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SUMMARY RECORD OF THE TWENTY-SIX MEETING OF THE EU JOINT TRANSFER PRICING FORUM

held in Brussels on 27th October 2009

1. GENERAL INTRODUCTION

The minutes of the June meeting have been processed under written procedure.

The agenda (doc.JTPF/016/2009/EN) was adopted.

2. JTPF REPORTS: FOLLOW-UP

Tom Neale explained the state of play of the procedure:

- On 14 September three documents were published: a Communication which is a political document with Commission views and two Staff Working Documents (the Commission publishes the JTPF reports as documents of the services).
- Reservations: for procedural reasons the reservations included in the JTPF reports were not included in the Commission proposal. However they were included in the document of the services (staff working documents).
- Council: on 22nd October the proposal was examined by a technical group of the Council. After a brief discussion the Swedish presidency asked MS whether they wanted to retain their reservations and all delegations replied positively. A deadline of one week was given to them in case they would like to redraft the text of the reservations.
- Next stage: the proposal will now need formal adoption by the Council. The document should be ready after the checking of the translations by jurist-linguist. It is expected that the adoption will take place under Swedish presidency.

The Chair concluded that an adoption before the end of 2009 was quicker than expected and an excellent outcome for the JTPF.

3. DISCUSSIONS ON CENTRALIZED INTRA-GROUP (DOC JTPF/014/2009/EN)

Contribution from Isabel Verlinden (doc. JTPF/018/BACK/2009/EN).

(reference documents already available for the last meeting:

doc. JTPF/006/2009/EN, JTPF/014/REV2/BACK/2007/EN , doc. JTPF/022/BACK/2007/EN , doc. JTPF/012/BACK/2008/EN, Secretariat working document prepared for the tax administration sub-group meeting doc. JTPF/021/2008/EN, summary record of the Malta sub-group meeting doc. JTPF/022/BACK/2008/EN, Business contribution on costs allocation doc. JTPF/023/BACK/2008/EN, Prof. Maisto draft report on shareholder costs doc. JTPF/024/BACK/2008/EN – in Pdf format, doc. JTPF/025/2008/EN, doc. JTPF/004/BACK/2009/EN)

The Chair introduced a new Bureau document based on former discussions. The aim of this meeting was to review the document to ensure it captured previous discussions and agreements and obtain the agreement of the forum to the document as a whole. A Business member (BM) also made a contribution on the margins typically attributed to low value adding services.

Tax administration (TA) vice-chair explained that the sub-group was very positive about the document even if some areas like the working assumptions, cost pools and allocation keys might need some improvement.

BM vice-chair explained that they were also very positive and the following areas should be reexamined: a service is deemed to be rendered, safe harbour, cross reference to the EUTPD. He recognized that the enhanced relationship concept is a very important topic but broader than the issue of services even if in this area it is also a very efficient tool to facilitate the work of any reviewer.

The group then examined each chapter:

1. Introduction:

It was agreed to amend the title of the table in annex I *Netherlands*: in line with the last sentence of paragraph 2 of the document to clarify that it regards the annex as a list of intra group services commonly provided that may or may not be within the scope of this paper. And to add in the last sentence of paragraph 4 the word 'full' between the words 'fewer' and 'audits'.

2. Overview:

A discussion on paragraph 7 took place which also addressed issues covered by chapter V on the working assumptions.

The Forum agreed to start paragraph 7 by transferring the sentence on the principle that 'all costs are allocable' and to delete in (i) the words 'acceptance of'.

The Chair invited the Secretariat to amend the beginning of the first sentence of the paragraph ('key elements').

3. Scope:

One TA suggested that it might be interesting to better define or clarify which routine services were within the scope of the document. The Chair supported by the Group replied that to know whether or not a service was within the scope of this paper it was necessary to take into consideration paragraphs 8 to 13. To keep flexibility in the approach it is very important not to refer to any definition but rather to a conceptual approach.

