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

held in Brussels on 7th December 2006

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

The agenda was adopted by consensus.

2. FOLLOW-UP TO THE JTPF REPORT ON ALTERNATIVE DISPUTE AVOIDANCE AND RESOLUTIONS (DOC. JTPF/001/REV4/2006/EN)

The Chair explained that the final version of the report including four minor consistency amendments had been sent to all members on 4th December. The Commission has started the administrative procedure and the adoption of the Communication is expected for February 2007. In the meantime the final report should not be considered as public and therefore JTPF members should only use it for internal purposes.

3. STATE OF PLAY OF THE IMPLEMENTATION OF THE CODE OF CONDUCT ON THE ARBITRATION CONVENTION (DOC. JTPF/006/BACK/REV3/2006)

The last version of the document was distributed on 4th December. Several Tax administrations requested the opportunity to update the information provided and therefore the Chair asked them to send their comments by 15th December. The updated document will then be published on the website.

4. DISCUSSION OF THE REVISED DISCUSSION PAPER ON PENALTIES (DOC. JTPF/017/REV1/2005/EN AND DOC. JTPF/036/2006/EN) ON THE BASIS OF THE ANSWERS PROVIDED BY THE MS TO QUESTIONS 2, 3 AND 4.

The Chair explained that the document had already been discussed in December 2005 and that Tax administrations had been invited to send their answers and comments on questions 2 to 4 by the end of April 2006. The Secretariat had prepared a revised version of the document including an analysis of the different answers in annex B and C. This document had been available since June 2006 and no comments were sent to the Secretariat. Considering that the JTPF will have its mandate renewed and that this will have an influence on its future composition the Chair suggested that the actual members should try to reach a consensus on general conclusions on this issue. Therefore he suggested that the Secretariat would prepare after this meeting a draft report based on elements from the discussion paper, including annex C and the conclusions. **Tax administrations were invited to send written comments on annex C by end of January 2007.** The Forum agreed by consensus to this proposal.

A room document including three possible conclusions on transfer pricing adjustments was distributed to the members. The conclusions were in summary: (1) no automatic imposition of penalties in case of TP adjustments; (2) in case of MAP where the TP adjustment is reduced it is appropriate to reduce the penalty; (3) the JTPF will examine the issue of serious penalties during its next mandate.

Several Business members started the debate by stating that they expected more in-depth conclusions on this issue. Some Tax administrations replied that this issue was governed by specific national legislation.

Forum members then discussed the third conclusion (serious penalty) and came to a consensus that due to the importance of the issue the JTPF should examine it during the next mandate. However, a long debate took place on what could be the outcome of the future discussions.

In summary, it was agreed that it could be useful to collect information on the number of cases where taxpayers were denied access to the Arbitration Convention due to a serious penalty. The Forum also agreed that it was impossible to harmonize Member States' definitions in the Forum but the JTPF should try to better define the scope of application. Tax administrations will not be asked to justify their penalty system, the JTPF will rather try to define in which cases a penalty should be considered as serious.

Tax administrations members agreed to send the information about the number of rejected cases by 1st April 2007.

For the second conclusion (MAP) the Chair reminded that its principle had been agreed at the December 2005 meeting. The OECD observer reminded that the desirability of cancelling or mitigating a penalty was expressly enunciated in the OECD Guidelines.

The JTPF agreed by consensus a modified conclusion along the following lines:

1. Include in the paragraph the words "where a penalty was applied".
2. Limit the scope of the conclusion to TP adjustment and exclude criminal and serious penalties.

3. The possibility to accept an automatic reduction of the penalty but in conformity with national laws or administrative practice that would have been applied to the case if it had been examined by national appeal bodies (administrative or judicial).

4. One Tax administration suggested the following sentence:

"Where such an adjustment initially attracted a tax geared penalty, it is appropriate that the penalty is reduced commensurately; however such an adjustment can be ruled out if it would give the taxpayer a better result than he would have received under a domestic procedure."

The JTPF agreed on the principles included in these four elements and invited the Secretariat to prepare on this basis the new text of the conclusion.

As regards the first conclusion (no-fault transfer pricing penalty) the JTPF agreed to the proposal but requested the following amendments:

1. The text should better reflect the OECD drafting and also refer to chapter IV, point 28.
2. In the fourth sentence the words "often genuinely" should be deleted and the word "calculate" should be replaced by "determine".

Finally some members commented on the introductory paragraph of the conclusions and the JTPF agreed to delete the second sentence (stating that the JTPF considered inappropriate the existence of specific penalty regimes for transfer pricing) and to clarify that the scope should be limited to transfer pricing adjustments.

The Chair concluded by stating that the future report will be short.

5. DISCUSSION OF SECRETARIAT NOTE ON JTPF MONITORING TASK (DOC. JTPF/024 AND 038/BACK/2006/EN AND DOC. JTPF/003 AND 029/BACK/2006/EN) AND DISCUSSION OF THE FRENCH PROPOSAL FOR THE USE OF COMMON CRITERIA TO DETERMINE WHAT SHOULD BE CONSIDERED AS AN "OPEN CASE" IN THE CONTEXT OF THE AC (DOC. JTPF/032/BACK/2006/EN).

