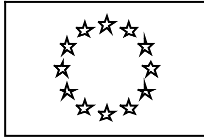

EUROPEAN COMMISSION
DIRECTORATE-GENERAL
TAXATION AND CUSTOMS UNION
TAX POLICY
**Coordination of Tax Matters**

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# EU JOINT TRANSFER PRICING FORUM

## BACKGROUND DOCUMENT
## ON THE REPLIES RECEIVED FROM MEMBER STATES
## TO THE QUESTIONNAIRE ON THE APPLICATON OF
## TRANSFER PRICING RULES AND
## THE ARBITRATION CONVENTION

**Meeting of Wednesday 4 December 2002**
**Centre de Conférences Albert Borschette**
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## 1. APPLICATION OF TRANSFER PRICING RULES WITHIN THE EU

### 1.1 Documentation requirements

Documentation requirements overall have increased within the EU in the sense that some Member States either by legislation or by circular letters have introduced specific new documentation rules or tightened existing requirements.

***Q1) Are there any specific transfer pricing documentation requirements in your tax legislation/regulations? The case being, please indicate the date of introduction or last modification and join any relevant official document***

**Seven** Member States have introduced specific transfer pricing documentation requirements: **France** in 1996 and 1999, **Spain,** which has specific documentation requirements for cost contribution agreements, intra group services ands APA in 1996, **Denmark** in 1998, the **United Kingdom** since 1 July 1999, the **Netherlands** and **Portugal** since 1 January 2002, finally **Germany** has administrative transfer pricing documentation rules (date not given).

Except for **Germany,** which plans to introduce legal documentation requirements, **no** Member State reported plans to either introduce or modify documentation requirements.

***Q1.1) On which level are these requirements?***

*Legal obligation:* **Denmark, Portugal, the Netherlands, Spain, the United Kingdom**

*Administrative regulations:* **Germany**

*Both legal obligation and administrative regulation:* **France**

***Q2) In case there are specific transfer pricing documentation requirements, is there a documentation submission deadline?***

In **Portugal** documentation requirements are to be met upon filing of the tax return **or** upon request of the tax administration.

**Spain** requires the submission of documentation upon audit **or** upon request of the tax administration.

**Denmark** stated that documentation requirements should be met upon request of the tax administration.

**The United Kingdom** requires the submission of documentation upon audit.

**Germany** and the **Netherlands** do not impose a specific deadline, although the Netherlands have a preference for contemporaneous documentation. If, however, a company has not

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prepared its documentation contemporaneously, it is given a reasonable time to establish its documentation.

In **France** documentation must be submitted upon audit but the compliance rules are not systematic. Article L13B of its Instructions on Tax Procedures provides for a deadline of two months upon request of the tax administration, which can be extended to three months. However, a specific request can be addressed to a company requiring a reply within 30 days. As regards APAs there are no deadlines for submitting evidence.

***Q3) Are there any penalties foreseen in case of absence or late submission of the required transfer pricing documentation?***

In the **United Kingdom, Portugal** and **Spain** in case of absence or belated submission of TP documentation, the same rules apply as in other areas of taxation which might include penalties.

**France** has specific transfer pricing provisions in article L13B of its Instructions on Tax Procedures as regards absent or insufficient replies to requests of the tax authorities. Article 1740-9 General Tax Code provides for a penalty of 7.500 € for each individual infringement.

The **Netherlands** do not have a specific penalty regime for TP. However, if a tax auditor has evidence that the taxpayer deliberately uses incorrect transfer prices, an administrative penalty may be imposed. In very exceptional cases, the taxpayer may even be subject to criminal prosecution (Art. 68 Tax Code). In case of significant shortcomings in documentation the burden of proof will be shifted to the taxpayer.

**Denmark** and **Germany** do not have specific penalty regimes for TP.

***Q4) Does your tax administration accept documentation in a language different from the official language(s) of your country?***

The **United Kingdom** in general is unlikely to accept extensive submissions in another language but sometimes translates some documents.

In **France** the Constitution provides for French as the only official language to be used by the administration. The same applies for companies according to the trade law. Exceptionally, English documents may be used if issued by foreign entities when necessary for the clarification of other documents in French. Conversely, as regards APAs companies may submit their documents in English, but if necessary a French translation might be requested.

**Denmark** in general accepts documentation in Danish, English, Swedish and Norwegian.

**Germany** requires documentation to be in German except in some specific cases where English is accepted.

In **Spain** a general administrative principle states that all procedures, appeals and litigations should be presented in one of the official languages. However, in practice, documentation in English and French is generally accepted.

