedures are often too long and are ready to listen to the Business members whether there is a problem. It must be clear that interest charges are not put in place to put a penalty on the taxpayer or to sanction a fault from the taxpayer. It is only a question related to money over time. The question of matching interest in case of international disputes is of course an issue. Charging interest also raised issues of fairness between taxpayers who paid on time and taxpayers who paid late.

The French delegate explained the convention between the Netherlands and France. It's an administrative agreement where both States agreed not to charge interest for the period where the suspension of tax collection is granted. On the other side the Netherlands shall not grant any refund of interest for the same period. There is symmetry in the approach. This means no gains and no losses for the taxpayer.

Several tax administration delegates affirmed that in their opinion any recommendation on this issue would hamper the whole administrative system in place in the different MS. Some also considered that any suggestion would go beyond the JTPF mandate.

The Chair clarified different parts of the paper:

- It is important to keep in mind that the length of time the AC or MAP procedure takes is largely due to the actions of the governments not the taxpayer.
- We should distinguish two periods for interest charged: one covering the period before the adjustment for which the tax administration is fully entitled to receive a compensation for late payment (the so called accrual of interests for late payment) the second one covering interests charged (or to be charged if the payment was suspended) during the MAP negotiations (where the taxpayer is requested to pay interest because the tax administrations try to determine between themselves where the tax should be paid). Our paper focuses on this second type of interest charges.
- It is well founded to consider that interest charges on TP adjustments are different from non TP adjustments: firstly the tax has been paid somewhere in the EU; secondly the taxpayer should not be penalized when tax administration discuss together to fix the case (considering the essence of the arm's length principle and the existence of a range to fix the price of the transaction, the adjustment is often not the fault of the taxpayer).
- As regards the possibility for the JTPF to adopt conclusions on such a topic, we must keep in mind that the recommendation from the JTPF to suspend tax collection was finally endorsed by the MS in the Council and subsequently implemented it through administrative or legislative amendments. This issue would request the same approach. It seems unduly harsh to suspend the tax but keep the interest charge running.
- There are two ways to tackle the issue: either tax administrations charge interests (because there was an adjustment) and reimburse interests (because there is a correlative adjustment) or we freeze the period of time covering the MAP discussions (the French/Dutch option). The advantage of the second option is that we avoid a discussion on the rate.

The Business Vice-Chair expressed the view that in any case it helps when interest charges are on the table as part of the MAP discussion (but on the request of the taxpayers). MS could be encouraged to follow the FR/NL approach.

The German delegate said that in Germany it is possible to put the interests in the MAP discussions. The problem is of course the symmetry.

The Netherlands clarified how they could legally reach such agreement: their national legislation gives the right to the tax administration to conclude such administrative agreements.

It was finally possible to reach a consensus that interest charges related to TP adjustments was a real issue causing troubles and concerns to the European business community.

From this conclusion the Chair described two options:

1. We go into the matter more closely by issuing a new questionnaire where MS would provide additional or updated information (e.g. do they suspend interest charges, do they repay interest charges after a MAP, the rates, etc).

2. We start from the agreement that there is an issue and we describe the different possibilities. Each MS would have the possibility to choose what it considers as the most appropriate approach considering its specific legal and administrative situation.

A consensus could be found that the secretariat will prepare a paper following the second option: the problem would be illustrated through practical examples, the objective would be described (a taxpayer should not pay interest for the period where tax administrations discuss together), the different possibilities will be described (matching payment/reimbursement after the MAP, interest charges included in the MAP discussion, freezing of interest charges, other).

The Chair added that an additional evidence that interest charges related to TP adjustments is also a pure TP issue is given by the fact that some MS agree to include these interests in the MAP discussion.

The OECD observer pointed out that the guidance found in par 4.64 may serve as a kind of minimum objective regarding the issue on whether interests should be charged .

5. ISSUES RELATED TO THE ARBITRATION CONVENTION:

The Chair reminded the members that one of the reasons for having fewer meetings was to give more time to the members to prepare their contributions and to send them before the deadline.

Unfortunately for this meeting many contributions were sent late again and this situation prevents the secretariat from preparing summary documents or discussion papers. This generally leads to less fruitful meetings.

5.1 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 28th June).

