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EU JOINT TRANSFER PRICING FORUM

Report on Cost Contribution Arrangements on Services not creating Intangible Property (IP)

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1. Introduction

1. Cost Contribution Arrangements (CCAs) are commonly used as a cost-effective means for multinational enterprises (MNEs) to carry out the group's activities. The business decision to have recourse to a CCA can be justified by various reasons, e.g. reasons of economies of scale, sharing of risks or skills or resources.
2. The topic of CCAs has been of long-term interest to the Joint Transfer Pricing Forum (JTPF). It was carried-over from its previous work programme and under the new mandate the JTPF confirmed its former decision to explore the possible scope and degree to which a common approach to CCAs could be developed within the EU.
3. CCAs are thoroughly discussed in chapter VIII of the OECD Transfer Pricing Guidelines (OECD Guidelines) and the OECD is currently involved in a project on the transfer pricing aspects of intangibles. To avoid duplicating OECD work, JTPF work focuses on services not creating intangibles (IP). This work should be seen as supplementing the existing guidance and completing the JTPF's work on low value adding intra group services (JTPF IGS Guidelines).
4. This report focuses on those issues which are for a reviewer difficult to deal with in practice and proposes how best to address them. The term reviewer covers both the taxpayer and the tax administration. Underpinning this report is the assumption that both MNEs and tax administrations act in good faith and unequivocally endorse the OECD principles. The emphasis of the report, therefore, is on how most expediently a reviewer may conclude that the arm's length principle (ALP) has been applied to CCAs on services not creating IP.
5. Both OECD Guidelines (mainly chapter VIII but also VI and VII in relation to the arm's length principle determination) and JTPF IGS Guidelines are taken into consideration in this document.

2. Terminology

6. Given that there may be a different understanding on whether and how a CCA on services may be distinguished from intra-group services charged directly or by way of creating a cost pool, this chapter seeks to establish a common understanding of the terminology used. It describes the concept of a CCA on services and distinguishes it from intra-group services.
7. A CCA is defined under 8.3 of the OECD Guidelines as *"a framework agreed among business enterprises to share the costs and risks of developing, producing or obtaining assets, services or rights, and to determine the nature and extent of the interests of each participant in those assets, services or rights. A CCA is a contractual arrangement rather than necessarily a distinct juridical entity or permanent establishment of all the participants. In a CCA each participant's proportionate share of the overall contributions to the arrangement will be consistent with the participant's proportionate share of the overall expected benefits to be received under the arrangement, bearing in mind that transfer pricing is not an exact science."*
8. Illustration of a CCA on services:

11. A further variant not explicitly mentioned in the OECD Guidelines but often encountered in practice is arrangements where several members of a multinational group pool the costs of certain services and charge them (directly or indirectly) to members of the group benefiting from those services. Further it is also possible that some members of the multinational group agree on a CCA on services and other members of the group that do not participate in the CCA provide services to the members of the CCA. A participant in a CCA can also engage a separate independent entity to perform all or part of its activities.
12. In practice it is sometimes difficult to differentiate between (shared) intra-group services - including cost pools - and CCAs on services not creating IP. The following table is intended to help reviewers to differentiate between the two concepts.

CCAs on services not creating IP	Intra-group services
Agreement to share costs, risks and benefits where all participants contribute in cash or in kind.	Intra-group services are limited to the provision or acquisition of a service by members of the MNE Group. The risk of not successfully and efficiently providing the service is generally borne by the service provider.
If participants join or leave a CCA, shares should be adjusted/rebalanced in accordance with the ALP.	Terminating or extending the service agreement to other participants has generally no implication on other service recipients.
Written agreements are highly recommended for reasons of having the CCA accepted or recognised by tax administrations. They are even compulsory in some MS. A written agreement and/or appropriate documentation is important for the reviewer when examining the implementation/performance of the CCA.	In practice, formal contracts are not always available. The agreement often is limited to the direct relationship between the provider and the recipient of the service. It should be feasible to demonstrate that from the perspective of the provider the service has been rendered and from the perspective of the recipient the service provides economic or commercial value to enhance his commercial position (section VII.1 IGS Guidelines)
As all participants are contributing to a common activity and share costs and the contributions reflect the expected benefits, contributions are usually valued at costs.	The profit element charged by the provider of the service is usually a key element as the provider will not share profits with the recipients.
The allocation of the costs is based on the expected benefits for each participant from the CCA.	The allocation key is based on the extent each company has requested/received or is entitled to the service.

