

EN

EN

EN



EUROPEAN COMMISSION

Brussels, 25.1.2011
COM(2011) 16 final

**COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN
PARLIAMENT, THE COUNCIL AND THE EUROPEAN ECONOMIC AND SOCIAL
COMMITTEE**

**on the work of the EU Joint Transfer Pricing Forum in the period April 2009 to
June 2010 and related proposals 1. Guidelines on low value adding intra-group services
and 2. Potential approaches to non-EU triangular cases**

**COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN
PARLIAMENT, THE COUNCIL AND THE EUROPEAN ECONOMIC AND SOCIAL
COMMITTEE**

**on the work of the EU Joint Transfer Pricing Forum in the period April 2009 to
June 2010 and related proposals 1. Guidelines on low value adding intra-group services
and 2. Potential approaches to non-EU triangular cases**

1. INTRODUCTION

It is commonly accepted that increased globalization gives rise to practical problems for both multinational enterprises (MNEs) and tax administrations (TA) when pricing, for tax purposes, cross-border transactions between associated enterprises. The approach adopted by European Union (EU) Member States to correctly evaluate the price of such transactions is that based on the arm's length principle (ALP)¹. The arm's length principle is based on a comparison between the conditions applied by associated enterprises and the conditions that would have applied between independent enterprises.

However, the interpretation and application of the arm's length principle does vary between both tax administrations and tax administrations and business. This can result in uncertainty, increased costs and potential double taxation or even non-taxation. These impact negatively on the smooth functioning of the internal market.

To address this, the EU Joint Transfer Pricing Forum (JTPF), an expert group, was set up by the Commission in October 2002², to find pragmatic solutions to problems arising from the application of the arm's length principle, in particular within the EU.

This Communication reports on the work of the JTPF for the period April 2009 to June 2010 and draws conclusions on the future work of the expert group.

2. SUMMARY OF ACTIVITIES OF THE EU JOINT TRANSFER PRICING FORUM

In the period April 2009 to June 2010, the JTPF met four times. Discussions were concluded on two subjects. One is associated with intra-group transactions and the other deals with double tax dispute resolutions when a non-EU associate enterprise is involved in a transaction (non-EU triangular cases). Reports were produced on each of these subjects. Monitoring exercises to gauge the level of implementation of previous JTPF initiatives were also completed. Discussions commenced in the period, but not yet concluded, cover matters related to small and medium enterprises

¹ The arm's length principle is in Article 9 of the Organisation for Economic Co-operation and Development (OECD) Model Tax Convention. OECD also developed Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations.

² Communication from the Commission to the Council, the European Parliament and the Economic and Social Committee: 'Towards an internal market without obstacles — A strategy for providing companies with a consolidated corporate tax base for their EU-wide activities' COM(2001) 582 final, 23.10.2001. p. 21.

and a particular intra-group arrangement known as cost contribution arrangement. The JTPF has also started to consider its future work programme.

2.1. JTPF conclusions on low value adding intra-group services

A particular feature of increased globalisation of MNEs is the growth of a wide range of intra-group services. As this type of service increased so did the compliance resources required to ensure adherence to the arm's length principle. It was also becoming apparent that the incidence of double taxation relating to such services was increasing.

In particular the evaluation of a specific category of intra-group services, subsequently classified as "low value adding intra-group services", against the ALP was highlighted as causing problems. The core of the problem lays in the potential for excessive resources to be devoted to documenting and auditing these low-value services and a gap in the existing guidelines dealing with this type of services. The objective was hence the search for more efficiency. The JTPF report in Appendix I takes a twin-track approach. Firstly, by setting in context the breadth and depth of any evaluation that might be needed for a certain category of intra-group services. Secondly, the report gives more specific guidance on how an evaluation may be conducted. The combined approach results in a set of guidelines on low value adding intra-group services.

Given the wide range of intra-group services, the report gives some parameters to the type of services that would benefit from the approach suggested in the report.

The report outlines certain underpinning principles. For example: all relevant costs are deductible, subject to domestic law provisions; good quality and relevant information should be made available and a flexible approach should be taken in the review of low value adding intra-group services.

The report then explores in more detail how those principles should be applied and provides guidance on matters that commonly cause difficulty. Examples of the latter are analysing a cost pool; defining shareholder costs and evaluating an arm's length charge and documentation.

An evaluation carried out in accordance with the guidelines could also be useful in other related areas. For example, resolution of double tax disputes or considering penalties related to transfer pricing documentation.

The report concludes that the guidelines proposed will better facilitate the evaluation of certain intra-group services. It was noted that some elements proposed may equally be applied to the evaluation of other categories of services. Finally, the need to monitor the effects of the implementation of the guidelines, should they be supported by MS, was identified as an important future action for the JTPF.

2.2. JTPF conclusions on non-EU triangular cases

Triangular cases involve a transfer pricing transaction between two Member State associated enterprises which is particularly difficult to resolve because another associated enterprise, in a third state, had a significant influence that resulted in a pricing outcome not in line with the ALP.

Two particular types of triangular cases can be distinguished. Those that involve only associated enterprises situated in Member States and those which involve an associated enterprise situated outside the EU. A report on the former has already been completed by the JTPF and was incorporated into the revised Code of Conduct for the effective implementation of the Arbitration Convention³. The JTPF report in Appendix II focuses on the latter type of triangular cases known as non-EU triangular cases.

In the first instance the report gives a useful definition of types of triangular cases. The report then goes on to explore and propose some potential approaches that could be helpful in double tax dispute resolution.

The range of potential approaches encompass: improvements to and extension of the tax treaty network; rolling back the results of an advanced pricing agreement and a flexible application of certain procedures linked to the mutual agreement procedure.

The completion of the report is significant for two reasons. Firstly, it provides pragmatic suggestions to deal with the issue as it currently stands. Secondly, by providing a sound basis on which to structure any further debate on the subject in the light of future experience.

2.3. Monitoring activity

An ongoing task of the JTPF is to monitor and manage the effective implementation of its reports.

A review of the statistical report of cases open under the Arbitration Convention process revealed that there are still numerous outstanding cases. A greater level of detail to better identify the reasons for delay would be beneficial and as a result the format of the report is being reviewed.

A specific review was made to measure the impact of the implementation of the Code of Conduct on transfer pricing documentation for associated enterprises in the European Union (EUTPD). The JTPF reported that the adoption of the code is recognised as a standard or reference point. This is the case even where MNEs do not officially opt into the code, it being a voluntary code for them.

Suggested improvements to the code included the use of a common language in preparing reports and greater acceptance of pan-European comparables in pricing evaluation.

The overarching conclusion, however, was that the code needed more time to be established before being reviewed. There was a time lag between the adoption of the code in 2006, and its impact on audits. The JTPF resolved to consider the matter again after two or three years, when a second monitoring exercise would be done.

³ Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee on the work of the EU Joint Transfer Pricing Forum in the period March 2007 to March 2009 and a related proposal for a revised Code of Conduct for the effective implementation of the Arbitration Convention (90/436/eec of 23 July 1990 COM(2009) 472 final, p. 7 and 10.