4. Audits and centrally provided intra group services

It was agreed to include the margins at the end of the first sentence of paragraph 14.

The TA vice-chair explained that in the pre-meeting some members suggested to shorten paragraph 17 by deleting the first part of the third sentence and by deleting the last sentence.

All BM were against this proposal because enhanced cooperation is an important tool to depart from a pure audit analysis of the problem.

The Chair explained that paragraph 14 to 17 - have to be read in conjunction and this is how we arrive to the conclusion included in paragraph 18 where we suggest an alternative approach.

The Forum decided not to amend the chapter.

5. Working assumptions:

A long discussion took place mainly due to the words 'working assumptions' and the fact that in paragraph 19 it is mentioned that they can be tested. For some members a working assumption is a irrefutable fact.

The Chair explained that there was a misunderstanding here: this chapter is supposed to explain to a reviewer the context in which the review should start and this should influence the behavior of the reviewer. Then the reviewer must decide whether he simply accepts the working assumptions or whether they (some) should be tested. In any event and at any moment during the review process it might appear that the working assumptions are not met and therefore the suggested approach is not applicable.

A TA member did not think opportune to test whether a MNE operates in good faith.

The chairman could not agree with this statement because in each MS the penalty system makes reference to the good or bad faith of a taxpayer and therefore this judgment is part of the usual task of a tax administration.

However it was finally agreed that the words "working assumptions" were being interpreted differently which was leading to confusion.

In the light of the above discussions the JTPF conclusion was to change the title into "critical assumptions" and to carry out some redrafting of the section.

It was also clarified that low value add services is not referring to the total amount value of the service.

6. Narrative:

The Forum agreed to add a bullet requesting the description of the allocation key(s), to add in paragraph 20 the words 'has been rendered' before 'complies'.

A discussion took place on whether it was really appropriate to make reference to verbal information. It was finally agreed to avoid the insertion of a misleading message to amend the sentence by including the words 'where appropriate, some information'.

7.1 Has a service been rendered:

The Forum agreed to delete the sentence starting with " For example" in paragraph 27 and the word 'any' in the last sentence of paragraph 28.

7.2 Cost pools:

One BM member suggested that we should clarify what is meant in paragraph 30 by 'all appropriate costs'. The Forum addressed this request by agreeing on adding a formula in the document (total cost minus shareholder costs minus direct charge costs = costs to be allocated) and by making reference in a footnote to paragraphs 2.32 to 2.45 of the OECD TP guidelines.

In paragraph 33, the group did not think appropriate to keep the drafting of the beginning of the fourth sentence and invited the secretariat to revise it.

Last bullet point in paragraph 36 should be clarified by adding that the reconciliation aims to guarantee that total costs allocated are not greater than total costs

7.3 Invoicing:

In paragraph 39, the Forum decided to delete the last sentence.

7.4 Shareholder costs:

No comments

7.5 Allocation keys

The Forum decided that it was not relevant to expand the list provided in paragraph 52. However a sentence explaining that more complex allocation keys might be used, but are not mandatory, will be added.

7.6 On call services

No comments

7.7.1 to add the word "method" after "most appropriate" in Paragraph 60 of the document

7.7 2 Margin

Isabel Verlinden presented the study conducted by PWC that compares margins earned by independent routine service providers within the EU. The database used was Amadeus for the period between 1999 and 2007. The screening aimed to provide a sufficiently reliable sample of independent companies. Screening criteria included: companies with available data for 6 years or more years in a 9 year period, size (revenue of at least 1 million Euro) and routine characteristics (intangible assets to total assets must be less than 5 percent). These criteria were used as to provide well-balanced results. Table 1 shows that the ratio operating profit/ total cost (full cost mark up) is relatively stable and the range is also limited. The study also covers the potential impact of the downturn on the profitability.

The Chair concluded that this study confirms the figures included in some previous contributions from France and the UK. A mark-up about 5% or a range between 3 and 10% seems acceptable. On that basis the Chair invited views on the setting-up of a safe harbour.

