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## **SUMMARY RECORD OF THE TWENTYFIRST MEETING OF THE EU JOINT TRANSFER PRICING FORUM**

**held in Brussels on 21<sup>st</sup> February 2008**

### **1. ADOPTION OF THE AGENDA (DOC. JTPF/004/2008/EN/FR/DE)**

The revised agenda was adopted by consensus. In terms of procedural remarks the chair announced that Stefaan De Baets would replace Roy Warden as vice-chair for the Member States' tax administrations.

### **2. ISSUES RELATED TO THE ARBITRATION CONVENTION:**

**2.1 Discussion paper on draft JTPF recommendations related to the interpretation of some provisions of the Arbitration Convention (doc.JTPF/002/2008/EN and doc.JTPF/007/BACK/2008/EN).**

#### **1. Serious penalties**

After a short discussion the members agreed to change the sentence of the recommendation in *“the JTPF invites MS to clarify or revise their unilateral statements in Annex of the AC in order to better reflect that a serious penalty should only be applied in exceptional cases like fraud”*.

The Chair stressed that the agreed recommendation did not aim to define the notion of a "serious penalty" but rather to clarify that this type of penalty should only be applied in exceptional cases and MS are invited to check whether their unilateral statement is in line with the present recommendation.

It was also agreed that the JTPF will monitor this issue in the future.

Finally it was also suggested that as the Council is in the process to adopt a Decision related to the accession of Bulgaria and Romania to the Arbitration Convention it could be a good opportunity to check and eventually amend MS' unilateral statements.

## 2. The setting-up of the advisory commission

A quick consensus could be reached on the adoption of the recommendation by clarifying that all provisions of article 7 had to be taken into consideration. Therefore the new text is: “The JTPF invites Member States to set up the advisory commission no later than 6 months following the expiration of the period mentioned in article 7. Where one Competent Authority does not take the necessary actions the second Competent Authority shall take the initiative.”

The Chair stressed that this recommendation is a major achievement for an efficient functioning of the AC as it gives a clear deadline for the setting-up of the advisory commission.

## 3. Independent persons of standing

The Secretariat explained the experience gained by the International Chamber of Commerce (organization in charge of commercial disputes resolution) as regards declarations of independence and absence of conflict of interests. Each national ICC committee has a list of potential arbitrators and for each case the ICC Commission suggest to the parties the names of arbitrators based on the nature, the sector and the language of the case. Once the parties have decided who will be the arbitrator(s) the selected person has to fill in a declaration of acceptance and a statement of independence. In the statement of independence the arbitrator is invited to disclose any facts or circumstances which might give rise to doubts about his independency like *“whether there exists any past or present relationship, direct or indirect, with any of the parties or their counsel, whether financial, professional or of another kind and whether the nature of any such relationship is such that disclosure is called for pursuant to the criteria set out before”*. The key point being that any doubt should be resolved in favor of disclosure. On the basis of the answers provided the parties have the possibility to refuse an arbitrator.

The members agreed by consensus that the suggested text could become a useful tool to facilitate procedure for the setting-up of an advisory commission by helping choosing independent arbitrators on objective criteria. The Secretariat was invited to amend the actual text by clarifying the notions of *“parties”* and *“Secretariat”*.

The Chair explained that this text should not be considered as a standard and mandatory document but well as an example of best practice. The actual independency assessment will always be based on a case by case decision. **Tax administration members were invited to send written comments to the Secretariat by the end of March.**

The Dutch delegate insisted that the form including its text does not entirely solve their problem of independency because it is always a statement by the arbitrator himself. She insisted to see the following paragraph of the document duplicated in the summary record (*“From these provisions it can be concluded that two levels in the assessment exist: 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. Moreover it should not be forgotten that the independency criteria should also be considered after the appointment of the person of standing”*).

On the aspect of competency the Business vice-chair explained that the Business community has some concern with the competency of some arbitrators included in the list. He also suggested MS review the list regularly taking into account relevant changes with arbitrators (eg. prolonged absence of relevant experience).

It was agreed by consensus that this issue would be reexamined with priority by the Forum at a later stage when more (e.g. 7) advisory commissions will have been set up.

The chair invited MS to mention whether they had cases sent to an advisory commission and only Germany mentioned one case.

#### **4. Date of admissibility of cases**

The Chair explained that the purpose of the discussion was to clarify the criteria to be applied to consider a case as covered by the Arbitration Convention. Indeed as under article 6 of the Convention a taxpayer has three years to present its request for MAP, which implies that tax assessments/fiscal years previous to the entry into force of the accession convention could be considered admissible.

Some members reminded that this discussion took already place in the past and that it was agreed that the criterion was that the case had to be presented after the date of entry into force of the Convention. These members insisted keeping the consistency with the past.

The Italian delegate suggested that based on article 6 and 18 of the Convention the criterion should be that the tax assessment should always have taken place after the date of entry into force of the convention.