3. Scope

13. While the JTPF IGS Guidelines focus on issues encountered in relation to services of an administrative nature ancillary to the business of the recipient, this document addresses specific considerations in cases where all kinds of intra-group services without IP impact are embedded into a CCA.
14. An exhaustive definition of the services which may be the subject of a CCA is neither possible nor desirable. Services that are within the scope of this document might include the following activities: IT, logistics, purchasing, real estate, finance, tax, human resources services, accounting, payroll and billing. This list of services is only illustrative and does not automatically imply that a service is covered by or excluded from the scope of this document.

4. General Features: is the CCA consistent with the arm's length principle

15. As a general principle, determining whether a CCA is consistent with the ALP requires that a CCA is consistent with what independent enterprises would have agreed to contribute under comparable circumstances given the benefits they reasonably expect to derive from the arrangement and which includes the sharing of costs and risks to satisfy a common need. The relevant question for a reviewer under Article 9 of the OECD Model Tax Convention is whether a CCA is implemented/performed in accordance with the ALP.
16. The OECD Guidelines (9.163) state that MNEs are free to organise their business operations as they see fit. A tax administration may perform where appropriate transfer pricing adjustments in accordance with Article 9 of the OECD Model Tax Convention. This means that a MNE should take into account the respective implications (e.g. on bearing risks) of each of the reasonably available alternatives when deciding whether services performed intra-group will be charged directly or indirectly, by way of IGS (including cost pools) or whether a CCA is considered as being more appropriate rather than simply labelling it (see also paragraph 43 below). The relevant facts should be documented. This should not lead the reviewer to challenge the business choice or the reasons behind the choice or to request from the taxpayer an analysis of what was the best choice.

A CCA on services not creating IP that is consistent with the ALP will have the following features:

- i. The arrangement should make business sense.
- ii. The economic substance should be consistent with the terms of the CCA.
- iii. The terms of a CCA should be generally agreed prior to the beginning of the activity.
- iv. The terms of a CCA should be at arm's length taking into account the circumstances known or reasonably foreseeable at the time of entry into the arrangement.
- v. Each participant should have a reasonable expectation of benefit.
- vi. The participant's share of the costs should be consistent with its share of the expected benefits.
- vii. Reasonable expected benefits can be assessed in terms of efficiency or effectiveness in quantitative or qualitative terms.

- viii. Contributions by a participant can be in cash or in kind and therefore active participation is not a requirement. The level of influence on decision-making will vary depending on the type of CCA, the expertise of the participants and the amount of costs being allocated to the respective participants.
 - ix. When a service subject to a CCA is also provided to or received from non-participants in the CCA it has to be valued at arm's length.
 - x. If participants join or leave the CCA, shares should be adjusted/re-balanced in accordance with the ALP.
17. The actual outcome may differ from the projected outcome, e.g. the contribution provided by a participant is excessive or the benefit derived from its participation in the CCA is inadequate. When such a difference occurs, the reviewer should analyse the reasons for this difference before concluding whether a participant's proportionate contribution has been correctly or incorrectly determined, or whether the participant's proportionate expected benefits have been correctly or incorrectly assessed.
18. A further question for the reviewer is whether the difference is so material that it requires an adjustment or the difference is considered as small enough to avoid any adjustment, given that the OECD Guidelines provide that tax administrations should refrain from making minor or marginal adjustments. The reviewer should also bear in mind that any modification will impact the other participants, which is also a factor in favour of avoiding small adjustments.
19. In some cases the facts and circumstances may also indicate that the reality of the arrangement differs from the terms purportedly agreed by the participants (8.29 OECD Guidelines). A reviewer's decision should always be based on the facts and circumstances relating to the specific arrangement for an adequate period but the reviewer should generally refrain from making an adjustment based on a single year. A reviewer should also take into consideration that the ALP does not require per se that projections of benefits match the actual benefits and even a material difference between actual and projected benefits does not automatically mean that the projection was not at arm's length. Care should be taken to avoid the use of hindsight.
20. Considering the previous paragraph, the application of the ALP might require an adjustment of the participant's contribution through a balancing payment when the situation arose for example from an incorrect evaluation of the expected benefits. In some other cases part or all of the provisions of the CCA will be disregarded e.g. when the facts and circumstances differ from the terms agreed in the CCA (8.26 to 8.30 of the OECD Guidelines).
21. Balancing payments will be treated as an additional cost for the payer and as a reimbursement of costs for the recipients.
- 5. Corroborative Information: Narrative related to a CCA on services not creating IP**
22. In the light of the facts and circumstances of a case, the level of experience and knowledge of the particular MNE concerned, a reviewer may take different approaches in requesting what is considered sufficient corroborative information to