In **Portugal** the taxpayer may request the permission to use a language different from the official language, but in general or when that request is refused, only the Portuguese language is accepted.

The **Netherlands** in general accept documentation in Dutch and English but in certain cases the taxpayer may be requested to clarify its documents or provide a translation in Netherlands.

The practice in some Member States, which do not have specific transfer pricing documentation requirements, is as follows:

**Austria** accepts documents in another language, but if necessary translation by the taxpayer is required upon request of the tax administration.

**Belgium** generally accepts documents in English.

**Finland** accepts documents in another language at the discretion of the tax administration.

**Italy** accepts documents in another language if the translation is not too burdensome.

**Greece** requires all documents to be translated into the official language.

***Q5) In case there are specific transfer pricing documentation requirements are there any exceptions provided for SMEs ?***

Except for **Portugal,** where only taxpayers with annual net sales and other income of more than € 3 mio. in the previous fiscal year are subject to specific documentation requirements, no other Member States have any specific exceptions as regards TP documentation requirements for SMEs. In general, Member States consider that documentation should reflect the extent and complexity of the transactions involved.

***Q6) Does your tax administration use databases in search of comparables?***

The **United Kingdom** prefers the use of country-specific databases but pan-European and any other databases without geographic limitation are used with care and adjustment.

**Spain** uses internal databases derived from annual accounts and corporate tax returns.

**Belgium** ("Amadeus", "Belfirst") and **Denmark** ("Dun & Bradstreet", "Kobmanstandus") use databases with geographic limitation**.**

**Portugal** does not have sufficient experience to prefer a specific type of database.

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**The Netherlands** only have experience with reviewing database searches provided by taxpayers, but does not have experience with setting up database searches to substantiate transfer pricing adjustments initiated by the tax authorities. The Netherlands does not prefer a specific type of database. While Portugal uses its own internal database, the Netherlands has access to “Osiris” and “Amadeus”.

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**France** uses “Diane” for France and “Amadeus” for Europe and beyond if necessary.

**Finland** makes a trial use of “Amadeus” at the moment.

***Q7) Which databases used by a taxpayer are accepted by your tax administration?***

**Spain** in general has a preference for Spanish databases (“SABI” being probably the most reliable and popular one). However, in particular circumstances, (when no country specific database is available or in certain sectors such as the financial sector), European databases are accepted to find or audit comparables. As long as the identity of markets is preserved or proper adjustments can be made, other databases are, on a case by case basis, accepted as well.

**France** “indirectly” recognises “Diane” and “Amadeus” which are used by the tax administration. Other databases are equally allowed if the information is satisfactory. In any event data are subject to checking through international co-operation.

The **United Kingdom, Belgium, Sweden, Portugal, Denmark, Finland, Ireland, the Netherlands** and **Greece** all replied that generally any database can be used in so far as it provides data of sufficient quality which are properly used and are relate to the transactions involved. The **Netherlands** added that considering the different accounting rules, European databases are less reliable than the US ones.

### 1.2 Legal basis for transfer pricing adjustments

***Q.8) Are the legal/regulatory provisions or court decisions upon which transfer pricing adjustments are based the same for domestic and cross-border transactions (e.g. in case of interest free loans given to an associated company)***

The **United Kingdom** , for pragmatic reasons, generally does not apply transfer pricing legislation domestically except for some conditions when it is appropriate.

**Austria, Portugal, Luxembourg, the Netherlands, Denmark, Ireland, Italy, Belgium, Finland** and **Spain** apply the same legal/regulatory provisions or principles (**Spain**, however, makes an exception for thin capitalisation rules, which only cover foreign related entities).

In **Germany** the rules for hidden profit distributions and hidden contributions to capital apply both to domestic and cross-border transactions. Section 1 of the Foreign Tax Act, however, applies only to specific cross-border transactions.

**Sweden** and **France** (articles 38-1/2 General Tax Code for domestic and articles 57 and 238A General Tax Code and L13B of the Instructions on Tax Procedures for cross-border transactions) also apply different rules for domestic and cross-border transactions.

### 1.3 Burden of proof

***[Please note the annex I to this document on questions 9 and 10]***

***Q9) Who bears the burden of proof for tax cases in your jurisdiction generally?***

Only in the **United Kingdom** and **Ireland** the burden of proof is on the taxpayer.

In **Luxembourg**, on a case by case basis, the burden of proof can be on the taxpayer **or** the tax administration.