2.4. Update on current and future work programme

The work programme that forms the basis of the current JTPF mandate was approved in September 2007. Five subjects were agreed to be examined. The first, monitoring, is an ongoing item. Two completed reports, one on improvements to the Arbitration Convention and the other on intra-group services, dealt with the second and third programme items. Work on the fourth and fifth items, small and medium enterprises and cost contribution arrangements, has recently started and is expected to be completed in 2011.

In addition to the approved programme items, two reserve items were recorded: alternative dispute resolution and risk assessment. The Commission Communication for the effective implementation of the Arbitration Convention⁴ noted that further discussion was needed on two matters: setting up an independent permanent secretariat for the operation of the Arbitration Convention, and the interaction between the Arbitration Convention and Article 25.5 of the OECD Model Tax Convention (MTC). These remain to be considered in the future.

The JTPF has already identified three other issues that may be considered for future work items. They are: the impact of the recent revisions to Article 7 of the OECD MTC, compensating adjustments and secondary adjustments.

Finally, the Commission carried out a public consultation on "Double tax Conventions and the internal market: factual examples of double taxation cases" in May and June 2010. An initial review of the responses suggests that transfer pricing issues remain a prominent feature of double tax concerns. The responses will be analysed further and there may be a role for the JTPF in addressing the concerns raised.

3. COMMISSION CONCLUSIONS

The Commission continues to regard the JTPF expert group as a valuable resource in addressing transfer pricing issues and providing pragmatic solutions to a variety of transfer pricing issues.

In particular the Commission notes that the report on low value adding intra-group services directly addresses a key task identified by the Commission when setting up the JTPF namely to achieve a more uniform application of transfer pricing rules within the European Union.

The Commission fully supports the conclusions and suggestions of the JTPF on low value adding intra-group services in the attached Guidelines. In particular the Commission considers that the guidelines are a good road map to a more expedient evaluation of the type of services defined.

⁴ Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee on the work of the EU Joint Transfer Pricing Forum in the period March 2007 to March 2009 and a related proposal for a revised Code of Conduct for the effective implementation of the Arbitration Convention (90/436/eec of 23 July 1990 COM(2009)472 final, p. 9.

The Commission invites the Council to endorse the proposed guidelines on low value adding intra-group services and invites Member States to implement quickly the recommendations included in the Guidelines in their national legislation or administrative rules.

The Commission also fully supports the conclusions and suggestions of the JTPF on non-EU triangular cases. In this regard the Commission welcomes that the JTPF addressed and tracked the development of these contemporary issues. The Commission is of the opinion that the use, wherever possible, of the proposed approaches and procedural considerations in the report will help resolving non-EU triangular cases.

The Commission invites the Council to endorse the proposed report on non-EU triangular cases and invites the Member States to implement practices that are in line with the approaches and procedural considerations contained in the report in their national legislation or administrative rules.

Member States are invited to report annually to the Commission on any measures they have taken further to these Guidelines and their practical functioning. On the basis of these reports, the Commission will periodically review these Guidelines.

In this context, the Commission notes the conclusions of the monitoring activity and looks forward to the outcomes of the JTPF current work programme items on small and medium enterprises and cost contribution arrangements.

The Commission also believes that the mandate of the JTPF should be prolonged once the current mandate comes to its end in March 2011.

Appendix I

GUIDELINES ON LOW VALUE ADDING INTRA-GROUP SERVICES

I. INTRODUCTION

1. Chapter VII of the Organisation for Economic Co-operation and Development (OECD) transfer pricing guidelines for Multinational Enterprises (MNEs) and Tax Administrations (OECD guidelines) examine "issues that arise in determining for transfer pricing purposes whether services have been provided by one member of an MNE group to other members of that group and, if so, in establishing arm's length pricing for those intra-group services". Broadly, the chapter then goes on to consider if a service has been provided and what, for tax purposes, the intra-group charge for such a service should be to accord with the arm's length principle.
2. The OECD guidelines recognize the wide range of services that may be provided and equally the wide range of benefit provided, or expected, by the provision of such services. The Joint Transfer pricing Forum (JTPF) thought it worthwhile to supplement the list of services mentioned in the OECD guidelines. At Annex 1 is a list of intra-group services commonly provided that may or may not be within the scope of this paper.
3. The JTPF identified certain issues, important to any reviewer (the term reviewer applies to the reviewer function exercised either by the taxpayer or the tax administration), in applying the guidelines as they relate to intra-group services. The issues include: increasing globalization and related central service provision; the increasing demand on resources; the potential for costs to be "stranded" in that no tax administration would accept them; and an awareness that some types of service provision represented a lower risk than others although that did not seem to have an impact in a practical application of the OECD guidelines by reviewers.
4. This paper is focused on how best to address those issues. The paper seeks to neither restrict the right of a tax administration to conduct an audit nor for an MNE to make representations based on the facts and circumstances, of their particular case to support the inclusion or exclusion of a specific service. Nonetheless it is anticipated that fewer full audits will be required into the intra-group services that fall within the scope of this paper.

II. OVERVIEW

5. Underpinning this paper is the assumption that MNEs and tax administrations act in good faith and an unequivocal endorsement of the OECD principles to be applied when considering intra-group services. The emphasis of the paper, therefore, is on how most expediently and efficiently a reviewer may conclude that the arm's length principle has been applied in the provision of certain intra-group services.
6. It is important that the proposals in this paper are applied cumulatively as questions that may be relevant at the beginning of the process may subsequently be satisfactorily answered after the provision of certain information later in the process.

For example, there may be a legitimate concern about the provision of a service which is then resolved by information supplied in the narrative. (See section VI.)

7. The key elements or principles of the approach developed by in this paper are:
 - (i) All costs are allocable but domestic law will not necessarily allow a full deduction of those costs.
 - (ii) Existence of certain important critical assumptions in establishing an agreed starting point for any review.
 - (iii) The provision of concise and dedicated information to provide an understanding of the type of service provided and the structure by which those services are delivered.
 - (iv) Flexibility in deciding the breadth and depth of review required in evaluating the provision of services against the arm's length standard.

III. SCOPE OF THE PAPER

8. An exhaustive definition of the services to which this paper applies is neither possible nor desirable. This is because of the range of services provided intra-group and the differing commercial impact that services can have within the context of a particular commercial activity. Additionally, any attempt to give a definitive statement would reduce flexibility in applying the proposals made in this paper.
9. It is, however, possible to give some parameters to the type of intra-group services targeted by reference to the general nature of the services to be included or excluded and the type of structure through which the services are allocated and charged.
10. Whilst certain elements of this paper could usefully be applied to the full spectrum of intra-group services they are aimed more specifically at some types of service provision than at others.
11. The services on which the paper is focused are the type of services that commentators have variously described as "the glue that holds the corporate structure together to support its main functions" or "of an administrative nature, auxiliary to the business of the recipient" and again "commonly available or readily acquired". The core nature of the service is that whilst required it is of a routine nature and not generating high added value to either the provider or recipient. The scope of this paper distinguishes between services that although low value adding could still generate a high turnover and can be included in this approach and services that are high value adding, even if not necessarily generating a high turnover, and would not be within the scope of this paper.
12. The paper does not focus on direct charge services, the facts and circumstances of which will, in general, be self-evident. Nor does the paper address services that intrinsically add high value. What high value adding means is relative to the service, the provider and the recipient. It would, however, be exceptional if the approach of this paper would satisfy a reviewer's needs in considering services in the nature of innovative research and development, intellectual property, financial transactions or

other services that are a significant commercial driver. Similarly, activity that inherently relies on the potential to attract a high level of reward associated with exposure to high risk will not be within the parameters envisaged. Specifically the paper does not address cost contribution arrangements.