confirm that a CCA on services complies with the ALP. In making an informed decision, access to appropriate, good quality information is crucial.

23. In preparing or reviewing a CCA, a reviewer will need to understand and achieve confidence on several key issues. The main question is: "does it achieve an arm's length outcome"? In most circumstances this question may be answered by the provision of a narrative that includes the information requested at paragraphs 24 and 25 below¹.
24. The key element is of course the agreement itself. There should be a clear expectation of mutual benefit for all parties to a CCA. An independent party would not enter into a CCA-type arrangement without a reasonable expectation of benefit (see 6.1 below). Secondly, the agreement should ensure that the allocation of the contributions reflects each participant's expected benefits (see 6.2 below).
25. As each CCA will be different, the exact content and extent of the narrative may vary but the following list of items should meet the requirements of most reviewers. If relevant, additional documentation can always be provided.

i) General information about the CCA

- a) Explaining the CCA within the overall context of the MNE's business in order to understand the rationale for entering into the CCA: the MNE's overarching transfer pricing policy, the type of services that are subject to the CCA, participants' mutual economic interest, required knowledge and skills, what contributions and risks are shared, etc..
- b) List of participants and the allocation of responsibilities and tasks associated with the CCA activity between participants and other enterprises.
- c) The budget for the CCA and its expected duration.

ii) Expected benefit from the CCA

- d) Expected benefit to be derived by each participant and the way it was assessed and reflected in the allocation method (including methodology and any projections used).

iii) Contribution to the CCA

- e) The form and value of each participant's contributions and a detailed description of how the value of initial and ongoing contributions is determined.
- f) A description of the accounting standard used and how it is applied consistently to all participants in determining expenditures and the value of contributions. A description of direct and indirect costs included in the contribution pool, settlement dates, payment methods and any budgeted versus actual adjustments.
- g) Information about the existence of government subsidies or tax incentives linked to the participants' contributions and their impact.

iv) Monitoring/Adjusting the CCA

- h) Information about balancing payments, i.e. under which conditions they arise, how they are calculated and when they are due.

¹

This is achieved in a similar way in Section VI Narrative, paragraphs 21 to 25 of JTPF IGS Guidelines.

i) A description of the Group standard as it relates to its audit approach and as applied to CCAs. For example, safeguards in place to ensure the consistent application of an allocation key for a particular service; ensuring costs/services are not duplicated.

j) How the CCA conditions are monitored and updated.

k) An understanding of how new participants are integrated into the CCA and how a participation is terminated. Provision of the method to be applied when shares in the CCA need to be adjusted/rebalanced.

v) Relationship to other entities

l) A list of other members of the Group or independent enterprises who benefit from services included in the CCA. Description of the fees to be charged and allocation key(s) for the allocation between the participants.

26. The above information may be made available and provided in different ways such as a dedicated written narrative or it may also be the case that the written agreement already provides most information. The important point is that the reviewer gets an understanding of how the CCA works in practice.

6. Specific aspects

27. This chapter addresses some specific issues for which the reviewers might need additional guidance.

6.1 The 'expected benefit' test

28. The 'expected benefit' test is an essential element in the setting-up, appropriate monitoring and review of a CCA. It will be the basis for assessing the arm's length nature of participants' contributions to the CCA and will justify the allocation key.

29. Based on the ALP, a participant's contribution must be consistent with the expected benefits it will derive from its participation in the CCA. Benefit in this context means an increase in economic or commercial value such as savings in expenses or an increase in income or profits. An appropriate demonstration that profits or income can be maintained or losses/greater losses can be avoided may also be considered as an expected benefit. It should be noted that what distinguishes IGS from CCAs as regards the benefit test is that for CCAs a reviewer should check - in addition to verifying whether the services covered were actually provided (IGS requirement) - whether contributions are in accordance with the expected benefits that participants might derive from the CCA.