In **most** other Member States the burden of proof lies with the tax administration in assessment, in appeals and in litigation, with the following exceptions:

The **Netherlands** and **Sweden** (except for the deduction of expenses),

**Greece** and **Portugal** (except in appeals),

In **Finland** the burden of proof lies with the party which has the best practical possibilities to present evidence.

In **Belgium** the burden of proof can be discussed.

***Q10) The case being, can the burden of proof be reversed, allowing the tax administration to estimate income?***

Only in **Denmark** there seems to be no possibility to reverse the burden of proof.

In all other Member States the burden of proof can be reversed and the tax administration is allowed to estimate a taxpayer’s income in the following cases:

(i) *If the taxpayer files false or misleading tax returns*: the **Netherlands, Sweden, Austria, Luxembourg, Portugal,** and **Finland**

(ii) *If the taxpayer is found not to have acted in good faith*: **Sweden, Luxembourg,** and **Portugal**

(iii) *If the taxpayer does not co-operate*: the **Netherlands, Sweden, Austria, Luxembourg, Greece,** and **Portugal**

(iv) *If the taxpayer does not comply with documentation requirements*: the **Netherlands, Austria, Greece,** and **Portugal.**

In **Germany**, the tax administration is allowed to estimate a taxpayer’s income in the following cases but still bears the burden of proof as regards the amount:

(i) *If the taxpayer files false or misleading tax returns*
(ii) *If the taxpayer does not co-operate*
(iii) *If the taxpayer does not comply with documentation requirements*.

In **France** the burden of proof can be reversed and the taxpayer’s income be estimated if documents are missing, if there are serious shortcomings in the accounting system of the taxpayer, in case of belated submission of declarations, infringements committed or appeals against the tax audit. Under certain conditions, transactions with service

providers in countries with preferential tax regimes might equally cause a reversal of the burden of proof since the taxpayer has to prove the existence of the service provider and that the amount paid corresponds to a normal invoicing practice.

In **Italy** transactions with controlled or unrelated companies resident in countries with preferential tax regimes or transactions through a third fictitious party give rise to a reversal of the burden of proof.

In **Spain** the burden of proof can be reversed and the tax administration is allowed to estimate a taxpayer's income in the following cases:

*(i)* *If the taxpayer does not cooperate*
*(ii)* *If accounts are missing or proved to be seriously misleading*
*(iii)* *If the taxpayer does not file tax returns or the data contained in the tax returns is incomplete in the sense that they do not permit the tax administration to determine the tax base*
*(iv)* *When a taxpayer has transactions with countries qualified as tax havens he has to prove the existence of those transactions and that the amount paid is at arm's length.*

In the **United Kingdom** and **Ireland**, where the burden of proof lies with the taxpayer, the tax administration is allowed to estimate a taxpayer's income in the following cases:

*(i)* *If the taxpayer files false or misleading tax returns (***United Kingdom** and **Ireland)**

*(ii)* *If the taxpayer is found not to have acted in good faith (***United Kingdom)**

*(iii)* *If the taxpayer does not co-operate (***United Kingdom).**

**1.4 Acceptability of transfer prices to tax administrations**

One of the means to overcome uncertainty on the acceptability of transfer prices are Advance Pricing Agreements (APAs), which determine, in advance of controlled transactions, an appropriate set of criteria (e.g. methodology, comparables and appropriate adjustments hereto, critical assumptions as to future events) for the determination of the transfer prices.

***[Please note the annex II to this document on questions 11-14]***

***Q11) Does your country have any specific legal or administrative rules governing APAs (The case being, please join any official documents)***

Only **five** Member States **(the United Kingdom, Belgium, Spain, the Netherlands** and **France)** have specific rules governing APAs.

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***Q11.1) Does your legal/administrative rules provide for unilateral, bilateral or multilateral APAs?***

**Two** Member States have legal or administrative rules providing for *unilateral, bilateral* and *multilateral APAs*: **Belgium** and the **Netherlands.**

The **United Kingdom** and **Spain** can conclude *unilateral* and *bilateral* APAs. (**Spain** can enter into *multilateral* APAs under double tax treaties)

**France** can only conclude *bilateral* APAs.

***Q11.2) Does the taxpayer have a legal/regulatory right to enter into APA negotiations?***

Only the **Netherlands** provide for a *regulatory right* of the taxpayer to enter into APA negotiations.

**Spanish** regulatory provisions allow taxpayers to participate in the APA process in different phases of the procedure. In unilateral APAs taxpayers may hand in pleadings, further documentation and evidence. In particular, they have the right to examine the final draft resolution and hand in within fifteen days voluntary comments that must be examined before the APA is finally concluded. In bilateral APAs Spain will accept the participation of the taxpayer if the other State also envisages this possibility**.**

***Q11.3) If your tax legislation does not provide explicitly for APAs can a similar agreement be obtained via other general procedures (please specify which)***

**Sweden, Denmark, Ireland, Luxembourg** and **Germany** rely on Article 25 of the OECD Model Tax Convention to conclude APAs.