A first consensus was reached to consider this issue of major importance for the future work programme.

1. Monitoring of the Arbitration convention.

The Forum agreed by consensus to update the number of pending cases on a yearly basis (**information should be sent by 1st April of each year**) and on the French proposal to use a common criteria for considering a case as pending (the word "pending" instead of "open" should be used in the future): *"The competent authority will acknowledge receipt of a taxpayer's request to initiate a mutual agreement procedure within one month from the receipt of the request and at the same time inform the competent authorities of the other Contracting States involved in the case attaching a copy of the taxpayer's request. The date on which such information is received by the competent authorities of the contacting States should be applied as the single criterion for including the case as "pending" in the Forum's tables. For cases which should no longer appear in the tables, the relevant closure date should be the date on which the other competent authority receives the letter closing the mutual agreement procedure sent by the competent*

authority of the first State. Where no such letter is sent, the date to be taken into account should be that on which the joint committee hearing the case has closed it".

The Chair clarified the scope of question 1: by "collecting information on the way the Code of Conduct is implemented by tax administrations" the JTPF should in fact update the information included in its doc.JTPF/006/2006 on a regular basis.

A long debate took place on question 3 related to the reasons why cases are still open after 24 months. Most members agreed that it could be interesting to get some feed-back on this issue but a majority of tax administrations argued that the confidentiality of the cases was an obstacle. It remained unclear to other tax administrations and Business why this should be the case. A consensus was finally reached to discuss this issue when the statistics on pending cases will be delivered: a general discussion could take place in the context of the exchange of experience (where Tax administrations could explain the reasons for delay).

It was agreed by consensus on the principle that the statistical and factual information collected could lead to conclusions amending or improving the Code of Conduct on the Arbitration Convention.

2. Monitoring of the Code of Conduct on EU Transfer Pricing Documentation.

A consensus was reached that in a first stage tax administrations should only report on the way they have implemented the Code and that the main input should come from the Business members. As the Forum will be renewed it will be up to the new Business members to agree on the way to deliver this information and to decide which type of information can be provided (factual and/or statistical).

3. Monitoring of the APAs Guidelines.

For this issue the JTPF had to clarify the scope of this monitoring (unilateral and/or bilateral and/or multilateral APAs; APAs only within the EU or worldwide) and the type of statistics that will be collected taking into consideration the limitations due to confidentiality constraints.

The JTPF finally agreed that the scope should be limited to APAs within the EU and all tax administrations, with the exception of Ireland and the UK, agreed to submit information on all types of APAs including unilateral APAs. The Netherlands only agreed to submit information on bilateral and multilateral APAs .

As regards the type of information to be submitted by Tax administrations, the JTPF agreed on the following:

- (1) Number of applications received in the period
- (2) Total number of applications on hand
- (3) Number of unilateral, bilateral and multilateral APAs concluded
- (4) Number of APAs rejected
- (5) Number of APAs withdrawn by the taxpayer

- (6) Average time of completion from the date when the formal request was received.

Business members also agreed to send feed-back information to the JTPF but again it will be up to the new members to agree on the way to deliver this information and to decide which type of information can be provided.

Finally it was agreed to collect information on which Member States have an APA system in place and when was it put in place.

4. Monitoring of the implementation of the Accession Convention to the AC.

It was agreed to update the information on a regular basis.

5. Statistical information on TP audits and related penalties.

Some Tax administrations argued that this information was not readily available.

6. DISCUSSION OF SECRETARIAT NOTE ON THE POTENTIAL FUTURE WORK PROGRAMME OF THE JTPF (DOC. JTPF/021/BACK/2006/EN AND DOC.JTPF/030/REV1/BACK/2006/EN).

Due to time constraints this issue could not be discussed. However, the Chair made the point that this exercise had been undertaken in the main to see if there were enough reasons to renew the mandate of the Forum and this was clearly the case. It was up to the next Forum to agree its work programme and this document would help them inform their decision.

The Chair invited the German delegate to give its presentation on triangular cases during the next meeting.

7. OTHER ISSUES

1. The Commission used the lunch break to congratulate and thank all JTPF members for the work achieved since the JTPF was set up four years ago. The work of the Forum resulted not only in two Codes of Conduct but also improved the general understanding of complex transfer pricing issues in Europe. Both results can be considered as major achievements.

2. It was agreed to insert the proposals made by the sub-group of Tax administrations in their note into JTPF documents in order to give the Forum the opportunity to consider these issues in the future.

3. The Chair explained that the procedure for the adoption of the summary records of Forum meetings should be changed as follows: a first written procedure, a second one to validate the amendments made in light of members' comments and finally a discussion of still pending issues at the next meeting. This was agreed by the JTPF.

4. The Chair closed the meeting by thanking all Forum members for the work achieved during the Forum's second mandate.

5. The next JTPF meeting should take place on Thursday 26th April.