30. It is important that the reviewer is satisfied that from a participant's perspective the contribution is in accordance with expected benefits in terms of e.g. economies of scale or sharing of risks and skills, and that the participant would have paid for the service or else performed the service itself. The key used for allocating costs should reflect the benefit expected by the participant and how the participant takes advantage of the outcome of the CCA in a way consistent with the arrangement.

31. The degree of certainty a reviewer requires to accept that the provision of a service under a CCA meets the arm's length standard will vary from case to case on a risk assessment basis. While in most cases the expected benefit for the respective participant can easily be derived from the appropriate demonstration of the overall

benefit of the CCA and the appropriateness of the allocation key chosen, cases where the expected benefit for the individual is less clear require a stronger focus from the viewpoint of an individual participant. Additionally and depending on the facts and circumstances, the expected benefit may also be evaluated directly i.e. by an estimation of the additional income to be generated or costs to be saved, or indirectly i.e. by using indirect indicators of the expected benefit such as turnover, number of employees, gross profits, etc.

6.2 Contributions of each participant

32. Each participant's contribution must be consistent with what independent parties would have contributed in comparable circumstances. Valuation of the shares in the expected benefits is one of the key elements in CCAs. This will form the basis for the calculation of the contributions.
33. Often allocation keys are used to determine what each participant will have to contribute, although the allocation method might be based on estimated costs that will be saved by each participant in the arrangement. The guidance on selection, justification, application, documentation and potential allocation keys given in paragraphs 48 – 55 of the JTPF IGS Guidelines applies equally in the context of CCAs on services not creating IP.
34. The value of each participant's contribution must be consistent with the value that independent parties would have agreed to in comparable situations. No specific result can be provided for determining participants' contributions in all situations, but rather the question must be resolved on a case by case basis consistent with the general operation of the ALP. With respect to CCAs in general, countries have experience both with the use of costs and with the use of market prices for the purposes of measuring value of the contributions to arm's length CCAs (8.15 OECD Guidelines). However, for the type of CCAs covered by this document, it is assumed that there is often a small difference between pricing at costs and at market value and it is therefore recommended for practical reasons to generally value the contributions at costs.
35. As contributions are based on expected benefits this generally implies that they are initially based on budgeted costs. In service CCAs there may be little material difference between budgeted and actual costs and therefore it may be practical to use the actual costs as the measure of the contribution of each participant. However, where adjustment of the contribution from estimated to actual costs is necessary this would generally be done retrospectively, i.e. by adjusting the historical budgeted costs. Unless national law prohibits it, it may be appropriate for practical reasons to make the adjustment prospectively. This means taking the eventual adjustment into account in the following year if it can be considered as not having a major impact. The question of whether any adjustment of the contributions from cost (at either budgeted or actual) to market price² is required to value the contribution is considered in paragraph 34.
36. In order to address the issue of adjustments to contributions, the OECD Guidelines recommend preparing an annual account of expenditure incurred in conducting the CCA activity, which would include a detailed description of how the value of the contributions is determined and how accounting principles are applied consistently to

²

8.15 OECD TPG refers to valuing contributions at market price

all participants in determining expenditures and the value of the contributions. It can be assumed that also third parties, when contributing jointly to a certain project, will agree on a common standard on how to determine their contributions. For practical reasons it is therefore recommended that MNEs should be allowed to use the accounting standards that are generally used throughout the group. A tax administration is however entitled to require adjustments, especially in cases where permanent major differences with the domestic accounting standards can be expected over the duration of the CCA.

37. Contributions should include all relevant costs for the acquisition, maintenance or for securing the benefits derived from the arrangement. A reviewer will need to understand which costs have been considered relevant (and can, therefore, be allocated). Sometimes this will be self-evident from the type of services covered by the CCA. Sometimes, in more complex situations, the arrangement should clearly explain what costs are excluded or how potential duplication of costs has been avoided.
38. A related issue is the treatment of tax incentives and government subsidies which is addressed in 8.17 of the OECD Guidelines. The key question is whether costs passed to the CCA should only include costs effectively spent from which tax incentives and government subsidies have been deducted. *"Whether and if so to what extent these savings should be taken into account in measuring the value of a participant's contribution depends upon whether independent enterprises would have done so in comparable circumstances"*.

