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## **SUMMARY RECORD OF THE TWENTY-FIFTH MEETING OF THE EU JOINT TRANSFER PRICING FORUM**

**held in Brussels on 3 June 2009**

### **1. GENERAL INTRODUCTION**

The Chair introduced the new Head of Unit, Thomas Neale, who said a few words and mentioned that the adoption of the Commission Communication based on the JTPF report should take place in September. Then the Council process will start.

The minutes of the March meeting had been processed under written procedure but the OECD proposed a minor factual change regarding the date of an OECD report on thin capitalisation. The revised minutes will be circulated after the meeting.

Regarding the agenda: triangular cases were added on the agenda in response to comments received during written procedure from Germany, Spain and the Netherlands.

The agenda (doc.JTPF/008/REV1/2009) was adopted.

### **2. DISCUSSIONS ON CENTRALIZED INTRA-GROUP (DOC JTPF/006/2009/EN)**

(reference documents already available for the last meeting: doc. 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 reminded members that the Forum had been working on the subject of centralised services for some time and this document was the fourth document dealing with this issue.

The Chair explained that this document is a follow-up to the meeting on 24 March when the Forum got through to stage 3, routine services. The preparation of DOC JTPF/006/2008/EN by the Secretariat was in response to the JTPF conclusion at stage three of an earlier paper to consider a realignment of the work of the Forum in the area of routine services.

The Chair emphasized the importance of the work done by the Forum in the preceding stages. In particular, he noted the Forum confirmed support of OECD rules on this subject, and had stated that in principle all costs are allocable but they are subject to domestic law in terms of deductibility. The Forum also started work on an expanded but non-exhaustive list of shareholder costs.

The Chair pointed out the DOC JTPF/006/2008/EN was not a final working document and that it would be discussed section by section in this meeting. The Chair also suggested that this topic would be handled like the APA topic by providing guidance/guidelines in an area not at risk with the aim of facilitate the work of all reviewers and lead to a better allocation of resources.

The Chair invited initial comment from the Bureau vice-chairs

The Business Vice-Chair explained that business members (BM) very much supported the paper the aim of which was to provide a useful framework and the adoption of an agreed methodology could be of great help. The work had wide ramifications in Europe in terms of double tax and deduction of costs. He invited Member States experts to consider consulting with their auditors in the field on this important subject. BM hoped that work here be the foundation to discuss more complex service provisions.

The TA's Vice-Chair informed the Forum that Tax administrations (TA) discussed the paper at the pre-meeting. The feeling was that the focus should be on routine services. Some concerns were expressed on certain aspects of the document and they would come out in debate. It was his own view that the Forum should not be only concentrated on documentation aspects of this work the intention was to go consider the subject more in the round.

The BM's Vice-Chair also reported that at their pre meeting the paper is viewed as an excellent start signalling a clear way forward.

The Chair gave an overview of the structure of the document and then proposed to look at document's sections, starting with Section 3, part 3.1 on definition. This definition is structured around the type of services and is also on the basis of the structure of those services and how the services are provided. The aim is to identify what are considered to be routine services. The Chair wondered if an illustrative list, either identifying routine or non-routine or some mix of the two would be useful in helping to define routine services. These lists could complement the rather general definitions. He asked the opinion of Forum's members.

The discussion then developed into wider commentary on section 3 overall and the following salient points were made:

The term "methodology" caused concern for some but the main point was to consider the underlying issues that the Forum was attempting to address i.e. an improved way of dealing with routine intra group services to the mutual benefit of Member States and BM then going back to drafting issues. The Chair suggested that we might rather use the term "approach".

The right to audit by a Member States was not diluted by any proposal in this paper. The idea was to better inform whether or not an audit was necessary or if an audit was launched to more quickly identify and conclude areas of intra group services related to routine services. This work was an opportunity to secure some consistency of approach.

In defining routine services the expert group understood the concept well and recognised it in the workplace but it could be difficult to pin down a definition that would apply in every circumstance. It is often the case that experience enables the type of service one is examining to be correctly classified as routine or non routine.

The role of lists in helping to define routine and non routine services was discussed and there was mixed views. Difficulties were envisaged in encapsulating the idea that what was a routine service in one commercial context may be non – routine in another. There may also be difficulties in keeping any such list up to date. On the other hand some Member States would appreciate the initial guidance that such a list could provide.