13. It is also important to note the distinction between straight forward charging and delivery mechanisms and more complex arrangements. It is not envisaged that a single centrally provided low value adding service charged out to several associates by means of a readily identifiable allocation key would give cause for concern. This paper therefore concentrates on multiple low value adding services that will often be provided through a single contract and generally involving a cost pool and allocation keys.

IV. AUDITS AND CENTRALLY PROVIDED INTRA-GROUP SERVICES

14. It is entirely reasonable that a reviewer will want confidence that any provision of services is in alignment with OECD principles; all appropriate costs are included, inappropriate costs excluded and an arm's length price applied. The level of confidence required and how acquired can be achieved in various ways depending on the particular circumstances of the case and a tax administration's overall approach to transfer pricing audits.
15. In addressing those concerns this paper suggests alternative approaches that will achieve an appropriate level of confidence that the arm's length principle has been applied. Equally a balance is sought between available resources, compliance burden and potential level of adjustment.
16. Clearly a full audit of a particular case will satisfy the needs of any reviewer but the approach developed in this paper seeks to arrive at a more expedient way to achieve that same end in the vast majority of cases that, within the scope of this paper, are commonly encountered.
17. At the other end of the spectrum to a full audit approach some tax administrations have embarked on MNE relationship building exercises. The desired outcome is to better understand each other's perspectives and build trust. The mechanism to achieve that is by means of a non-audit-driven open and ongoing dialogue between tax administrations and MNEs. So for example in the context of centrally provided intra-group services a tax administration will ask (outside of an audit scenario) for an explanation of how the MNE operates its system. The MNE will engage in an open dialogue with the tax administration to ensure a full understanding of the framework supported as necessary with contemporaneous information. It is also recommended that updates take place through regular meetings. The outcome may be that the tax administration will consider particular facets of the MNE's business as compliant and therefore low risk. But if subsequently an audit is considered appropriate then the areas of concern can be better targeted. Additionally, certain fundamental questions (e.g. has a service been provided) may not be tested, other than perhaps by affirmation, based on the level of trust and confidence that has been built up in the relationship between the tax administration and the MNE.
18. However, acknowledging that the approach outlined above is not yet widely developed across Europe and that a full audit approach will not improve the current

situation the following guideline framework is recommended where further examination of the provision of centrally provided intra-group services is in point.

V. CRITICAL ASSUMPTIONS

19. These are:
- (a) Services concerned are low risk, low value adding business transactions.
 - (b) A service provided meets the OECD arm's length standard in particular the services concerned are rendered and the recipient is provided with economic or commercial value.
 - (c) An MNE will have its own governance system and audit procedures in place and any services provided will be subject to that governance process.
 - (d) Good quality information will be supplied on demand.
20. It is accepted that some or all of the above critical assumptions may be tested as the process continues.

VI. NARRATIVE

21. A reviewer in the light of the facts and circumstances of a case, their level of experience and knowledge of the particular MNE concerned may take different approaches in requesting what they consider sufficient corroborative information to confirm that a service that has been rendered complies with the arm's length principle. In making an informed decision access to sufficient, good quality information is crucial. This paper proposes that the provision of a narrative would largely meet that information requirement.
22. Given the routine nature and low value adding of the services, the narrative should give sufficient confidence to the reviewer 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 and the recipient - if it were independent - would have paid for the activity or else performed the service itself. Therefore the question of whether a service has been provided should not be a contentious issue.
23. The exact content and extent of a narrative may vary but a comprehensive narrative is envisaged as a relatively modest document. It is particularly important to maintain a balance between the level of information requested, the low risk nature of the services addressed and the potential compliance burden. As appropriate all or some of the following non-exhaustive topics will be covered:
- (a) As part of a sanity check exercise to put the provision of services in context some indicative ratios may be requested (e.g. costs incurred for intra-group services compared to overall operating expenses or the level that intra-group service provision turnover bears to total turnover). Any such ratios will need to be interpreted within the context of the associate's nature of trade.

- (b) Explaining a service provision within the overall context of the MNE's business in order to understand the rationale both for the provider and the recipient. For example economies of scale may make it more efficient for a subsidiary to have payroll services or HR services centrally provided. Again, it may make more economic sense to have "on demand" access to IT services.
- (c) A reconciliation of the MNE's overarching transfer pricing policy to the services actually centrally provided.
- (d) An account of the type of services provided and to whom.
- (e) Details of the benefit or expected benefit to the recipients. The benefit derived from certain services will be self evident (e.g. payroll). Other services, where the benefit is not so immediately apparent, may require further explanatory comment. For instance if worldwide promotional activity services are present how does that service benefit an individual subsidiary?
- (f) An explanation of the structure by which services are delivered. There may be one central service providing entity or alternatively different subsidiaries provide specific services intra group. Again a mix of two systems may be used and the interaction of those systems will need to be understood.
- (g) A description of the group standard as it relates to its audit approach and as applied to services. For example defining direct and indirect cost for inclusion in the cost pool; safeguards in place to ensure the consistent application of an allocation key for a particular service; ensuring services are not duplicated.
- (h) A description of how any cost pool is constructed.
- (i) A description of the allocation key(s).
- (j) The arm's length justification of the rate of mark up applied or alternatively why no mark up is applied.
- (k) A record of how services are accounted for to include the invoicing system, settlement dates, payment methods and any budget versus actual adjustments.
- (l) A description of how any mergers or acquisitions are incorporated into the service provision system.
- (m) An understanding of how new services are integrated into the system and how a service is terminated.
- (n) How on demand services are handled.
- (o) How the service provision system is maintained and updated.
- (p) Documentation that can be provided.

24. The above information may be made available and provided in a variety of ways. Clearly a dedicated written narrative could be provided. Some of the information, if appropriate, may be given verbally. It might also be the case that the examination of written contracts will provide an insight to the wider context and will provide most

of the information in any narrative. Each of the approaches or some combination of them is valid. The important point is that the outcome is an understanding of how any service provision system works.

25. After obtaining a narrative the next stage is to consider what, if any, further detailed explanation is needed and how that should be provided.

VII. SPECIFIC AREAS

26. The narrative will set the scene and also provide a level of detail. Some areas are more important than others in coming to a reasoned decision and further guidance is offered:

VII.1. Has a service been provided?