6.3 Anticipated benefit versus actual

39. As CCAs are arrangements based on expected benefits, independent parties might in consideration of the often long duration of the CCA include a clause in the contract allowing regular assessment of whether expected benefits are in line with actual benefits and whether contributions should not be changed in the future.
40. Addressing those two concerns opens the issues of whether contributions can be adapted to the actual situation and whether this is to be considered as arm's length or as the improper use of hindsight.
41. The CCA must be examined by reference to the assumptions of future benefits based on the economic and commercial circumstances prevailing or reasonably foreseeable at the time the arrangement is entered into. Therefore if a reviewer considers the benefit projections as reasonable, future events affecting the initial projections should not lead to retrospective adjustment of the contributions.
42. As unexpected or unforeseeable events or circumstances may affect the initial benefit assumptions, a reviewer should consider whether independent parties would have provided for an adjustment or renegotiation of the agreement in such cases.

6.4 Participation in a CCA

43. The key feature of a CCA is that the contributions of the participants are in accordance with the expected benefits of the respective participants from the participation in the CCA. An enterprise taking its expected benefit solely or mainly from the performance of the CCA activity itself would not be considered as being a member of the CCA but rather as a service provider (company) that would add a profit element in its calculation, i.e. should be considered as a company providing services at arm's length.

6.5 Joining/Leaving a CCA

44. The general issue of entities joining or leaving a CCA is in practice often a very difficult topic even if mergers and restructuring are part of the day-to-day business of MNEs. How to assess the value of work in progress and/or the specific skills acquired from past activities are questions often leading to difficulties for any reviewer.
45. However, as the present scope is limited to CCAs on services not creating IP, the examination of buy-in / buy-out issues should be very limited (or non-existent). Answering the following questions should help reviewers: what additional costs will be paid by participants when an entity leaves or exceptionally when it joins? Is the arrangement still sustainable after the departure of this company? Should those new elements (different cost structure, or expertise, or skills, or risks, etc.) be compensated in money or do they only lead to a revision of the expected benefits that will lead to the adoption of new allocation keys or does the new participant bring specific knowledge?
46. Clearly, if the outcomes of prior activities developed under the CCA have no value, no compensation should take place. However, entry or departure of a company will generally lead to an adjustment of the proportionate shares (allocation keys).

6.6 Documentation

47. Reviewers should be aware that CCAs are already governed by the Code of Conduct on EU Transfer Pricing Documentation (EU TPD) wherein it is stated that MNEs should include in the masterfile a list of CCAs as far as group members in the EU are affected.
48. The OECD Guidelines (5.4) refer to prudent business management principles that would govern the process of considering if transfer pricing is appropriate for tax purposes and the extent of any required level of supporting transfer pricing documentation.
49. This theme is echoed in point 2.3.1 of the EU TPD which says: "The "prudent business management principle", based on economic principles, implies that the sort of evidence that would be appropriate in relation to a transaction of large value might be very different from the sort of evidence that would be appropriate in relation to a transaction where the overall value is significantly smaller".
50. Applying this principle to CCAs would lead participants to prepare or to obtain materials about the nature of services covered and the terms of the arrangement as well as its consistency with the ALP (including projections used to establish the expected benefits and budgeted versus actual expenditures).
51. It should be noted that information from one source (e.g. a written agreement) may cover information already covered by another source (e.g. a narrative). The extensive use of computerized systems also provides the opportunity to see summary level detail which may then remove the need for more extensive primary documentation.
52. CCA agreements supplemented where necessary by information listed in the narrative relating to CCAs are considered by the JTPF as relevant information as regards EU TPD requirements.

6.7 Post review considerations:

53. CCAs will often involve more than two entities and are often set up between many or even all the members of a MNE. Adjustments may therefore not only affect one entity but impact on all the other participants. The avoidance of double taxation may in those cases of dispute require cost and resource intensive procedures. It is therefore recommended that, on the one hand, tax administrations refrain from challenging the participation or contribution allocated to their taxpayer for minor adjustments and on the other hand, taxpayers should make efforts to follow these guidelines when setting up and documenting their CCAs on services not creating IP.
54. In case of dispute the mutual agreement procedure may involve more than two Competent Authorities. Therefore it will be useful to apply the multilateral approaches recommended in the Code of Conduct on the Arbitration Convention for triangular cases.