The TA's Vice-Chair suggested working on basic examples forming a non-exhaustive list.

The Chair agreed this approach perhaps with some supportive overarching statements such as "services of an administrative nature", "auxiliary to the recipient's main business". BM said that routine services were activities that were the glue holding the MNE together to support its main functions.

The question of whether or not a service had been rendered in the first place also arose. The Forum noted it had already reaffirmed its agreement with the OECD principles of deciding whether or not a service had been provided. This guidance merely sought to supplement the application of those principles. The Secretariat by way of explanation said that the guidance was to be taken as a whole and that once the whole of the approach was taken into account - narrative documentation etc it would also support any need to be satisfied that particular service had been provided. So for example there may be some doubt in the auditors mind but the provision of the narrative as described could eliminate that doubt.

#### Section 4: Methodology

The Chair summarized the section as he saw it: it starts with a statement of working assumptions. The section aims at establishing a very general (not prescriptive or limiting) approach which could apply to 90 or 95% of the cases which might arise, with the understanding that additional audits would be required in certain cases.

The approach starts with the principle that we apply the Prudent Business Management principle to routine services. The basic assumption that a service has been rendered is to be read in that context, it's not an iron-cast assumption but it help us to move through the methodology. For several services we can all agree it is

very easy to assume that it was rendered: e.g. payroll and accounting. The approach seeks to develop a very pragmatic and interactive approach to deal with routine services. The approach is flexible in that based on the information provided and the facts and circumstances some of working assumptions will need to be tested more than others.

One TA recognised that the main aim of the document is to give sufficient information to an auditor to help him when checking the provision of an intra-group service. It was suggested that the structure of the document should be first the documentation to check the service was provided and secondly the pricing. The Chair in responding to that echoed earlier comments that this paper was not just about documentation. It was about taking a rounded view in dealing with routine services that in the majority of case it would be self evident that a service had been provided. It also explored what evidence or further information it was reasonable to expect and to provide in explaining how a particular intra group service provision was operated. The culmination of a low reward routine service, supported by an appropriate explanation or/and documentation, should enable either rapid resolution of any audit or assist in a decision that an audit was not required.

A BM said that what is interesting with this document is that it is addressed to all reviewers (tax auditors, service providers and service recipients). On the aspect whether the service was rendered or not the idea developed is that for such routine services it should not request too many justifications. It was also observed that MNEs already have to comply with internal and external audit requirements which to some extent should give comfort that a particular service existed and was being provided. Additionally in response to the concern raised by a TA that a service may be duplicated it will be detected by the internal or external audit and then eliminated.

One TA suggested that the drafting of the section should be changed: e.g "a tax administration considers that a service has been rendered when the following conditions are fulfilled". Moreover the document should provide the type of proof or documentation that must be provided to evidence whether the service has been rendered or not. The Chair explained that this point had been addressed by the content of the narrative which would provide the requisite evidence.

Another TA added that what the JTPF needs to answer is 'what sort of understanding' supplemented by 'what sort of evidence' needs to be provided to enhance confidence/relationship and facilitate the examination of this kind of services. The Chair could agree with this statement but added that this would not be achieved through the adoption of a list of evidence to be provided. The TA agreed and added that the auditors are not looking for individual items of evidence for each individual item of the service but well evidence that some system is in place. The Chair suggested the narrative would address that need.

The discussion broadened out into the relationship that a TA and MNE`s could foster. Some TAs had embarked on a programme of enhanced relationships. The essence of the approach was that there was a real time dialogue between administrations and MNE`s. That process engendered understanding of how an MNE operated and how it implemented its systems supported by contemporaneous evidence to ensure compliance. The TA`s were able to flag up areas of concern and discuss how those needs could be met or addressed going forward. This approach,

over time will enable a balance and timetable approach to audit issues. Moreover trust was built between TAs and MNEs so that fundamental questions and answers did not always have to be tested as neither party would have reason to doubt the veracity of the statements made. Enhance relationship promotes good governance through transparency, building confidence, open dialogue, leading to mutual understanding and respect

All members appreciated the strengths that such an approach could have and agreed it was important in the context of this work to find the right balance between the kind of evidence that can be legitimately asked for and what it is actually asked for against the backdrop of the provision of low value services. It seemed a natural progression to now examine the proposed content of the narrative

A TA explained that such an approach supplements an overall risk assessment approach to compliance work including transfer pricing. For example in that particular TA country they would work on the basis that the service has been rendered unless they have substantive concerns that it has not. This risk assessment approach does not mean a softer approach to transfer pricing but an efficient use of the resources available. An offer was made to make a presentation on the risk assessment approach in practice.