Whilst some members felt the findings could be challenged the majority accepted that this was a typical example of the kind of general study that became available from time to time and to which reference could be made. The discussion touched on the option of a safe harbour definition. A large majority of MS were not opposed to the option of a safe harbour and all MS (apart from Italy) agreed to mention in the document a reference to these figures. After a long debate it was agreed to insert in paragraph 61 the following sentence: the margin will be modest and typically agreed margins fall within a range 3%-10% and often around 5%. This statement is underpinned by the fact that circumstances may support a different margin. The range suggested here will also be subject to periodic updates in the light of settled cases which reflect arm's length agreements. A BM pointed out that more clarification on whether a margin would apply on the cost base or whether a net margin was needed. Finland and Sweden introduced a scrutiny reservation and Italy will make a reservation.

The Chair concluded that this new drafting should help to develop a best practice within Europe.

8. Documentation:

On paragraph 69 it was confirmed that the proposed revision of Chapters 1-111 OECD Guidelines does not change the previous interpretation that the use of the most appropriate method does not require a justification why other methods were rejected.

9. Post review:

One BM suggested that this document on services should include a cross reference to the EUTPD and its specific recommendation that a taxpayer applying the EUTPD should not be subject to a documentation related penalty.

This suggestion was endorsed by all members and an additional paragraph will be included.

Chair conclusion:

This document can be considered as agreed (subject to some drafting amendments). This document can be considered as agreed subject to some drafting amendments. If a substantive matter arising on drafting cannot be resolved through the written procedure it will be discussed at the next JTPF meeting in February 2010.

A revised version, taking into account the drafting amendments agreed at the meeting, will be circulated in the format of a draft report by mid December for comments to be submitted under written procedure by mid January.

4. DRAFT REPORT ON NON-EU TRANSFER PRICING TRIANGULAR CASES (DOC. JTPF/007/REV1/2009/EN)

On 1st October a revised Bureau paper was sent to the Forum for comments under written procedure. On 22nd October only one comment was received from Germany with a new drafting proposal.

The Chair asked members which was their preferred version.

The BM vice-chair suggested to keep the Bureau proposal (without the words 'as far as possible') but also to reinstate the second paragraph currently deleted in the preamble. The other option is to withdraw the paper.

Another BM explained that her concern is that the text could lead to the non application of the arbitration convention: two Competent Authorities could decide not to give access to the AC because a third state is involved where in her opinion the normal process would be to apply the second stage of the process (sending the case to the advisory commission). It is only the advisory commission that should decide whether a case cannot be solved. Several TA members were opposed to that analysis and said that the text as suggested extends the scope of the AC which applies to bilateral transfer pricing disputes only. If the AC were applied to such non-EU triangular cases without explicit reference to the arm's length principle, this might imply that under the AC two EU states might be forced to accept and share losses (that are contrary to the arm's length principle) whereas the third state might be allowed to tax profits (that are also contrary to the arm's length principle)

The Chair and the TA vice-chair insisted that the JTPF will never be able to solve the legal aspect of whether the arm's length principle or the elimination of the double taxation is more important or should prevail. Moreover this is not part of its mandate. On the contrary the mandate of the JTPF is to find pragmatic solutions to TP problems and this document develops pragmatic approaches to deal with TP triangular cases. It would be a pity to lose all the work achieved.

The TA vice-chair also insisted on the existence of safeguards in the document: a case can only be considered as a non EU triangular cases with the consent of the taxpayer.

One TA member said that for the first time the potential conflict between the two legal principles was debated in public and that her interpretation was that they must be read concurrently. She made a new drafting suggestion that was adopted: second deleted paragraph of the preamble is kept and the last paragraph in the definition chapter will read:

Where there is a transaction involving a non EU third state, EU taxpayers should –as far as possible- enjoy the same treatment as for transactions including only EU MS.