The Chair said that for the first time we can see that not so many old cases were still pending (most of them were solved last year).

The Business members complained about not having one figure for each MS instead of a range. For the external world it gives a strange impression to have between 128 and 165 pending cases ! MS should apply the same definition.

The Chair said that he tends to agree with this statement but on the other side the JTPF has already tried in the past to achieve such a goal without success. Finally it should not be forgotten the scarcity of human resources: it's probably more efficient to ask the CA to work on the resolution of the cases.

It was agreed by consensus that the MS will also provide information on the number of cases that were sent to an advisory commission.

5.2 List of independent persons of standing eligible to become a member of the advisory commission (doc.JTPF/010/BACK/REV8/2005/EN): lists from new Member States and availability of CVs. Discussion on criteria to be applied to consider a person of standing to an advisory commission as independent. See Dutch contribution (doc. JTPF/015/BACK/2007/EN)

The Chair invited all MS to send the CVs -of independent persons of standing- in English to the Secretariat. New MS should also designate their persons of standing eligible to become a member of the advisory commission.

The issue of the availability of CVs in EN is of major importance if we want to have quick setting up of the advisory commissions.

The Dutch delegate presented her concern as regards the interpretation of the criteria to be applied to consider a person of standing to an advisory commission as independent and competent. The problem is that both MS must come to an agreement on the persons which means that the MS applying the stricter criteria will always force the other MS to accept the stricter approach. The Dutch invited the members to try to agree on a common interpretation of these criteria.

One Business member asked the NL what the term tax consultant meant in their contribution. The Dutch delegate confirmed that this term covers independent tax advisers as well as internal tax directors/experts. The Business member replied that in this case nobody from the private sector would be eligible.

The Chair stressed that there are two levels in the assessment: a first assessment of the independency and competency must be done by the MS before someone is put on its list and a second assessment by both States before someone is selected to become a member of an advisory commission.

One Business member agreed with the Dutch conclusion that for tax advisers (working for the so-called Big Four) there was probably always a conflict of interest and therefore he would never agree to become a member of such a commission.

At the end of the discussions it was finally agreed that

- the availability of all CVs in English would really facilitate the tasks of the Competent Authorities who have to set up such commission.
- The Secretariat will try to find out to what extent the experience gained by other organization in charge of (commercial) disputes resolution as regards declarations of independence and absence of conflict of interests could be used by the JTPF in its recommendation.

The Dutch delegate said that it could maybe solve the problem but only if it's not a standard declaration.

The secretariat pointed out that it should not be forgotten that the statement of absence of conflict of interest at the beginning of a case can be insufficient. It should also be followed by an obligation of information during the resolution of the case itself in case there are new facts.

5.3 Discussion of the Secretariat table on serious penalties (doc.JTPF/007/REV1/2007/BACK/2007 Version of 8th October).

The Business Vice-Chair expressed his concern that while on the basis of the table only two MS have denied access to the arbitration convention (twice in France and in some occasion in Spain-but no figure is available), this does not reflect the pressure that this AC provision can put on taxpayer to agree with the adjustment.

One Business member complained that several MS in their unilateral statements have described penalties that should never be considered as serious.

UK delegate said that it should not be forgotten that the AC was adopted in 1990 and there has been considerable time to reflect on how it should be implemented.

The UK would not want to deny a taxpayer a reasonable opportunity to relieve double taxation. A taxpayer would be penalised excessively if access to the AC were denied in anything other than very exceptional circumstances.

The Chair explained that we should consider what the aim of the AC was: the elimination of the double taxation. Therefore to achieve this goal we must admit that the aim of the AC was certainly to deny the access to the AC only in exceptional cases. Article 8.1 provides also for a great flexibility as it says "Competent Authorities MAY deny access". I.e even where there is a so-called serious penalty, access could still be granted. Considering this aim what is the option for the JTPF? We cannot change the provision of the AC but the Forum could recommend a liberal interpretation of the provision.

It was finally agreed that the JTPF would recommend that the access to the AC should only be denied in exceptional cases and MS are invited to clarify or revise their unilateral statements in annex of the Conventions. The Secretariat will prepare a draft recommendation.