Before going through the narrative a short discussion took place on the interaction with the EUTPD. It was finally agreed that this would be examined at the end and it might be that an annex on intra-group services will be added.

The Chair suggested to go through the list of a) to o).

Overall BM said that they had not major problems with the narrative.

A first discussion point was about where the text in bold referring to the link between the contract and the narrative should be put It was decided to keep at the end.

a) It was agreed to replace the word industry because it might be too limiting.

b) to c) No comments were made.

d) "an overview of expected benefit to the recipients": a long discussion took place about "on call" services for which it can be very difficult to assert/check whether they have been rendered or whether there is a benefit for the recipient as the service might only be used every fifth year. Finally it was agreed that those services were sufficiently addressed by points m) and n).

e) "an account of the services provided and to whom": some members suggested that we should not limit the narrative to one side of the transaction. It was therefore decided to develop an additional point to incorporate the perspective of the recipient

f) "explanation of the structure through which services are delivered": this point is considered as essential by tax administrations as it is an opportunity to understand the way services are rendered/organized and it is a good way to build understanding which in turn enables a more informed decision to be taken about how to deal with a particular service about what is happening.

g) "a description of the group standards as it relates to its audits approach and as applied to services": It was agreed that for the auditor it is very important to know what standards and assumptions were applied in internal audits. It was also suggested to make a cross-reference to 4.3.4 (allocation keys).

h) "how any cost pool is constructed": this point might be amended on the basis of the discussions on 4.3.3.

i) to n) No comments were made.

o) "available documentation": cross reference with the specific chapter on documentation.

The group concluded that on the basis of the information provided for the narrative auditors should be able to determine whether a service has been rendered which had previously been flagged up as a major concern to be met. However some points like the cost pool, the allocation keys will be further discussed in specific chapters.

Then a discussion took place on the necessity to always conduct a benchmarking for such a "routine" or "low value added" service. It was recalled that i) only refers to a "justification" that the mark-up rate is at arm's length. This kind of justification can take various forms but is not necessarily a benchmarking. For example an auditors experience of recent cases may be sufficient for them to take a judgment that a particular cost plus was not inappropriate.

On specific aspects of routine services the Forum considered that 4.3.1 and 4.3.2 did not require discussion.

#### Discussions on 4.3.3 (cost pool):

A brief introduction was given by the Secretariat. In the first instance the paper considers how reviewers may acquire sufficient confidence in the integrity of a cost pool. The differing levels of review described are all valid depending on the facts and circumstances surrounding a particular case. The key test is for any reviewer was that they had a sufficient understanding of the cost pool to enable them to accept the robustness of the pool.

Following some questions on the drafting the Secretariat explained that the three approaches were drafted on the basis of actual practices. Each approach can be taken individually or progressively until the reviewer is satisfied: the first is a fairly high level assessment where for several reasons (amongst which the service is considered as "routine" or "low value added") can gain confidence in the cost pool/information provided; the second is a more in depth review where confidence is reached after analysis of some invoices (which might only occur during the first time a service is provided) and the last approach confidence is achieved through an examination of the elements listed. However, it is suggested to avoid a total re-audit of the cost pool when it relates to this kind of routine services even if the reviewer will always have the right to conduct a full audit.

One Business member stated that the business community had no problem in explaining how the system works and how it arrives at a cost. However, what might be helpful for a MNE is that the information is provided to the country of the

provider that would then inform the other MS of the service recipient that they have looked at it and that the cost pool is fine.

Some Business members put emphasis on the issue of invoices. Indeed service charges are constituted of direct charges (with invoices) and indirect charges (mainly part of wages accounted through cost centers) and it is unreasonable to expect a breakdown of all constituent parts where a cost may be the result of the inputs from several different entities.

The Secretariat explained that it was not the proposal that an invoice should be analyzed right back to its origins when it was effectively the cumulative price of several perhaps associated and independent contributors. The suggestion was however that it would be reasonable to ask for an analysis to the level of detail or the level of burden of proof requested for a third party invoice and that required level should not be higher for internal than for external services.

The Chair concluded that it seemed that although some were at this time hesitant about the differing levels of review that could be applied the Forum is generally happy with the ideas developed in this section even if some elements will need to be slightly reworded or reformulated.