7. Conclusions

55. The JTPF concludes that following the recommendations in this report will facilitate evaluation and acceptance that the ALP has been applied in the majority of the cases that fall within the scope of this report.
56. It is recommended that for future reference and at the end of this process the narrative becomes a file note in conjunction with some arrangements for regular updates.
57. The JTPF will monitor the effect of these guidelines regularly.

ANNEX: Summary of the current state of play as regards Member States' CCA legislation, administrative guidance and best practices

This section aims to summarise the current state of play as regards CCA legislation or administrative guidance within EU MS.

The section below is drafted on the basis of contributions provided by EU tax administrations to reflect the situation prevailing on 1 July 2011.

Question 1: Do you have specific legislation relating to CCAs? If not, is it under consideration and when might it be introduced?

Few MS have specific legislation on CCAs.

Estonia, Spain, the Netherlands, Portugal and Slovenia apply specific legal provisions concerning CCAs for obtaining assets, rights or services, whereas Poland's legislation refers to CCAs only in the context of intangibles. Germany has specific provisions only as regards CCA documentation. Other MS use the OECD Transfer Pricing Guidelines or their own general TP guidelines to evaluate CCAs.

Introducing new specific provisions on CCAs is only under examination in Greece.

Question 2. Has your administration issued internal audit guidelines providing guidance on CCAs and if yes, which key points do they address (e.g. how to recognise an arrangement, how to audit the arrangement, how to facilitate exchange of information with other countries, etc.)?

Few MS have issued internal guidelines on auditing CCAs.

Italy, Lithuania, Slovenia and the United Kingdom have guidelines on transfer pricing which also cover the audit of CCAs. In particular, the UK guidelines stress the importance of identifying a clear expectation of mutual, overall benefit to distinguish a CCA from a more normal situation with straightforward transfer of goods or services.

In Hungary, a government decree on documentation requirements regarding transfer pricing agreements in general is applied.

Latvia has internal general guidelines regarding CCAs, which are based on the OECD guidelines.

Portugal is in the process of approving a Transfer Pricing Audit Manual that also includes internal audit guidelines in areas such as CCAs.

Question 3. Has your administration published domestic administrative guidance on CCAs (Guidelines, Regulations, Circular Letters, etc.) explaining the procedure to be followed by the taxpayer when preparing a CCA, with particular reference to the structure and documentation requirements (where existing, could you provide details of the electronic link to the documents)?

Few MS have issued domestic administrative guidance on CCAs.

In Denmark, CCAs are addressed in the Danish Transfer Pricing Documentation Guidelines.

Estonia has issued guidelines containing a short overview of the OECD TP guidelines and examples.

In Hungary, a government decree on documentation requirements regarding transfer pricing agreements in general is applied.

Germany has issued administrative guidance which is binding for the tax administration, but not for the courts.

The Italian audit guidelines are public, addressed to tax inspectors but also followed by taxpayers.

Portuguese regulations envisage including relevant information on a CCA in the TP file.

Question 4. What is the most common type of CCA used by enterprises in your MS?

CCAs dealt with by MS Tax Administrations most often relate to services, development of intellectual property, research and development and acquisition of assets.

Questions 5-7. What particular practical problems have you encountered in dealing with CCAs and how have you addressed those problems? What are your particular concerns as regards CCAs on services? Based on your experience, how frequent are disputes linked to CCAs?

The most common practical problems encountered in the context of CCAs relate to the availability/timely provision by taxpayers of sufficient information/TP documentation, the suitability of allocation keys, the calculation of entry and exit fees, valuation of buy-in/buy-out payments, distribution of costs, identification of comparables, applicability of profit margins, as well as the actual identification of a CCA.

Specific concerns for TAs in this context include the criteria for identification of a CCA, measuring the value of participants' contributions to a CCA and evaluating the associated benefits (expected and actual) and risks for the purpose of allocating costs, the applicability of mark-ups, as well as access to relevant documentation.