5.4 Discussion of the answers provided on Thin capitalization questionnaire (doc. JTPF/018/2007/EN version of 15th October)

At this stage only 14 replies were received and therefore the Secretariat invited the members to prepare oral statements. Some MS were also invited to clarify their written answers.

The oral statements will be completed by written contributions.

BE: Q1: Yes Q2 to 5: Yes but on a case by case

BG: Q1: Yes Q2: NO Q5: No because it is not a question about the application of the arm's length principle.

Cyprus: No provisions on thin cap, usual rules would apply, no experience with the AC, would be examined on a case by case.

CZ: New rules will be in force in January 2008

Q1: Yes in general, Q2 and 3: not applied Q4: generally no because a ratio exists in their legislation Q5: generally yes.

DE: It's a difficult issue. The answer is Yes but on a case by case. We want to exclude cases where it was the application of anti abuse rules.

FR: Q1: Yes Q2 to Q4: no because no specific legislation Q5: Yes

GR: no specific rules, the arm's length principle would be applied

Italy: Q1: yes it's not a thin cap problem Q2 to 5: the answers will be sent later

Ireland: Ireland: Q1: domestic legislation provides that interest that exceeds a reasonable commercial return is not deductible - this is similar to an arm's length rule. Q2 to Q4: nothing in domestic legislation. Q5: in case 1 Yes, Case 2 and 3, on a case by case; in case 4: No because this is simply a rule of thumb. **Latvia:** national rules on Thin Cap exist but Latvia has no experience with the AC and therefore cannot answer the questions

Lithuania: Q1: Yes Q2 and 3: no because no specific rules Q4: no Q5: case by case under MAP

MT: Yes to all questions

Romania: ?

Slovak Rep: No experience so far with the AC. New rules on thin cap will take effect in January 2008. Q1: yes Q2 and 3: probably yes but an updated answer will be sent after 1/1/2008 Q4: no because no rules Q5: on a case by case

Slovenia: The AC is not yet in force in Slovenia but they have thin cap rules

Spain and Poland have sent their written answer that will be added in the revised document.

One Business member stressed that the answers from the MS are not in line with the AC provision where commercial and financial transactions are included in the scope.

An assistant from a Business member presented the ECJ conclusions on the Test Claimants Case of March 13, 2007 (case C-524/04): Thin Cap Group Litigation v. Commissioner of Inland Revenue. In order to avoid any misinterpretation of the ECJ Decision or long discussion on its interpretation the Bureau has decided not to sum up his presentation but will put on Circa the Case Decision and the ECJ press release (this second document should facilitate a quick reading)..

The Chair concluded that there is a clear consensus to accept question 1 as covered by the AC. The Secretariat will revise the table on the basis of these answers and prepare a discussion paper. However at the light of the ECJ case law MS are invited to check the legality of their answers.

5.5 Problems related to the interaction between MAP and judicial appeals (doc. JTPF/010/BACK/2003/EN). Update of Doc.JTPF/008/2003/EN on the application of Art.7(3) of the AC.

The Chair explained that this issue is - as underlined by Business - of major importance and up to now it is very difficult to assess the situation prevailing in each MS. Indeed some of them (France and UK) have clarified through unilateral statements that they would apply Art.7 (3) but do not seem to do it in practice.

It was agreed that MS will be invited to complete a new questionnaire by 20th December where they would be invited to explain whether they can derogate from the decisions of their judicial bodies, what do they consider to be a judicial body (when is the decision considered as final?), and for those MS who can derogate, do they do it in their administrative practice?

5.6 Report from the Member States on the implementation of the Code of Conduct for the effective implementation of the Arbitration Convention. Background documents: doc. JTPF/006/BACK/REV5/2006 (implementation of the Code of Conduct on the Arbitration Convention and the suspension of tax collection) and doc. JTPF/005/BACK/REV2/2006/EN (state of play of the ratification process of the accession convention to the AC).

The Secretariat explained that the answers from the MS to the questionnaire on the Code of Conduct on the AC are not available as the translation of the letters is not yet ready.

Reports from Cyprus, Hungary, Poland, Portugal, Spain and Sweden seem to be missing.

As regards the state of play of the ratification, BE, FR, IT and Slovenia have still to ratify it. For France and Slovenia it should probably take place by the end of 2007.