#### Discussions on 4.3.4 (allocation keys):

The Chair asked the members whether or not they would wish to go into more detail, providing more examples of the kind of keys which are generally accepted, or is that not necessary?

One Business member put emphasis that whatever clarifications on these keys would be given it should not be forgotten that taxpayers may already apply some rules that have historically been accepted and that whatever is adopted it should not have a retroactive effect.

Another BM supported the idea that it might be very difficult to better define or to give guidance on allocation keys because sometimes very simple allocation keys might be appropriate where in other cases more complex or inventive ones are used. Therefore the Forum should not be too prescriptive or limitative.

The Chair suggested we might focus the guidance on whether one key (generally the turnover) or several keys (turnover and headcounts) are appropriate but we should avoid giving the impression that in some situations some keys are definitely appropriate because it is always a case by case approach.

One BM suggested that what is important is that an allocation key is applied with consistency and should not be too burdensome. Chair suggested adding a paragraph suggesting that there might be differences in the methodology applied but what is more important is that the method should be justified and consistent. The choice of the key will depend on the circumstances of the company and a balance should be kept between the level of precision of the key and the burden.

It was also agreed to delete the second sentence starting by "the application of an allocation key...".

#### Discussions on 4.3.5 (the arms's length range):

The Chair asked whether the Forum would like to go a step forward with the issue of the mark-up: could we give more specific guidance or define what is the typical range?

One Business member suggested to amend this section by making reference to the application of a cost based method or a gross/net cost plus method but we cannot limit the scope to gross cost plus. On the other hand if the profit split method is applied it is likely that the service is non routine. This proposal was endorsed.

The Forum also agreed to modify the last sentence of the second paragraph: it's wrong to conclude that the absence of a CUP means that the service is a non routine service and therefore potential highly sophisticated service non routine service.

The Chair then collected views on setting-up a safe harbour.

Only two members from the tax administrations were rather opposed to such approach (one of them prefers the risk assessment process). Where some other TAs clearly supported the idea, the large majority was silent. However all members could agree that the "plus" was not a major issue and one TA member suggested that instead of a range we could define a point.

Finally all members could agree that it was a good idea to ask the Secretariat to develop in the revised document an approach that would not be prescriptive but provide some guidance based on some statistical analysis as one BM stated that from the statistical figures she has it can be seen that the results are quite stable. The Chair summed up by suggesting that the Forum might publish those statistical information and update them on a regular basis. The taxpayers and the tax administrations might then use this information without making reference to a safe harbour.

#### Section 5: Documentation.

This Section was quickly addressed by agreeing that it would be merged with section 4.

One BM concluded that it was expected that by agreeing to provide the information listed under 4.2 (which might be more burdensome than actually) it is expected that the JTPF has overcome tax administrations concern/question whether the service was rendered.

The Chair concluded that the JTPF made a big step forward and that based on some re-drafting, the document that will be tabled for the October meeting will see confirmed the progress made today.

### **3. DRAFT REPORT ON NON-EU TRANSFER PRICING TRIANGULAR CASES (DOC. JTPF/007/2009/EN AND DOC. JTPF/011/BACK/2009 ON WRITTEN CONTRIBUTIONS).**

Due to time constraints and considering the three contributions received, it was agreed to start a new written procedure.



**4. DRAFT 2009 APA TABLE (DOC. JTPF/010/BACK/2009/EN).**

Some TAs have still to send their contribution: Bulgaria, Estonia, Italy, Luxembourg, the Netherlands and Slovenia

The Chair drew attention that this table will be an important background document for the Fiscalis seminar on APAs that will take place in September.

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

The table was not provided as all contributions were not received.

**6. ANY OTHER BUSINESS:**

6.1 Monitoring of the work programme:

The Chair said that the October meeting will focus on the revised document on intra-group services and will start the monitoring of the EUTPD.

Then the JTPF will examine the issues of SMEs and CCAs.

6.2 EUTPD questionnaires: (doc. JTPF/012/BACK/2009 NOT TO BE PUBLISHED)

Answers from some TA all missing: Finland, Italy, Lithuania, the Netherlands and Portugal.

Some translations are also missing.

6.3 Provisional dates for 2010 meetings: 4<sup>th</sup> February, 8<sup>th</sup> June and 26<sup>th</sup> October