27. It is key that the reviewer is satisfied 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 its commercial position and the recipient would have paid for the activity or else performed the service itself.
28. It is not always possible to provide incontrovertible evidence that links a particular associate to the benefit derived from a particular service. A reasonable interpretation should be made of available evidence supported by any MNE representations. The principle that all costs are allocable should be remembered and therefore if a service cost is not felt to be attributable to one particular associate it must be allocated to another subject to the respective domestic law which may not allow a full deduction of those costs.
29. As mentioned above the degree of certainty a reviewer requires in accepting the provision of a service meets the arm's length standard will vary from case to case. Given the routine nature, commonplace provision and low value adding of the services coupled with a supporting narrative explanation verification of provision of the type of service addressed by the guidelines in this paper should not be a contentious issue.

VII.2. Cost pools

30. An area that commonly gives cause for concern is the quantitative and qualitative content of a cost pool.
31. Any reviewer will want a level of confidence, which will vary depending on the particular circumstances of the case, that all appropriate costs are within the pool and inappropriate costs are excluded. Before addressing the question of mark up and allocation it is necessary to ensure that shareholder costs and costs relating to direct charged services are excluded (i.e. total costs, minus shareholder costs, minus direct charge costs gives the costs to be allocated). It is also important to understand the nature of the costs remaining in the pool. The costs may be made up of direct and indirect costs as well as any appropriate operating expenses of the enterprise as a whole (e.g. supervisory, general and administrative) in as far as they have not already been accounted for in the cost categories.

32. This section of the guidelines outlines suggested approaches, with differing levels of detail, to verify a cost pool. The section then goes on to consider in more detail certain specific aspects involved in verifying a cost pool.
33. The approaches are focused on achieving a balance between an appropriate level of confidence and the necessary level of detail. Any one of the approaches described may be taken in isolation or in combination and of course other approaches may be taken that are equally valid in reaching agreement on the make up of a cost pool.
34. A reviewer may opt to take a high level assessment of a cost pool by assessing the integrity of the accounting and auditing systems. Such an approach demands a good understanding of the systems on which the MNE relies to verify the integrity of its cost pool. Explanations of the audit criteria, the standard in applying those criteria, and the rationale behind levels of mark ups and allocation keys applied will be needed. This approach has clear links with the ongoing MNE dialogue envisaged above.
35. Another reviewer may, in achieving the confidence level they require, opt for some additional selective/random examination of costs. This approach is an extension of the first in that an overall comprehension of the procedures in creating the cost pool is still required but some further limited enquiry is deemed appropriate.
36. Again a reviewer may gauge it appropriate to have somewhat more detail than suggested in the above two approaches. In that case a more detailed description of how the cost pool is operated will be required. It would, however, be exceptional, within the context of this paper, to perform a complete audit of the cost pool. Nonetheless as well as an overall understanding a request may be made for more detail in some relevant areas.
37. Depending on which of the above approaches may align itself best to the facts and circumstances of the case all or some of the following cost pool information could be called for in as far as not already provided in any narrative:
 - (a) The company/group audit standard that is applied to the pool e.g. materiality limits; standard of proof.
 - (b) An explanation of the cost accounting method used in attributing direct and indirect costs to the pool. A description of how costs are dealt with will be needed where multi service provision centres exist.
 - (c) The basis on which costs identified as shareholder costs were specifically excluded from the pool. It may be that a separate analysis of these costs will be submitted for the sake of completeness.
 - (d) A description and analysis of the cost pool headings (e.g. IT, accounting, HR).
 - (e) The origin of any mark up applied and identification of costs allocated without mark up.
 - (f) A description and analysis of costs allocated. Detail here will particularly be in point where worldwide service costs are attributed to individual associates.

- (g) A reconciliation of total pool costs to total allocated costs to guarantee that costs allocated are not greater than total costs.

VII.3. Invoicing

38. Attention is also drawn to what can be described as legitimate expectations in carrying out a critical analysis of any cost pool.
39. Often invoices will not be available where the costs attributed are internally apportioned direct or indirect costs. In those circumstances an explanation of the logic and process applied to arrive at the attributed costs will be needed. In the absence of an absolute figure judgment is needed to appraise whether or not a particular cost is appropriate to be included in the cost pool and that the quantum is a fair reflection of the cost incurred.
40. Where invoices do exist frequently they will reflect a mix of external third party costs as well as internal costs in an amalgamated final invoice. The final cost is correctly represented by one final invoice albeit that invoice is the result of earlier invoiced costs incurred by several entities contributing to the final service provided. For example associate A when providing routine IT support may sub-contract elements of that support to associate B. Associate B may in turn subcontract to independent C. The invoice appearing in the cost pool of A will be that provided by associate B. In this type of scenario whilst it is a reasonable proposition that an invoice may be requested and its origin traced it would be unreasonable to expect a definitive break down of the constituent parts of any invoice through B to C and possibly beyond. This is not least because an invoice provided by one independent enterprise to another would generally not lead to (or would it necessarily be possible to provide) a breakdown of the origin and constituent parts of that invoice.

VII.4. Shareholder costs

41. In national law, administrative procedures and case law there are not many definitions or other information about activities that constitute a shareholder cost.
42. The OECD guidelines refer to certain activities that constitute shareholder activities. At Annex 2 is a non-exhaustive list that includes existing OECD elements and additional services that the JTPF reviewed and recognized as ones that are regularly classified as shareholder costs. The classification will always depend on the specific facts and circumstances.
43. There is though a fundamental benchmark test that can be applied when deciding if a cost is in fact a shareholder cost.
44. This extract from Para. 7.9 of the OECD guidelines gives a clear statement on this issue: *"In a narrow range of cases, an intra-group activity may be performed relating to group members even though those group members do not need the activity (and would not be willing to pay for it were they independent enterprises). Such an activity would be one that a group member (usually the parent company or a regional holding company) performs solely because of its ownership interest in one or more other group members, i.e. in its capacity as shareholder. This type of activity would not justify a charge to the recipient companies"*.

45. Judgment is required when an activity not only discharges a shareholder duty but also produces an additional benefit. A Board Member of a parent company may carry out duties related to the ownership interest of that parent in other group members. That activity would normally be classified as a shareholder cost. Once a shareholder cost is identified it is inappropriate to charge that cost out either directly or through a cost pool.
46. But in the execution of those duties initially for shareholder purposes it may be that the Board Member will discharge the duties in such a way that an additional service is supplied and a benefit received over and above that of the parent company's ownership interest.
47. In that case the question arises has an additional service in fact been provided? In answering that question considerations include: does the whole group benefit; or is the benefit attributable to a certain subsidiary, how are costs to be apportioned and the correct arm's length price applied? The answer lies in the attribution of costs partly to the parent and partly to the subsidiaries. That attribution will be informed by the type of industry, the type of company and the service provided which then leads to the conclusion that a case by case approach can be the only viable approach.

VII.5. Allocation keys

48. Two particularly relevant OECD guidelines comments about allocation keys are:

"Any indirect- charge method should be sensitive to the commercial features of the individual case (e.g. the allocation key makes sense under the circumstances), contain safeguards against manipulation and follow sound accounting principles and be capable of producing charges or allocations of costs that are commensurate with the actual or reasonably expected benefits to the recipient of the service" (OECD 7.23).