As regards the implementation of the Code of Conduct for the effective implementation of the Arbitration Convention and its recommendation to suspend tax collection during MAPs the secretariat has recently received the answer from Germany. Therefore during a future meeting this topic will be discussed.

5.7 Business contribution on the interpretation of the AC provisions (Doc.JTPF/021/BACK/2007/EN)

During the last meeting a Business member raised the issue of the interpretation of the provisions of the AC as regards the question to know from which date a case is admissible/covered by the AC.

On the basis of article 18 of the AC (*the Convention shall apply to proceedings referred to Article 6(1) which are initiated after its entry into force*), a consensus could be found that the Secretariat will prepare a recommendation that a case is covered by the AC when the requested is presented after the date of entry into force of the AC even if the adjustment applies to earlier fiscal years.

6. DRAFT 2007 APA TABLE ON THE AVAILABILITY OF AN APA PROCEDURE (DOC. JTPF/006/REV1/2007/EN VERSION OF 10/10)

Most MS did not reply so far and the Chair invited all MS to send the information as soon as possible. The data collected is of major importance to monitor the APA guidelines.

7. ORAL REPORT FROM THE NEW BUSINESS MEMBERS ON THE FEED-BACK RECEIVED ON THE IMPLEMENTATION OF JTPF ACHIEVEMENTS (CODES OF CONDUCT AND GUIDELINES). SEE CONTRIBUTIONS FROM BUSINESS EUROPE, BAKER&MCKENZIE, DELOITTE, EDUARDO GRACIA, GRANT THORNTON, KPMG AND MAISTO. SEE ALSO BUSINESS CONCLUSIONS (DOC.JTPF/020/BACK/2007/EN)

The chair said that he was grateful to all Business members for the information provided.

The Business Vice-Chair summarized the different contributions by explaining that as regards the AC there is a limited experience but there are a number of issues where the JTPF should bring clarifications. As regards the EUTPD there is a problem of terminology (the word master-file included in the EUTPD covers other documentation concepts as well) and the language issue remains a major administrative cost.

One Business member said that the AC was a useful tool but there were room for improvements. The acceptance of pan-European comparability factors is still an important issue.

Another Business member pointed out that so far the EUTPD does not seem to be such a success. Indeed the obligation to provide information on APAs and business restructuring does not seem appropriate.

The Chair concluded by confirming that the EUTPD will be monitored in 2008. As regards the AC most of the points included in the document from the Business are already put on the JTPF agenda.

The Chair pointed out the importance of the Business suggestion to put a clear deadline for the setting-up of an advisory commission (e.g. 6 months from the end of the two year period). He asked the members whether they could agree with this recommendation.

The MS Vice-Chair said that MS need some time to think about this proposal.

8. DISCUSSION ON CENTRALIZED INTRA-GROUP SERVICES (DOC. JTPF/014/REV1/BACK/2007/EN AND DOC.JTPF/022/BACK/2007/EN).

It was agreed not to open the discussions for timing reasons. See also 9.3.

9. ANY OTHER BUSINESS:

9.1 2008 meetings are scheduled on 21/02/08, 05/06/08 and 27/11/08.

9.2 Documents adopted under written procedure (summary record and work programme)

9.3 Monitoring of the work programme

The Chair summarized the work achieved so far:

- The secretariat will prepare draft recommendations on:
 - (a) Interest charges
 - (b) Independent persons of standing
 - (c) Serious penalties
 - (d) Article 18 AC
- Thin cap: the Secretariat will prepare a revised table and prepare a discussion document. MS are invited to check the table and verify the legality of their answers in the light of the ECJ case law.
- A questionnaire on Art. 7 of the AC will be prepared. MS are invited to send their answers by 20th December.
- MS are invited to send the CVs in English for the independent persons of standing; to complete the APA table, to send their answers on the implementation of the Code of Conduct on the AC
- On triangular cases the sub group has received a mandate to prepare draft recommendations. Next meeting is scheduled on 15th January.

- Centralized intra-group services will be put as a first point on the next agenda. As several contributions include suggestions and/or questions all members were invited to send their comments on the documents by the end of December 2007. On basis of these contributions the Secretariat will prepare a discussion document.