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## **EU JOINT TRANSFER PRICING FORUM**

### **Tax Administration Sub-Group comments on the Secretariat draft discussion paper on specific issues of APAs (Doc. JTPF/016/2005/EN)**

**(Distributed as a room document)**

**Meeting of 12<sup>th</sup> and 13<sup>th</sup> December 2005**

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**SUMMARY OF THE EUJTPF SUB GROUP MEETING HELD IN ROME 7<sup>TH</sup>**  
**NOVEMBER 2005.**

This is a summary of the subgroup meeting held in Rome on 7<sup>th</sup>. November. These notes reflect the discussion on paper 016 and are distributed to MS delegates with the aim of helping our discussion in the pre meeting of 12<sup>th</sup>.November. In the light of the discussions it may be decided to present these conclusions (or those agreed) to the Full Forum as the position/s of MS.

General comments made by the subgroup

1. There is a general agreement that developing better practice in APA procedures is a worthwhile area for the Forum. The aim is to smooth the process between MS. The improvement of bilateral APA procedures should be seen as one of several possible measures of making the internal market stronger to challenge global competition. APAs help to avoid the problem of double taxation and are therefore useful for taxpayers and tax administrations. Avoiding double taxation and reducing administrative burdens through improving bilateral APA procedures can make the internal market stronger. APAs also help to avoid double non taxation and is therefore of vital interest for tax administrations.
2. The Forum should not compel MS to carry out certain actions. However, the very idea of best practice implies an order of merit: some practices may be better than others in general, not excluding the fact that the latter may be better in some specific cases. The results of the Forum should not be prescriptive but be flexible. Nevertheless, the Forum is not merely conducting empty research: the Forum is aiming at producing guidance and results. The aim is to encourage the use of better procedures for Business and MS. This means that both MS and business have a commitment to reach progress.

APA Specific Issues: Legal framework

3. There is a general agreement that APAs should provide certainty for both taxpayers and tax administrations. Precisely how this can be done in detail will vary between MS but certainty is in general necessary. (A discussion on whether such a statement should be enough or some more detail is needed may be carried out at the pre meeting)
4. There seems to be a need to clarify terms which might be otherwise confusing. There is a difference between monitoring or checking an APA and carrying out an audit as a result of an APA. (However some tax administrations carry out the monitoring within an audit procedure). It is common ground that when there is an agreed APA the agreement has to be monitored and checked. But it is unlikely that this activity will amount to a full audit, if the critical assumptions are met. If the check of an APA needs the same effort as a full audit then the time and resources spent negotiating the APA will have been wasted.

APA Specific Issues: Fees

5. Some MS do not charge fees, some would like to. It should not be necessary for a MS to receive a fee for an APA to provide good service: Good service should be provided as a matter of course taking into account the limitations concerning human resources.

6. A fee may be seen as part of an "entry test" to assess the taxpayer's intention and level of preparation and to avoid abuse of the procedure.

APA Specific Issues: Non participants in the APA. Transactions to be included

7. It is up to the taxpayer to initially decide which transactions and which group companies he wants to have included in the APA. But on the other hand it is up to the tax administration whether it accepts the taxpayer proposal. The tax administration is not obliged to accept everything in an application. In general the more that is included, the greater the certainty offered by the APA. Whilst it is the ideal that all inter-company transactions could be included, in practice this can rarely be done if an MNE is very diversified or complex. It is important that MS are as flexible as possible in allowing the taxpayer to include what he wishes in the APA notwithstanding a test of reason. It is necessary that the taxpayer's logic for excluding as well as including companies and transactions is explained in the application.

8. It may be appropriate for a MS to exchange information (EOI) spontaneously with another MS whom the first MS feels should be included in the APA. However, there are some MS that understand that EOI might automatically lead to a bilateral APA. That may go against the taxpayer's choice for a unilateral or bilateral APA. There may be circumstances where the taxpayer has good reasons to believe that a unilateral APA is more appropriate than a bilateral (for instance, a unilateral APA may be faster to conclude). It should be borne in mind that a unilateral APA does not solve the problem of double taxation and that the other MS must be informed at the latest, after the unilateral APA is concluded. [removed from par. 12]

APA Specific Issues: Unilateral v Bilateral APAs

9. It was recognized that most MS provide for both unilateral and bilateral APAs. Both unilateral and bilateral APA's have advantages and disadvantages. There was a clear commitment in the Code of Conduct that if a MS has agreed to a unilateral APA, this MS spontaneously notify any tax administration which is directly concerned with the case and give information which appears relevant for the correct assessment of taxes on income and capital of the other MS.