"To satisfy the arm's length principle the allocation method chosen must lead to a result that is consistent with what comparable independent enterprises would have been prepared to accept." (OECD 7.24)
49. The application of a self evident allocation key for a single service provision should not present the reviewer with any undue problems e.g. payroll service allocated by headcount.
50. The provision of more than one service under a single contract may require the deployment of several different allocation keys. Different rationales will be applied in deciding upon an allocation key depending on the specific circumstances. It would, however, be inconsistent to apply a different allocation key to different recipients of the same services.
51. The touchstone is that any allocation key can be justified and is consistently applied (and is reviewed on a regular basis).A balance is needed between the precision of the key and the burden that would be created if a complex key is insisted upon that only gives a marginal improvement over a key that is operationally more easily applied.
52. The pragmatic approach outlined above is that whatever allocation key is decided upon it must be capable of being justified and applied consistently.

53. Whilst the application of any particular allocation key will depend on the facts and circumstances of a particular case the following keys are in common usage:
- (a) IT: number of PCs
 - (b) Business management software (e.g. SAP): number of licenses
 - (c) Human Resources: headcount
 - (d) Health and safety: headcount
 - (e) Management development: headcount
 - (f) Tax, Accounting, etc: turnover or size of balance sheet
 - (g) Marketing services: turnover
 - (h) Vehicle fleet management: number of cars
54. It should be noted that more complex allocation keys might also be used.
55. It may be the case that historically an allocation key has been agreed that reflects arm's length conditions and the consequent price. It is not intended these guidelines require an automatic review of what may already be in place.

VII.6. "On call services" (OECD 7.16-7.17)

56. One other area that might require some further thought is the treatment of what are known variously as "on call contracts", "call off contracts" or "stand by contracts". In third party situations it is commonplace that arrangements will be made to make use of a service as and when required. The implication of that is threefold. Should a charge be made merely for potential access to a service, what, if any, additional charge should be made if the service is actually called on and what are the ramifications if the service is not used in a particular year?
57. Firstly, an infrastructure has to be in place to offer and meet the commitments in an on call arrangement. In some cases it may be reasonable that a charge is made to cover the infrastructure costs and a mark up. Equally, in other cases it may be reasonable that a user pays a charge for potential access to that infrastructure but no additional fee when the agreed on call service provision is activated. That can be contrasted to the situation where a specific service is requested over and above the standard on call service. In that instance a separate additional fee is appropriate and a direct charge made.
58. A member of the group may not require an on call service in any one year but that fact does not necessarily mean they will not buy into the service the next year. Nor does it automatically mean they will be entitled to a reduction in the annual fee because in one year it was not used. The fee will depend more on the perceived risk by the provider and the user's appetite for risk on a year on year basis.

VII.7. An arm's length charge

59. As has often been said transfer pricing is an art not an exact science and that proposition allows a degree of judgment about the level of evidence that is required to evaluate a transfer price and to ascertain that a particular method is a reasonable estimation of an arm's length price (OECD 1.12-1.13 and 1.68-1.69).

VII.8. Methodology

60. It may be the case that historically a methodology other than those described in the OECD guidelines has been agreed that reflects arm's length conditions and the consequent price (OECD 1.68). It is not intended these guidelines should displace any such method.
61. If a suitable CUP can readily be found for a particular service provision that will be the most expedient route to resolution. For example, the service under review has been supplied to independent third parties or a similar service has been received from a third party.
62. With intra-group services, however, it is more often the case that appropriate CUPs cannot be located. Whilst generally any of the other OECD methods may be in point in reviewing that a service provision is at arm's length this paper notes that a cost based method would be the most commonly observed method (OECD 7.31).

VII.9. Mark-up considerations

63. As the low value adding services we are concerned with in this document will typically only attract a modest mark up, establishing an appropriate cost base is relatively more important.
64. Once the cost base of a particular service is determined it is then appropriate to consider what mark up, if any, on those costs should be applied. OECD guidelines recognize that it is not always the case that a mark up should be applied (OECD 7.33 and 7.36). Indeed the guidelines go further in suggesting that although as a matter of principle a mark up may be appropriate a cost benefit analysis may be such that a tax administration may not pursue the matter beyond allocating costs. (OECD 7.37).
65. In cases where it is appropriate to use a mark up, this will normally be modest and experience shows that typically agreed mark ups fall within a range of 3-10%, often around 5%. However that statement is subject to the facts and circumstances that may support a different mark up.
66. The character of the services that these guidelines address would suggest the in-depth analysis of the five comparability factors, including the functional analysis, together with a qualifying benchmarking exercise covering a quantitative and qualitative screening of the potential comparables to establish a suitable mark up may be a too resource intensive approach. It may be envisaged, therefore, that a reviewer will consider a less prominent search for information to evaluate the mark up put forward. However, the less prominent search should of course pass the arm's length test. To a greater or lesser degree the following non-exhaustive list may be taken into account by a reviewer in arriving at a final position:

- (a) The underlying rationale and evidence the service provider relied on in setting the mark up.
 - (b) The experience and knowledge of the reviewer in what they have typically encountered as agreed mark ups for the type of services these guidelines envisage.
 - (c) The wider body of evidence that is available from statistical research.
 - (d) Published practice /experience e.g. by some tax administrations.
67. It is sometimes the case that the same mark up is applied to a range of services provided under a single contract. That may well be an acceptable proposition if it can be judged that the particular services would attract a similar mark up and any variance is anticipated to be minimal.

VIII. DOCUMENTATION

68. The OECD guidelines (Para.5.4) refer to prudent 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.
69. This theme is echoed at 2.3.1 of the JTPF report on EUTPD wherein it is recorded:
- "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".
70. In applying this principle to the services concentrated on by these guidelines documentation including written agreements may not be available. However, the absence of written documentation should not be the deciding factor in rejecting service provision or benefit but rather should be an element in any overall fact pattern on which a decision is based (OECD 7.18).
71. It is logical, taking into account the cumulative nature of this approach - addressing routine services, the acceptance of certain critical assumptions, provision of a narrative and cost pool explanations - that the purpose of requesting supporting documentation will already have been met.
72. However it may be useful to reiterate what a useful and a proportionate documentation pack may contain:
- (a) A narrative as detailed above.
 - (b) Written agreements.
 - (c) Cost pool as detailed above.
 - (d) Justification of OECD methodology applied.

- (e) Verification of arm's length price applied.
- (f) Invoicing system and invoices - see narrative.

73. It should be noted that information from one source (e.g. a written agreement) may cover information required from another source (e.g. a narrative). The extensive use of computerized systems also provides the opportunity to see summary level detail which may then prevent the need for more extensive primary documentation.

IX. POST REVIEW CONSIDERATIONS

74. It is recommended that for future reference and at the end of this process the narrative becomes a file note in conjunction with some arrangement for regular updates.

75. Continuing the theme of efficient use of resource it would be counter productive to ignore what was established in an earlier review. An exception reporting procedure may be agreed wherein the status quo applies, with perhaps any appropriate pricing realignment being assumed, unless a tax administration is notified to the contrary.

76. A tax administration should consider if an exchange of information would be appropriate and an MNE may consider it worth dedicating a section of any EUTPD policy they may have to this particular area.

77. In line with the Code of Conduct on EUTPD Member States should not impose a documentation related penalty where taxpayers comply in good faith, in a reasonable manner and within a reasonable time in supplying the information outlined above.