The Netherlands requested a scrutiny reservation. Germany reserved its position on the sentence.

5. EUTPD MONITORING (DOC. JTPF/012/REV1/REV1/2009/EN, DOC.JTPF/017/BACK/2009/EN AND RELATED EXCEL DOC, DOC. JTPF/015/BACK/2009/EN)

Both vice-chairs made a presentation of the monitoring outcomes. BM vice-chair said that companies' answers are not totally positive but the EUTPD is recognized as a tool providing information on what level of documentation is generally expected by TAs and as such the masterfile is considered as a reference. However few companies have officially opted for the EUTPD. Further monitoring will be needed in the future. TA vice-chair added that as the EUTPD was adopted in 2006 and that audits generally take place 2-3 years after the tax return it is very difficult to assess the level of implementation.

One BM stressed that some MS have introduced the EUTPD concept in their tax legislation as a mandatory set of documentation requirements where most other left it optional for the taxpayer. This can lead to practical problems for MNEs when they determine their transfer pricing documentation policy. He also encouraged the adoption of a common approach on TP requirements for SMEs.

The Chair concluded that from the feed-back received we can see that the EUTPD is considered as a standard or a reference point for the type of TP documentation that should be prepared, even if most MNEs do not opt for it officially. The EUTPD provides a solid platform for the future but will continue to benefit from regular monitoring. For example the use of a common language or the acceptance of pan-European comparables emerge from the current round of monitoring as areas that would benefit from further attention. However it is premature to for modifications should be considered in the light of the outcomes of a second monitoring exercise in two or three years time.

This conclusion was adopted by the Forum.

6. DRAFT 2009 APA TABLE (DOC. JTPF/010/REV1/BACK/2009/EN)

The Secretariat briefly reported on the Fiscalis seminar held in Croatia where for the first time all APA teams from EU countries and observers from Croatia and Turkey sat together and exchange views to identify best practices.

From the debates held in this seminar it does not seem that a monitoring exercise on the implementation of the APA guidelines is necessary at this time.

7. DRAFT TABLE ON THE NUMBER OF PENDING CASES UNDER THE ARBITRATION CONVENTION (DOC.JTPF/009/REV1/BACK/2009)

The chair made the following points on the content of the table and the number of open cases: it can be observed that the 3 year settlement target is not always reached and that there are discrepancies in the number of reported cases both of which are important issues . He suggested that next year the JTPF might prepare a document to consider what lies behind the reported figures. One BM stressed that with the adoption of the new art. 25.5 of the OECD Model Tax Treaty more and more countries are looking to Europe and its AC. They want to see what is the added value of an arbitration clause in practice.

Claudine Devillet from the Belgian tax administration was invited by the chair to explain what the UN is doing in this area. She explained that at UN level a sub-group on disputes was set-up which mandate is to prepare a report for next September on the opportunity to include an arbitration clause in the UN Tax Convention model. As she is the coordinator of the sub-group she is looking for factual elements on the AC: e.g. what is the influence of arbitration on MAP, what are the difficulties encountered, etc.

The Chair concluded that the JTPF might include the drafting of a report on the AC in its future work programme and for the UN request a contact has already been established with Tom Neale.

8. ANY OTHER BUSINESS:

The Chair summed up by reminding that the Intra-group services document will be circulated for comments under written procedure. The report on non EU triangular cases which appeared to be essentially agreed subject to a Dutch scrutiny reservation and to the German reservation will also be circulated under a written procedure.

On the monitoring of the work programme the Chair explained that in February the JTPF will start the examination of SME topic. Therefore all members are invited to send written contributions by mid of December: legal or administrative aspects, what are the problems, best practices, suggestions, etc.

Members were also invited to send by the end of January contributions on CCAs: it should help the Bureau and the Secretariat to assess whether CCAs are still a problem. Issues could include the definition, recent trends, what leads to dispute, any other aspects.

2010 meeting dates: 4th February, 8th June and 26th October