SOME MS CONSIDER IT IS IMPORTANT TO DEVELOP FURTHER THIS POINT.  
In this sense, an alternative drafting to this point is proposed:

It was recognized that most MS provide for both unilateral and bilateral APAs. Both unilateral and bilateral APA's have advantages and disadvantages There was a clear commitment in the Code of Conduct that MS should make a notification to the Member Stated affected by the agreement. The notification shall consist of either the full APA or a summary of the agreement (including notably the information necessary for the identification of the tax payers engaged in transactions covered by the agreement, the type of transactions, the methodology applies and its justification as well as the

accounting periods affected and the conditions or modalities for its revision or annulment, where applicable). Further, the MS granting the APA should, upon request, provide all further relevant information (i.e. without restrictions) about the transactions covered by the APA. The principle of reciprocity governing the exchange of information should be respected in this specific area. However, a MS that does not enter into APA's, ruling or any other advance agreements concerning transfer pricing should also receive information.

1011. There is general agreement that bilateral APA are preferred above unilateral APA since bilateral APA do provide certainty on two sides of the border whereas a unilateral APA does only provide certainty on one side of the border because the other MS may not agree.

11. Taking into account the costs and time necessary for concluding a bilateral APA, a cost-benefit analysis can be a reason for a taxpayer to prefer a unilateral APA.

1213. In order to avoid double taxation and reduce administrative burdens to strengthen the internal market, the Forum should develop faster bilateral APA procedures between MS that can be more attractive to taxpayers. Nevertheless the limitations of the MS must be respected.

13. 14. With regard to unilateral APAs it is important that the rights of the other MS are not affected by a unilateral APA. This means that when a unilateral APA is concluded, a MAP cannot at all be excluded. In other words, in this case a MAP must be possible and it should be feasible where the other MS concerned makes an adjustment as the latter could not participate in the APA procedure.

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14. The option of including another MS in the APA should always be considered by the MS preparing for a unilateral APA. There is an implied commitment in every tax treaty that all MS should act as good treaty partners. Taxpayers however should not be forced into a bilateral APA where not appropriate, e.g. where the MS cannot guarantee a quick and efficient procedure. But in this case the taxpayer clearly is in danger to run into double taxation.

15. Depending on the case, the taxpayer should be invited to request a bilateral APA where the MS feels this is appropriate. [moved to par. 11]

16. It is believed that sometimes two unilateral APAs may be faster to negotiate than one bilateral but the problem might be a "gap in between" the agreements. This potential problem becomes worse because the Competent Authority is rarely involved in unilateral APAs, so there is a missing link between the MS. The Forum should aim to make bilateral agreements faster to negotiate (considering however the possible lack of resources some MS may have to face) to reduce the appeal of unilateral APAs .

#### APA Specific Issues: Complexity thresholds.

17. Some MS take the view that it is up to the taxpayer to choose whether he it wants an APA (“where there is an APA request, apparently there is uncertainty”). Other MS do apply a complexity threshold.

19. Where applied, complexity threshold is an issue for domestic rules. However to avoid being too prescriptive, complexity thresholds have to be subjective. The pre-filing meeting may constitute the appropriate step to negotiate with a taxpayer to see if an APA is appropriate.

20. It is for the MS and taxpayer to judge ideally together, whether an APA is appropriate. Within the necessary conversations, Tax Administration may decide to propose modifications to accept an APA or to reject it and taxpayers are free to adapt the proposal or revoke the application.

#### APA Specific Issues: Critical Assumptions

21. Critical assumptions are a key part of any APA and should be considered very carefully. If a critical assumption of an APA is broken then strictly the APA is no longer valid. However, there should not be an automatic, complete end to the agreement. An attempt should be made to rescue the APA. All parties should consult each other, the MS involved and the taxpayers, to examine the reasons why a critical assumption has not been met. However, this possibility of consulting should not be seen as a soft option: MS are strongly of the opinion that critical assumptions are by their nature vital to the APA and must be respected.

#### APA Specific Issues: retrospection/rollback

22. The main point of an APA is to provide certainty for the future. If a rollback is possible, it should be a secondary aim of the APA. MS have different practices regarding rollback but there is an acknowledgement that rollback of an APA might be a useful tool for resolving existing transfer pricing disputes provided that this is appropriate to the facts of a particular case. In light of this, rollback cannot be applied automatically but only on a case by case basis when an agreement has been reached .

30<sup>th</sup>. November 2005