78. A review may result in an adjustment. If the adjustment is the consequence of rejecting a particular cost, reasons for that decision should be made clear so that the cost may be reallocated and maintain the principle that all costs are allocable.

79. An adjustment may then form the basis of a mutual agreement procedure under a DTA and/or the Arbitration Convention. In that case it would be appropriate to draw the attention of the Competent Authorities to the fact that the guidelines have been applied. In the absence of any new elements acceptance of the adjustment without further enquiry might be a justifiable

X. CONCLUSIONS

80. The JTPF concludes that following these guidelines will facilitate the evaluation and acceptance that the arm's length principle has been applied in the majority of the cases that fall within the scope of these guidelines.

81. The JTPF recognizes that this report is specifically targeted at low value adding services but some of the critical assumptions and elements might equally apply to more complex high value adding services. .

82. The JTPF will monitor the effect of these guidelines regularly and in particular to ensure the mark ups referred to remain relevant.

Annex 1: List of intra-group services commonly provided that may or may not be within the scope of this paper.

A. Information technology services, for example:

- A.1. building, development and management of the information system;
- A.2. study, development, installation and periodic/extraordinary maintenance of software;
- A.3. study, development, installation and periodic/extraordinary maintenance of hardware system;
- A.4. supply and transmission of data; and
- A.5. backup services.

B. Human resource services, for example:

- B.1. legislative, contractual, administrative, social security and fiscal activities connected to the ordinary and extraordinary management of personnel;
- B.2. selection and hiring of personnel;
- B.3. assistance in defining career paths;
- B.4. assistance in defining compensations and benefit schemes (including stock option plans);
- B.5. definition of personnel evaluation process;
- B.6. training of personnel;
- B.7. supply of staff for limited period;
- B.8. coordination of the sharing of personnel on a temporary or permanent basis; and management of redundancies.

C. Marketing services, for example:

- C.1. study, development and coordination of the marketing activities;
- C.2. study, development and coordination of the sale promotions;
- C.3. study, development and coordination of the advertising campaigns;
- C.4. market research;
- C.5. development and management of Internet website;
- C.6. publication of magazines handed out to clients of the subsidiary (even if concerning the whole group).

D. Legal services, for example:

- D.1. assistance in drafting and reviewing of contracts and agreements;
- D.2. ongoing legal consultation;
- D.3. drafting and commissioning legal and tax opinions;
- D.4. assistance in the fulfilment of legislative obligations;
- D.5. assistance in the judicial litigation;
- D.6. centralized management of relationship with insurance companies and brokers;
- D.7. tax advice;
- D.8. transfer pricing studies; and
- D.9. protection of intangible property.

E. Accounting and administration services, for example:

- E.1. assistance in the preparation of the budget and operating plans keeping of the mandatory books and accounts;
- E.2. assistance in the preparation of periodical financial statements, annual and extraordinary balance sheets or statements of account (different from the consolidated financial statement);
- E.3. assistance in compliance with fiscal obligations, such as filing tax returns, computing, and paying taxes, etc.; data processing;
- E.4. audit of the account of the subsidiary; and management of the invoicing process.

F. Technical services, for example:

- F.1. Assistance regarding plant, machinery, equipment, processes, etc.
- F.2. planning and executing ordinary and extraordinary maintenance activities on premises and plant;
- F.3. planning and executing ordinary and extraordinary restructuring activities on premises and plant;
- F.4. transfer of technical know-how;
- F.5. providing guidelines for the products' innovation;
- F.6. production planning to minimize excess capacity and meet demand efficiently;
- F.7. assistance in planning and implementing capital expenditure;
- F.8. efficiency monitoring; and

F.9. engineering services.

G. Quality control services, for example:

G.1. providing quality policies and standards of the production and provision of services;

G.2. assistance in obtaining quality certifications (e.g. ISO 9000); and

G.3. development and implementation of client satisfaction programmes.

H. Other services:

H.1. strategy and business development services in case there is a connection with an existing or to be established subsidiary;

H.2. corporate security;

H.3. research and development;

H.4. real estate and facility management;

H.5. logistic services;

H.6. inventory management;

H.7. advice on transport and distribution strategy;

H.8. warehousing services;

H.9. purchasing services and sourcing raw materials;

H.10. cost reduction management;

H.11. packaging services.

Annex 2: Non-exhaustive and non-prescriptive list of shareholder costs (text in italic repeats OECD guidelines).

From the discussion held in the JTPF meeting of March 2009 it can be concluded that generally the costs listed in this table can be considered as incurred for the benefit of the parent company. However the JTPF concluded that the analysis will always require that the following questions be raised in relation to each cost listed: is it benefiting the whole group, does it benefit the parent company only, should it be allocated out to the subsidiaries, or should it be considered to benefit to a certain subsidiary? Therefore only a case by case approach can be taken.

| | Description of costs to be considered as shareholders costs | Comments |
|------|--|---|
| a. | <i>Costs of activities relating to the juridical structure of the parent company itself such (see OECD guidelines para 7.10a)</i> | Generally shareholder cost but see below |
| a.1. | <i>costs for the meeting shareholders of the parent company, including advertising costs</i> | Shareholders costs |
| a.2. | <i>costs for the issuing of shares of the parent company</i> | Shareholders costs |
| a.3. | cost of the board of directors of the parent company that is associated with the statutory duties of a director as a member of the board of directors. | <p>The 1984 OECD Report admits that board members may perform activities that are to the benefit of the subsidiaries so that only part of the cost relating to the board of directors may be regarded as shareholder costs. This may be the case when one or more director(s) have qualifications and skills that go beyond the mere holding function and include knowhow and skills which are pertinent to the business of the subsidiaries.</p> <p><u>JTPF conclusions:</u></p> <p>A case by case approach is always appropriate because a director or board member could perform activities (partly or totally) for the specific benefit of a (some) subsidiary (ies) and thus could need to be allocated.</p> |
| a.4. | costs for the compliance of the parent with the tax law (tax returns, bookkeeping, etc.) | Shareholder costs |

| | | |
|------|--|---|
| b. | <i>costs relating to reporting requirements of the parent company including the consolidation of reports (see OECD guidelines para 7.10b)</i> | Shareholder costs |
| b.1. | Costs for the consolidated financial report of the parent; | Shareholder costs |
| b.2. | Costs for the consolidated financial statements of the group | <p><u>JTPF conclusions:</u></p> <p>Targeted costs: all costs that are necessary for consolidation at whatever level.</p> <p>It might be the costs relate to the parent company or the subsidiary and the question is who benefits? There might be a parallel benefit for the subsidiaries but consolidation is an activity of the group as such. Some members explained that in practice local costs for the subsidiaries are not passed on to the parent because it would be too costly to identify and to isolate those costs</p> |
| b.3. | costs for the application and compliance with cross-border tax consolidation. Tax legislation of some Member States provide for cross-border tax consolidation that requires the parent company , to collect information from the subsidiaries and comply with formal requirements such as making tax adjustments of the accounts of the foreign subsidiaries to compute the consolidated income for company tax purposes. These costs are incurred for the exclusive benefit of the parent company; | <p>Shareholder costs</p> <p>Although under rare circumstances the subsidiary company may receive a benefit from the consolidation, such as the elimination of withholding taxes that would otherwise apply in the country of the parent company on payments made by the parent company.</p> |
| b.4. | costs for the audit of the parent | Shareholder costs |
| c. | <i>Costs of raising funds for the acquisition of its [the parent company's] participations (see OECD guidelines para 7.10c)</i> | Shareholder costs |
| d. | <i>Costs of managerial and control (monitoring) activities related to the management and protection of the investments in participations unless an</i> | Generally to be considered as Shareholder costs |