The suggested text was finally agreed without amendments but subject to further examination by Italy and Sweden.

**The Chair invited both delegates to send their answers by the end of March.**

#### **2.2 Discussion paper on draft JTPF recommendations related to interest charges in the context of Mutual Agreement Procedure (doc.JTPF/003/2008/EN).**

The Chair reminded that the members during the last JTPF meeting could reach a consensus recognizing the importance of this topic for the Business community. From the last discussions it was agreed only to deal with the interests during the MAP phase and three types of options were envisaged to avoid any double charge where one taxpayer has to pay interest charges for late payment and the second taxpayer does not receive interest on the amount of tax reimbursed. (“Mismatch”).

The tax administrations’ vice-chair explained that MS had a consistent approach with this issue by claiming that it would be very difficult to apply specific administrative or legal rules to interests related to MAPs. Indeed this issue cannot be isolated from the global system in place and ruled by each national tax law. The three options suggested would request a change in each national law and are therefore not welcomed. During the pre-meeting the members expressed doubts on the exact meaning of “freezing”: did it mean that the interest charges were only collected at the end of the MAP or that no interest would be charged at all.

This statement from the tax administrations’ vice-chair was followed by very long discussions where a large number of tax administrations’ experts supported the views developed.

Several MS supported the views that interests and penalties are not covered by the Arbitration Convention, and that it is only possible to suspend the collection of interests during MAPs.

The Chair, supported by the Business community, could not agree with this statement because the document drafted by the Secretariat was directly based on the last meeting's minutes where the MS themselves explained how they dealt with this topic and the three options were developed on this basis. The idea behind the three options was to be as flexible as possible to take into consideration the different national legal practices. As regards the need to amend national laws he strongly disagreed with the argument by reminding that the recommendation made by the Forum to suspend of tax collection also requested the modification of national rules.

As any consensus was impossible to reach two solutions were envisaged: (i) the setting-up of a sub-group or (ii) the sending of a questionnaire to better assess the actual situation concretely applied in each MS.

Finally all MS tax administrations' members were invited to answer whether under their domestic laws or administrative provisions they reimburse interests incurred on the amount of taxes to be reimbursed to a taxpayer at the end of a MAP procedure under the Arbitration Convention for the period covered by the MAP.

The answers were the following:

<b>Member State</b>	<b>Preliminary Answer</b>
Austria	YES
Belgium	YES
Bulgaria	<b>NO</b>
Cyprus	YES
Czech Republic	Generally NO
Denmark	YES
Estonia	<b>NO</b>
Finland	To be checked
France	<b>NO</b>  But in case of MAP no interest is charged
Germany	YES
Greece	YES
Hungary	YES
Italy	YES
Ireland	<b>NO</b>
Latvia	YES

Lithuania	NO
Luxembourg	NO But interests are suspended during the MAP
Malta	YES
Netherlands	YES
Poland	YES
Portugal	NO
Romania	NO
Slovak Republic	YES
Slovenia	YES
Spain	There is no specific rules for MAPs and the reimbursement is not automatic
Sweden	YES
United Kingdom	YES in all cases

From these answers the Chair concluded that 6 MS do not reimburse interests (ES, IE, HU, BG, FR, LUX) but in the case of France and Luxembourg the situation is not comparable as they do not apply interests during the MAP procedure.

**The Chair invited the tax administrations' experts to check and confirm their answers by the end of March** and in June the JTPF will try to issue an appropriate recommendation based on the following assumptions: the cash flow problem should not exist (as according to the Code of Conduct tax collection is already suspended during MAPs), the mismatch arising due to differences between interest rates is not an issue of concern for the JTPF, different rules regarding the treatment of interest across Europe may result in additional cost for MNEs and this could be alleviated if when reimbursing tax overpayments interests would be granted.

**2.3. Updated table on thin capitalization questionnaire (doc. JTPF/018/REV1/2007/EN) and Secretariat's discussion paper on thin capitalization (doc. JTPF/005/2008/EN).**

Due to time constraints this topic was not discussed. Just before the meeting an Italian contribution was received that will be distributed as a background document.

**2.4. List of independent persons of standing eligible to become a member of the advisory commission (doc.JTPF/010/BACK/REV9/2005/EN): lists from new Member States and availability of CVs.**

Late contributions will be included in a revised document that will be distributed after the meeting.

The Business vice-chair questioned whether the criterion to be considered as eligible as Chairman had been assessed consistently by MS: e.g. some MS show all candidates as eligible, some show none.

The Chair reminded that all MS were invited to send the CVs of independent persons of standing to the Secretariat and that it would be helpful to join an English version. New MS were also reminded that they should designate their persons of standing eligible to become a member of the advisory commission.

**Answers are expected by the end of March.**

**Missing CVs from:** Belgium, France, Luxembourg, Portugal, United Kingdom

**Missing list of independent persons of standing from:** Cyprus, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovenia.