In **Austria, Germany, Finland** and **Luxembourg** advance rulings or binding agreements can be concluded in certain cases.

***Q12) The case being, are there any regulatory deadlines from the date of application for an APA, that the tax administration needs to respect to conclude or refuse an APA? (please indicate)***

The **Netherlands** have a non-legally binding guidance on this issue. Whereas for unilateral APAs the aim is to conclude within 8 weeks (this term is suspended for the time it takes for the taxpayer to provide additional information requested by the tax authorities or when it is the taxpayers move otherwise; a ‘chess clock’ principle is applied), this period is 8 weeks for the establishment of a first position in case of bilateral or multilateral APAs.

In **Spain** the legal deadline is six months from the date of application. However, the process may continue until a decision is taken. Although not specified in the legal regulations, this deadline is considered to apply to unilateral APAs only .

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***Q13) The case being, are there any rules with respect of the duration of the agreement?***

The **United Kingdom** (all case by case), **Belgium** (maximum 5 years), the **Netherlands** (in principle 4/5 years), **Spain** (maximum 3 years with possible extension of 3 more years upon examination and if no significant change in circumstances), **France** (between 3 and 5 years, upon request of the taxpayer at the start of negotiations the APA can be applied from the current tax year) and **Finland** (the current and following tax year), decide on a case by case basis.

Only the **Netherlands** reported the possibility to roll back the APA to previous tax years.

***Q14) Are documentation requirements to obtain an APA compared to a normal transfer pricing audit the same or different?***

In the **United Kingdom, Belgium, Luxembourg** and **Spain** they are the same. (In **Spain** documentation requirements for APAs are specified in article 19 of RD 537/1977. Although there is no such specification in general TP documentation requirements, there is no limitation in the type of documentation that tax authorities may ask a taxpayer to provide in a TP tax audit.)

They are different (meaning in general more demanding) in **Germany** (on a case by case basis), **Denmark** (need to deal with impact of future changes in business and markets) and **France** (on a case by case basis starting from a list in the annex of instruction 4A-8-99 n°171 of 17 September 1999).

In the **Netherlands,** for concluding an APA the taxpayer needs to prove that the price is in accordance with the arm's length principle by providing information of comparable transactions between unrelated parties or with a benchmark study. In case of a normal tax audit, a benchmark study is also requested (on the basis of article 8b § 3 of the Corporate Tax Code of 1969), although, in such a situation, the lack of such a study does not reverse the burden of proof.

***Q15) Are there any other requirements to obtain an APA (e.g. contemporaneous or prior tax audit)***

**None** of the Member States reported on the existence of any other requirements to obtain an APA.

***Q16) Does your tax administration charge a fee for negotiating an APA ?***

**None** of the Member States reported on charging fees for negotiating an APA.

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***Q17) How is the fee for obtaining an APA calculated*?**

Not applicable

***Q18) The case being, are there any specific provisions for SMEs to obtain an APA?***

In the **United Kingdom** "informal" agreements can be reached in tightly prescribed circumstances.

## 2. ARBITRATION CONVENTION (INFORMATION ALREADY CONTAINED IN WORKING DOCUMENT DOC JTPF/0007/2002/EN)

### 2.1. The starting point of the three year period

***Q19) Please indicate below what the position of your tax authority is with respect to the notion of "first notification of the action". (The case being, please join any official document laying down this position.)***

**Most** Member States consider the *formal sending to the taxpayer of the tax re-assessment notice* as the "first notification of the action" which results or is likely to result in double taxation.

**Four** Member States (**Portugal, Spain, Italy** and **Greece)** take the *formal sending of the tax audit report* as the starting point for three-year period.

**Three** Member States (**Denmark, Ireland** and **France)** consider that the *formal communication to the taxpayer of the intention to make an adjustment* constitutes "the action" that sets the period in motion.

### 2.2 The starting point of the two year period

***Q20) Please indicate below what the position of your tax authority is with respect to the starting date of the two-year period. (The case being, please join any official document laying down this position.)***

**Eleven** Member States consider that the two-year period starts when the competent authority *receives a request from the taxpayer*.