| | | |
|------|---|--|
| | <i>independent party would have been willing to buy for or to perform for itself:</i> | |
| d.1. | Costs of the parent company's audit of the accounts of the subsidiary if it is carried out exclusively in the interest of the parent; | <p>Shareholder costs</p> <p>However, if the audit is also in the interest of the subsidiary the activity is partly an intra-group service: this is the case when the audit is compulsory under the law of the state of incorporation of the subsidiary, when the audit report is published with the financial statement of the subsidiary or published on the website of the subsidiary or, in general, is used by the subsidiary (e.g. provided to a bank when the subsidiary applies for a loan or used by the management of the subsidiary itself).</p> |
| d.2. | Costs for the drafting and auditing of the financial statements of the subsidiary in accordance with the accounting principles of the States of the parent (e.g. US GAAP) | <p>Shareholder costs, unless such activity has a positive effect for the activity of the subsidiary on its own and not simply because it is part of the group. This may be the case where the financial statement drafted by applying the accounting principles of the parent company is used by the parent company itself to services to the subsidiary, as market analysis, budgeting, etc...</p> |
| d.3. | Costs of information technology | <p><u>JTPF conclusions:</u></p> <p>Those costs are rarely supported solely for the benefit of the parent company. Therefore a case by case approach is necessary.</p> |
| d.4. | Costs for the general review of the affiliates' performance if not connected to the provisions of consulting services to the subsidiaries | <p><u>JTPF conclusion:</u></p> <p>Those costs can be performed exclusively for the parent and are in that case only shareholder costs however in many cases this can help to improve the subsidiary's management as well and thus require allocation</p> |
| e. | Costs to reorganize the group, to acquire new members or to terminate a division | <p><u>JTPF conclusions:</u></p> <p>The OECD is actually discussing Business restructuring and future OECD</p> |

| | | |
|------|---|--|
| | | <p>conclusions could be helpful.</p> <p>A case by case approach was suggested because the restructured entity could also have a direct benefit.</p> <p>OECD comments: The OECD notes that the wording in TPG 7.12 is “costs for analyzing the question whether to reorganize the group, to acquire new members, or to terminate a division” and that this is a significantly narrower scope. The OECD view is not to treat restructuring costs such as write off of assets, termination of employment contracts, etc. as shareholder costs or as a service, but rather to examine on a case-by-case basis which entity should bear these costs, depending in particular on the rights and other assets of the parties.</p> <p>There is some discussion in the OECD discussion draft on the transfer pricing aspects of business restructurings about which entity within an MNE group should bear the restructuring costs and the OECD tentatively concludes that depending on the facts and circumstances of the case, it could be the restructured entity, another group entity that benefits from a relocation of activity, the parent company, several group entities, etc</p> |
| f. | Costs for initial listing on a stock exchange of the parent and costs for the activities related to stock market listing of the parent, in the years after the initial listing (e.g. preparation of documents required by the stock market supervisory body). | Shareholder costs |
| g. | Investor relations' costs of the parent company | Shareholder costs |
| g.1. | costs for press conferences and other communications with (i) shareholders of the parent company (ii) financial analysts , (iii) funds and (iv) other stakeholders of the parent company; | |

| | | |
|----|--|-----------------------|
| h. | Study and implementation of the capitalization structure of the subsidiaries | Case by case approach |
| i. | Costs for the increase of the share capital of the subsidiary | Case by case approach |
| j. | <p>Other activity you indentify as shareholder activity:</p> <p>Activities relating to the adoption and enforcement with statutory rules and rules of conduct with regard to "corporate governance" by the parent company itself or the group as whole</p> | Shareholder costs |

Appendix II

REPORT ON NON-EU TRIANGULAR CASES

1. PREAMBLE

1. In accordance with the discussion held at the Joint Transfer Pricing Forum (JTPF) in its meetings of October, 23rd, 2007 and February 21st, 2008 a sub-group was asked to discuss further the issue of triangular transfer pricing cases. The sub-group met in Brussels on 15 January 2008, 29th April 2008, 8th July, 2008 and 23rd January 2009.
2. This report is based on the work of the sub-group as reported to the plenary meeting of March 2009.
3. This JTPF report provides some non-prescriptive suggestions regarding dispute resolution relating to transfer pricing cases in the case of non-EU triangular transfer pricing, as hereafter defined, without any prejudice to whether or not such cases may be covered in part or whole by the EU Arbitration Convention.
4. It is neither the intention that Competent Authorities (CA) activity in non-EU triangular cases would provide any greater certainty than for EU triangular cases nor that the non-EU definition denies access to the Arbitration Convention only because a non-EU state is involved.

2. DEFINITION OF TRIANGULAR CASES (IN THE CONTEXT OF MAP)

5. To assist in focusing the JTPF discussion it was suggested to adopt a definition on triangular cases which is intended to be neither too broad nor too narrow. This adopted definition duplicates the one included in the report on EU triangular cases.
6. For the purpose of this document a triangular case is a case where two states in a MAP cannot fully resolve any double taxation arising in a transfer pricing case when applying the ALP because an associated enterprise [as defined in the Arbitration Convention] situated in a Third State and identified by both EU CAs (evidential based on the comparability analysis including a functional analysis and other factual elements) had a significant influence in contributing to a non arm's length result in a chain of relevant transactions or commercial / financial relations and recognized as such by the taxpayer suffering the double taxation and requesting the MAP.
7. Two types of cases can be distinguished:
 - cases where all associated companies concerned are situated within the EU (hereafter referred to as EU triangular cases);
 - cases where the associated company identified as being the source of non arm's length results in a chain of relevant transactions or commercial / financial relations is situated outside the EU (hereafter referred to as non-EU triangular cases).

3. POTENTIAL APPROACHES TO NON-EU TRIANGULAR CASES

3.1. Treaty network

3.1.1. Improvement and extension of the treaty network

8. In the absence of a Double Taxation Agreement (DTA) or where a DTA does not contain a Mutual Agreement Provision (MAP) provision, there is no clear process to facilitate the elimination of double tax. To remedy this situation an extensive network of treaties between both EU Member States and non-EU Member States, which contain an effective MAP Article, is considered vital.

3.1.2. Inclusion of Article 25 (5) of the Organisation for Economic Co-Operation and development (OECD) Model Tax Convention (MTC)

9. The MAP procedure in most current DTAs does not *require* the Competent Authorities (CAs) to reach an agreement that eliminates the double taxation but only that they use best *endeavours* to resolve the case. Where, after applying best endeavours, Competent Authorities cannot agree, unrelieved double taxation or taxation not in accordance with the tax treaty may result. This situation is a major source of concern for taxpayers and CAs. Recent developments in the work of OECD on Article 25(5) of the MTC provide the option of mandatory arbitration.