**2.5 Table on the application of Art.7(3) of the AC (interaction between MAP and judicial appeals)** (doc. JTPF/024/REV1/BACK/2007/EN and doc. JTPF/024/BACK/2007/EN).

Due to time constraints this topic was not discussed.

However, one Business member questioned the statement from MS that they cannot derogate from a judicial decision by reminding that the Arbitration Convention is an international multilateral convention.

**The Chair invited all MS to send their contributions by the end of March.**

**Missing contributions from:** Belgium, France, Greece, Lithuania, Luxembourg, Romania, Slovenia, United Kingdom.

**2.6 Reports from the Member States on the implementation of the Code of Conduct for the effective implementation of the Arbitration Convention and State of play of the implementation of the Code of Conduct related to the Arbitration Convention** (doc.JTPF/006/BACK/REV5/2006 February 2008)

These topics will be examined in June.

### **3. DISCUSSION PAPER ON CENTRALIZED INTRA-GROUP SERVICES (DOC.JTPF/001/2008/EN AND DOC. JTPF/014/REV1/BACK/2007/EN AND DOC. JTPF/022/REV1/BACK/2007/EN**

The Chair explained that so far contributions from FR, LV, NL, SW, UK and Business were received and on this basis the Secretariat has prepared a discussion document including 27 issues requesting further discussion.

The Business' vice-chair explained that the Business members recognized the usefulness of the Secretariat document but thought also important to prioritize the issues to facilitate the discussions. Therefore they have divided the questions in 4 clusters:

1. Question 2 and the qualification of services: the issue of the benefit test is a difficult one but is important for Business and tax administrations. The idea would be to divide the services in 3 categories: shareholder services to be at cost of the HQ, s services with a clear benefit for the operating company

should be charged at the level of the operating company and mixed costs that would request an allocation formula. The qualification of the cost will probably request long discussions but the aim is to make sure that the cost can be deducted somewhere.

2. Questions 10, 11 and 12 regarding direct versus indirect charges: the key discussion here is the allocation key.
3. Question 18 regarding risk categorization: what type of costs request a mark-up?
4. Question 26 regarding documentation: what is the appropriate evidence?

The UK delegate considered the Business proposal as a good basis to start the discussions and is particularly keen on the risk assessment approach.

The German and French delegates are also very keen to deal with the issue of central services and agreed with the Business' suggestion but stressed the importance of the other topics included in the list as well.

**It was agreed to distribute the revised Business document by mid of March and to start the next meeting by this topic.**

**4. PRESENTATION AND DISCUSSION OF THE DOCUMENT FROM THE SUB-GROUP ON TRIANGULAR CASES. (DOCUMENT FROM THE SUB-GROUP ON DRAFT RECOMMENDATIONS FOR EU TRIANGULAR CASES AND DOC.JTPF/008/BACK/2008/EN )**

Stefaan De Baets who hosted and chaired the sub group meeting held in Brussels on 15<sup>th</sup> January made a PowerPoint presentation.

He presented the different draft recommendations on TP triangular cases amongst EU MS and explained that the sub-group suggested basing the work for non EU triangular cases on the recommendations to be reached on EU triangular cases.

The Business vice-chair reminded that for the business community the key point is to resolve double taxation.

The JTPF invited the sub-group to discuss how to adapt the Code of Conduct on the AC to EU triangular situations during its meeting of 29<sup>th</sup> April. At the same time the Business contribution on non EU triangular cases could also be discussed and considered to develop draft recommendations on non EU triangular cases.

**5. DRAFT 2007 APA TABLE ON THE AVAILABILITY OF AN APA PROCEDURE (DOC. JTPF/006/REV2/2007/EN)**

**The Chair invited MS to send their contributions by the end of March.** He stressed the usefulness of the information like the average time to negotiate an APA.

**Missing information from:** Austria, Belgium, Cyprus, Estonia, France, Greece, Hungary, Italy, Latvia, Lithuania, Luxembourg, Portugal, Romania, Slovenia

**6. ANY OTHER BUSINESS:**

**6.1 2008 meetings are scheduled on 05/06/08 and 27/11/08.**

**6.2 Documents adopted under written procedure (summary record )**

**6.3 Monitoring of the work programme**

The Chair summarized the future work by reminding:

- The issue of centralized intra-group services will be the first point on the June agenda. In the meantime the Business document prioritizing the issues will be distributed and might already attract some comments or contributions. On this basis the Secretariat might present a revised document.
- Tax administration's members are invited to send their contributions by the end of March on the different questionnaires and discussion documents: list of independent persons of standing and CVs, thin cap, APAs, interest charges, article 7 of the AC.
- On triangular cases the sub group has received a mandate to prepare draft revised provisions for the code of conduct and to discuss further the non EU triangular cases. Next meeting is scheduled on 29<sup>th</sup> April.