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## **EU JOINT TRANSFER PRICING FORUM**

### **ADDITIONAL COMMENTS ON THE FUTURE WORK PROGRAM**

**Meeting of Tuesday 14th September 2006**

**Centre de Conférences Albert Borschette  
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**Background document**

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## **Comments from The Netherlands:**

The draft working program has not been discussed at the last JTPF meeting. From the June 2006 JTPF meeting we understand that it is the intention of the Bureau/ Secretariat that the new Forum, if any, will decide on its working program. We also understand that the Commission might decide during summer time on the renewal of the Forum after 2006. In this respect we like to provide you with our thoughts.

The Netherlands would support extension of the JTPF. Taking into account the work accomplished by the Forum (on the arbitration convention and documentation) and the difficulties arising from 4 meetings per year, the Netherlands considers 2 meetings per year sufficient to deal with the remaining issues to be discussed.

As regards the secretariat information note on the future work program (document JTPF/021/2006/EN), the Netherlands has the following remarks. We would support the monitoring work (par. 4.1.1), work for SME's (par. 4.1.3) and follow up of the Arbitration Convention work (par. 4.1.4). The Netherlands however is of the opinion that the Forum should not pursue any activities for which the OECD is better equipped. It is important that the Forum and OECD by no means go in any different way and in our view this risk is present if the Forum might pursue activities on technical issues. The Netherlands therefore does not agree on the idea of making "shorter, more focussed documents" on technical issues as taken up in par. 4.1.2 (triangular cases, CCAs). These are typically topics that should be taken up by the OECD and not the Forum.

In our paper of 26 February 2006 we have made some proposals that the Forum might consider. We suggested to discuss whether bilateral agreements between two tax administrations on an accepted range can result in a significant relief of documentation requirements for taxpayers. For example: an agreement that a cost plus within a certain range might be acceptable for specifically, narrowly described, elementary service activities. If such an agreement could be reached, then the taxpayer would no longer be required to perform a costly benchmark study if he uses this agreed range. Furthermore, cases of double taxation due to differences in domestic legislation will be limited. We would like to discuss whether the EU internal market might benefit from such an approach.

Another topic to be considered might be the use of databases. The use of databases in the EU causes problems for tax authorities and taxpayers. US databases however contain more information and are more useful. The Forum might consider to discuss how European databases could be improved.

## **Comments from Poland:**

As far as the „Secretariat information note on the future work programme” (DOC:JTPF/021/BACK/2006/EN) is concerned, Poland would like to present the following suggestions of topics on the future work of JTPF:

### Exchange of practical experiences – technical discussion

From our point of view, exchanging of practical experience is extremely important in developing awareness of possible procedures in profit transferring especially in connection with highly complex transactions including transactions amongst MNE or involving intangibles.

It would be especially vital to discuss issues relating to:

- a) Cost Contribution Arrangements and other agreements involving intangible property
- b) Convergence of arm's length pricing of transactions for corporation tax purposes.
- c) Incidence of the application of transfer pricing rules across the EU and developing some guidance about when a transfer pricing related audit is likely to be a worthwhile and cost effective endeavor for tax administrations.

### Small and Medium sized Enterprises

Poland is interested a lot in examination the possibility of applying JTPF achievements to SMEs. However, it is essential to stress that in our opinion work should be focused only on limited types of complex transactions.

### Follow-up of the Arbitration Convention in the light of the OECD work on arbitration and practical experience of arbitration cases

Poland is interested in developing further best practices on how the AC should work in practical terms. However, as Poland does not have any cases under the AC yet, we will not be able to give constructive remarks in this area.

## **Comments from Business members:**

With regard to the potential future work programme, we can agree to the topics set forth in the "Secretariat Information note".

From our perspective, a further issue to be discussed in the EU JTPF could be the treatment of business restructurings which is obviously an issue which is discussed at the OECD level and

intensively in Germany. The issue relates to the treatment of supply chain restructurings and the discussion of so-called business opportunities. Since e.g. the OECD and the German tax authorities are currently working on a statement paper and administrative principles respectively, it is in our view an issue of major importance which could be discussed in the Forum. Although it is certainly a topic which remains at the legal disposal of the Member States, it could be helpful to discuss the topic to - at least - examine the different perspectives between the member states.

#### Comments from a second Business member:

It is perhaps not as clear as it should be whether thin capitalisation issues are covered by the Arbitration Convention. They should be since Article 4 refers to “commercial or financial relations.” However, I believe that the work of the Forum did not clarify the matter. I believe that there is some difference across Member States about the extent to which transfer pricing matters incorporate thin capitalisation; for example, the UK legislation on transfer pricing incorporates thin capitalisation, other Member States have separate legislation, and some look upon the interest rate as within the transfer pricing rules but not the quantum of the debt. It is a confusing area. Where Member States have legislation, consistency of approach in relation to safe harbour rules and arm’s length principles appear lacking.

Recently the Advocate General published his opinion in the Thin Cap Group Litigation (C-524/04, 29 June 2006). Although this focussed on the UK’s thin cap rules, the AG also made two general points. In paragraphs 69 to 80 the AG maintains that there is an obligation on the country making the thin cap adjustment that a corresponding adjustment in the other Member State is obtained. Reciprocal recognition is a crucial part of the requirement that thin cap rules are applied in a way proportionate to their aim. It seems to me that ensuring that thin cap is covered by the Arbitration Convention is an important issue for the Forum to take up, since reciprocal arrangements would thereby be guaranteed.

Secondly, and this point goes wider than relevance to the Arbitration Convention, the AG indicated his clear preference for an arm’s length test for thin cap, rather than a fixed criterion, such as a fixed debt-equity ratio. This would be an interesting area for the Forum to explore. How does one demonstrate arm’s length debt levels, and how do the rules and approaches differ across, and how can these differences be minimised.

### **Comments from Ireland:**

Ireland's comments on the suggested future work programme are as follows:

#### **Monitoring of the two Codes of Conduct and the effectiveness of their implementation**

The implementation of the Codes of Conduct is a matter for the Member States. Nonetheless, Ireland had no objection to the Forum examining difficulties identified in the operation of

the two Codes of Conduct with a view to considering whether any modifications should be made to those codes. However, care would need to be taken as regards taxpayer confidentiality.

### **Exchange of practical experience – technical discussions**

While there may be some value in the Forum discussing some technical issues, the approach suggested seems very open ended. It may be more appropriate to identify in any new work programme those areas that members of the Forum would wish to prioritise and focus on these.

### **Multilateral MAP/ arbitration cases and triangular MAP/arbitration cases.**

Ireland had no objection to the Forum discussing this issue. However, if the issue relates to the interpretation of Article 25(3) of the OECD Model, it may be more appropriate to deal with it at OECD level.

### **Cost Contribution arrangements**

Because this is a technical issue on which OECD guidelines already exist, this appears to be an area where work might best be carried out at the level of the OECD.

### **Disputes resolution and avoidance**

This is an area in which the Forum has made a valuable contribution to date. Ireland is open to this being further pursued by the Forum. However, the issue of convergence of arm's length pricing for corporation tax and customs does not appear appropriate to the Forum. In addition, the question of when a transfer pricing audit should be carried out is a matter for tax authorities and does not seem relevant to the Forum.

### **SMEs**

Ireland has no objection to the Forum examining this.

**Further work on how the Arbitration Convention should work**

Ireland has no objection to the Forum examining this.