**Two** Member States (**Belgium and Sweden)** only *on condition that all necessary information has been provided to the tax administration.*

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For **Greece** the two-year period starts only when *the other Member State notifies that it is not prepared to make a corresponding adjustment.*

**Germany** and **Spain** take the view that the two-year period starts when the competent authority receives a request from the taxpayer but a taxpayer would not be justified to claim the expiry of the two-year period (and request the tax administrations to invoke the arbitration procedure) if the mutual agreement procedure was delayed because of the lack of taxpayer's co-operation or documentation.

**The Netherlands** assume that according to Article 7.1 of the Arbitration Convention the two-year period starts on the latest of the following two dates: a) the date on which the tax assessment incorporating the adjustments is irrevocably determined, or b) the date on which the competent authority receives the request. When both a domestic appeals procedure/litigation and a mutual agreement procedure (under either a Double Tax Treaty or the Arbitration Convention) are initiated the Netherlands can suspend the domestic appeals procedure/litigation and enter into "early" consultations with the competent authority of the other Contracting State. If these "early" consultations fail to eliminate the double taxation the domestic proceedings can re-start. If the domestic appeals proceedings/litigation subsequently also fails to eliminate the double taxation then the competent authority procedure is continued. In such a case the Netherlands competent authority, at the taxpayer's request, may request the other Contracting State's competent authority to agree, under Article 7.4 of the Convention, to reduce the two-year period to a maximum of one year, starting from the date of the irrevocable determination of the tax re-assessment in the domestic proceedings. This reduction is requested on the grounds that some initial discussions have already taken place as part of the "early" consultations.

### 2.3 Procedures to be followed during the interim period when not all Member States have ratified the Convention

***Q21) A request has been made by a taxpayer before the Convention has expired but the two-year period did not elapse before 31 December 1999. Did the Competent Authorities continue to look for a mutual agreement under the EU Arbitration Convention with the other Member State after 31 December 1999?***

**Most** Member States *continued* to look for a mutual agreement under the Arbitration Convention with the other Member State.

**Denmark, Finland** and **Greece** on the other hand *suspended* the mutual agreement procedure under the Arbitration Convention but continued under the provisions of the relevant bilateral tax treaty.

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***Q22) A request has been made by a taxpayer before the Convention has expired but the Competent Authorities have not reached a mutual agreement within the two-year period which elapsed before 31 December 1999***

**Most** Member States take the view that cases, which have been initiated under the Arbitration Convention prior to 1 January 2000, should be completed according to the rules of the Arbitration Convention including arbitration.

**Denmark** and **Finland** take the view that the arbitration procedure (second phase) is suspended and will be taken up again once the Arbitration Convention will re-enter into force.

For **Germany**, which has already ratified the Prolongation Protocol, the arbitration procedure is suspended and will be taken up again once the Protocol is ratified by the government of the other Member State and if and when the other Member State agrees.

***Q23) A request is made by a taxpayer after 1 January 2000***:

The replies to the Commission services' questionnaire have revealed that Member States' views on this issue differ substantially. On the basis of the replies received, only **Italy** *rejects* the taxpayer's request to initiate a mutual agreement procedure under the Arbitration Convention and notifies the taxpayer that a new request needs to be made once the Convention re-enters into force. Five Member States **(Luxembourg**, the **Netherlands, Spain, Ireland** and **the United Kingdom)** are in a position to *continue the procedure* as foreseen in the Convention if and when the other Member State agrees. If the other Member State does not agree, those Member States will – with the taxpayer's consent - initiate a mutual agreement procedure under the double taxation agreement with the other Member State.Nine more Member States (**Austria, Belgium, Denmark, Finland, France, Germany, Greece, Portugal and Sweden)** initiate a mutual agreement procedure but under the double taxation agreement with the other Member State (Austria and Denmark only if so requested by the taxpayer), with the effect that there is no time limit to reach a mutual agreement.

As regards the arbitration procedure, i.e. the second phase of the Convention, seven Member States (**Austria, Belgium, Denmark, Finland, France, Italy** and **Sweden)** take the position that it is *suspended* and can only be taken up once the Convention will re-enter into force (**Italy** only upon a new request).

Six Member States (**Greece, Luxembourg,** the **Netherlands, Spain, Ireland** and **the United Kingdom)** are in a position to *handle the case under the arbitration procedure* as foreseen in the Convention if and when the other Member State agrees. If the other Member State does not agree, those Member States will continue the mutual agreement procedure under the double taxation agreement with the other Member State (Spain only if so requested by the taxpayer).Two Member States (**Germany** and **Portugal)** consider the arbitration procedure *suspended* and will take it up again once the Prolongation Protocol has been ratified by both Contracting States and if and when the other Contracting State agrees.

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