10. According to paragraph 64 of the OECD Commentary to this provision, paragraph 5 of Article 25 "*...is [therefore] an extension of the mutual agreement procedure that serves to enhance the effectiveness of that procedure by ensuring that where the competent authorities cannot reach an agreement on one or more issues that prevent the resolution of a case, a resolution of the case will still be possible by submitting those issues to arbitration ...*".

11. Therefore, as far as bilateral DTAs will include such a clause, the effectiveness of MAP will be strengthened.

12. It would be also helpful if EU Member States were able to indicate whether or not in negotiating or reviewing their tax treaties, they will propose to include article 25(5) of the OECD MTC.

13. Some practical aspects of the inclusion of the new Article 25(5) were also discussed. It was considered that, in applying article 25(5) of the OECD MTC in bilateral tax treaties, Competent Authorities could face implementation difficulties in the absence of clear rules (e.g. how to set up an advisory commission, how to select the members, how to share the costs, language to be used, how to select a point in the range, etc.). This could lead to very long procedures including the risk of ultimately stepping out of the Art. 25.5 arbitration process. However the model mode of application ("sample mutual agreement on arbitration") which is included as an annex to the OECD's update of the Commentary to Article 25 might be useful in this respect.

3.2. A case by case approach to resolution

14. The following routes to resolution are put forward but it is emphasized that the facts and circumstances of particular cases will finally determine if a proposed solution is appropriate.

3.2.1. *Resolution of the issue prospectively: Advance Pricing Agreements (APA)*

15. One approach may be to enter into an APA relating to the transactions in order to avoid the issue arising for prospective years. Moreover by concluding an APA, CAs could agree to apply the outcome of the APA to previous years covered by the pending MAP procedures through an official or informal agreement taking into consideration the possibilities allowed under domestic law.
16. On the issue of potential roll back, the subgroup referred to point 8.3 of the Guidelines for APAs in the EU, included as an annex to the Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee on the work of the EU Joint Transfer Pricing Forum in the field of dispute avoidance and resolution procedures and on Guidelines for Advance Pricing Agreements within the EU (COM (2007) 71 final) of 26 February 2007, that reads:

“8.3. Rollback

58. Rollback – when provided for in domestic legislation – can be considered where it will resolve disputes or remove the possibility of disputes in earlier periods.

Rollback should only be a secondary result of the APA and should only be carried out where it is appropriate to the facts of the case. Similar facts and circumstances to those in the APA should have existed for previous periods in order for rollback to be appropriate.

Rollback of the APA should only be applied with the taxpayer's consent.

A tax administration has recourse to the usual domestic measures if, as part of the APA process, it discovers information which would affect the taxation of earlier periods. But tax administrations should advise the taxpayer of any such intended action to give the taxpayer the opportunity of explaining any apparent inconsistency before making a tax re-assessment concerning previous periods.”

For further consideration see paragraph 77 of APA report

3.2.2. *Article 25 (3) of the OECD MTC*

17. Article 25(3) of the OECD MTC, where incorporated in the relevant treaties between the parties, might be interpreted such that it extends the scope of Art 25 to solve disputes relating to transfer pricing adjustment in the case of non-EU triangular transfer pricing cases and provides the option of a tri-lateral approach to eliminating that double tax. However not all DTC`s follow the language of the MTC to facilitate this interpretation.
18. In those cases a possibility could be the conclusion of a separate and specific (bilateral/multilateral) protocol / (additional) convention to solve such cases. However, the approval of this protocol / (additional) convention might necessitate adoption through the legislative chambers – which might take considerable time.

3.2.3. *Extension of the AC to a third State*

19. It may be worthwhile exploring on a case by case basis whether the provisions of the AC can be extended to a Third State, based upon Articles 35 and 36 of the Vienna Convention on the law of treaties assuming acceptance of such rights or obligations by the Third State. CAs may wish to consider using this instrument to involve the third country in the proceedings as well. This extension would only bind the CAs involved in the specific case.
20. Articles 35 and 36 of Vienna Convention on the law of treaties read:

“Article 35: Treaties providing for obligations for third States

An obligation arises for a third State from a provision of a treaty if the parties to the treaty intend the provision to be the means of establishing the obligation and the third State expressly accepts that obligation in writing.

Article 36: Treaties providing for rights for third States

A right arises for a third State from a provision of a treaty if the parties to the treaty intend the provision to accord that right either to the third State, or to a group of States to which it belongs, or to all States, and the third State assents thereto. Its assent shall be presumed so long as the contrary is not indicated, unless the treaty otherwise provides.

A State exercising a right in accordance with paragraph 1 shall comply with the conditions for its exercise provided for in the treaty or established in conformity with the treaty.”

3.3. Procedural considerations

3.3.1. *The role of the taxpayer*

21. The JTPF recognizes the key role of the taxpayer in non-EU triangular cases.
22. Although the MAP is in essence a procedure between tax administrations, in view of the specific nature of the triangular cases, more involvement of the taxpayers in the MAP could be envisaged for example by providing additional information requested and points of factual clarification.
23. In this context it must also be added that it is primarily for the taxpayer to identify the commercial/financial relationship(s) resulting in double taxation. The taxpayer needs to provide a comprehensive analysis of all relevant facts and present evidenced based reasons as to which contracting States should start the appropriate procedure. Adoption of the concepts within the European Union code of conduct on transfer pricing documentation for associated enterprises (EUTPD) might be quite helpful.
24. As soon as possible the taxpayer should inform the CAs that (an) other party (ies) in (a) third non-EU MS(s) is (are) involved. Indeed without such information the resolution of the case could be impossible due to the different deadlines. It is in the interest of both tax administrations and taxpayer(s) that a co-operative position is taken to achieve swift resolution. This implies the timely exchange of information

and delivery of documentation by all stakeholders (including the tax administrations).

3.3.2. *Coordinated actions between EU CAs*

25. In an identified non-EU triangular case the participation of non-EU competent authorities is crucial to eliminate double taxation. The EU competent authorities should agree how to discuss the case and who is best placed to make initial contact with the appropriate non-EU Competent Authority, in order to instigate a procedure to implement efficiently the MAP process.

3.3.3. *Extension of the two-year term*

26. Where appropriate, to give enough time to the CAs involved to reach an adequate and acceptable solution invoking paragraph 4 of Article 7 may be considered, i.e., by mutual agreement, and with the agreement of the associated enterprises concerned, the two-year time limits of paragraph 1 of Article 7 may be extended. If this option/solution is pursued, it is strongly recommended that parties agree on the term of the extension of the two-year term in advance as well, and do not agree to an open-ended extension. That way, the taxpayer's rights would be safeguarded and the tax authorities would be able to pursue an equitable resolution although taking more time than usual under Article 7 of the AC.

4. CONCLUSION

27. The JTPF believes that, in the light of practical experience to date, it has taken the discussion as far as it is possible. However future developments, as countries and businesses gain more experience in the subject, may bring the item back on the JTPF work programme.

- 28.