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Analyses and coordination of tax policies

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Taxud.E1/JMVL/EM

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SUMMARY RECORD OF THE FIFTEENH MEETING OF THE EU JOINT TRANSFER PRICING FORUM

held in Brussels on 21st March 2006

1. Adoption of the agenda (doc. JTPF/008/2006/EN/FR/DE)

1. The proposed agenda was adopted by consensus.

2. Adoption of the summary record of the JTPF meeting of 12th and 13th December 2005 (doc. JTPF/002/2006/EN)

2. It was agreed by consensus on the following modifications: in paragraph 6 "as of 31/12/2004" will be added after "the number of pending cases"; in paragraph 9 "up to now" will be replaced by "until the meeting" and paragraph 13 the word "audit" will be changed by "transfer pricing adjustment". A business member asked to include in paragraph 45 the idea developed in paragraph 138 of the report on alternative dispute avoidance.

3. 3. Oral report by the Council Presidency on the state of play of the Forum's second report

4. The Austrian delegate explained that the Presidency was waiting for an opinion from the Council Legal service. She said also that there were language problems with the document and the financial questions group will try to reach an agreement on the text so that it could be approved as an A point during an ECOFIN.
5. The Chair expressed some concern about the timeframe: it took one year to the JTPF to reach an agreement and it will take approximately one year to go through the procedural approval.

- 4. Examination of the draft JTPF report on Alternative dispute avoidance and resolutions (doc. JTPF/001/2006/EN)**
6. The Forum moved on to consider the APA report. The Chair reminded everyone that a considerable amount of work had already been done on this. The two previous APA papers on key issues and specific points had already been discussed last year. These, together with the very first APA paper and the MS subgroup agreed statement had been amalgamated into a report which had already been subject to a written procedure. Hence, the Forum had already had plenty of opportunity to comment on any real issues that had been placed in the report. The report before the Forum contained the written comments from those MS which had made them and the Chair suggested that these now be considered by the Forum to resolve any conflicts between what had been placed in the report from the previous work done and the new comments made in the written procedure. In this way, the Chair explained, he hoped to avoid unnecessarily lengthy discussions when members had already been given plenty of opportunity to discuss the real issues.
 7. The Chair explained the idea behind the report: it contained a detailed analysis of the work done by the Forum and, for APAs, details of the best practice that the Forum had developed. This best practice section contained the reasoning of the Forum and, in bold text for each best practice, rules which should guide the behaviour of tax administrations and taxpayers.
 8. The Forum proceeded to work through the report, starting from the suggested amendments from the written procedure. The Chair suggested that these be taken as accepted by the Forum unless anyone objected, in which case they could be discussed. Where two contradictory suggestions were made at the same point, the Chair adopted the approach of discussing what seemed to be the more radical suggestion first.
 9. Some drafting suggestions were accepted by the Forum. These were incorporated into the Report in paragraphs 5, 6, 19, 20, 23, 26,29, 34, 35, 39, 45, 52-53, 59, 60 and 61, 65-67
 10. Discussions on some paragraphs went beyond mere drafting issues. In paragraph41, it was agreed to replace what had been previously been agreed by the Forum with the OECD text on these points. Paragraph 44 was changed to reflect the position of some MS who said that they were unable to make actual agreements with taxpayers – but these MS also stated that this did not mean that APAs could not be negotiated, rather that the legal agreement would be between the countries involved. Paragraph 47 was changed to reflect the situation in Denmark where APAs were conducted solely by the CA unit and not auditors, as opposed to the situation in Germany where auditors had to be involved in an APA. This did not change the view of the Forum over what was best practice: relevant experienced personnel should be used on APAs by tax administrations but the negotiations between countries were Competent Authority negotiations. A discussion took place as regards the drafting proposals made by the Member from the Dutch Tax Administration on paras. 50 and 51. It was agreed to avoid language suggesting any link between a taxpayer's request for certainty and fees or a complexity threshold
 11. Paragraph 64 proved very problematic. In previous meetings, the Chair stated, it had been agreed that on some occasions anonymous approaches from taxpayers

before any pre-filing meeting might be useful and the Forum has wished this encapsulated in best practice. But now this debate re-opened as the Forum struggled to find language agreeable to all MS. During a lengthy debate, the Netherlands and the UK stated that they would not permit anonymous approaches. Germany said that it would accept anonymous approaches on occasion. The Chair reminded the Forum that no country was being asked whether it would or would not accept such approaches, the reason for developing best practice on this point was to accept Business comment that on occasions these approaches might be useful. The Chair said that even where MS would not accept anonymous approaches it seemed unreasonable for those MS to argue for language which tried to stop other MS from doing so. No agreement was reached on this point and it was decided that the Secretariat should be left to consider the points made and to try and come up with drafting suggestions.

12. The time for the meeting was now drawing to a close. The Chair expressed his disappointment at the slow progress and this was echoed by the Business members of the Forum and some MS. The Chair said that the lack of progress – only paragraphs 1-67 of the 138 paragraph report had been discussed, let alone the five appendices – was particularly disappointing given the fact that the issues had already been discussed before, an agreed MS sub-group statement had been issued and published (but now redacted in part by some of those MS who had previously agreed to it), and the report had already been subject to a written procedure.
 13. After input from Business, it was agreed that the Secretariat would incorporate the suggestions of the Forum into the report up to paragraph 65 and, for the written comments not yet discussed, make a judgement over what would be included. This re-draft would again be sent out for a written procedure to allow another revision before the June meeting. In this way, the Chair hoped, the need for lengthy debate in the meeting would be lessened.
- 4. State of play on the nomination of the independent persons of standing as referred to in Article 7 (1) of the Arbitration Convention (doc. JTPF/010/BACK/REV3/2005/EN)**
14. Most Member states have replied so far. Italy and Greece said that the list will be sent very soon.
- 5. State of play of the implementation of the Code of Conduct on the Arbitration Convention (doc. JTPF/006/BACK/2006), the updated number of pending cases under the Arbitration Convention which were reported as of 31/12/2005 (doc. JTPF/009/BACK/2006/EN – to follow), and the state of play of the ratification of the Convention 2005/C 160/01 on the accession of the ten new Member States to the Arbitration Convention (doc. JTPF/005/BACK/2006/EN).**
15. Different tax administration members clarified the situation in their country:
 - Italy explained that all offices involved in MAP and AC cases are aware of the existence of the Code and do their best in order to apply it. Concerning the

suspension of tax collection, the Italian law nr.99 of 22 March 1993 already provides for it.

- Greece specified that all services are informed but the tax administration is still examining whether the Code should or should not be put in their national law.
 - Sweden said that they do suspend tax collection.
16. As regards the implementation of the Code of Conduct on the Arbitration Convention, the Chair, explained that this point is included in the work programme of the JTPF and is of great importance in the follow up of the actions undertaken by the JTPF. He noted the lack of answers to the question related to the suspension of tax collection and the vagueness of some of the answers. Therefore he invited tax administration members to check the drafting of their contributions and to answer the question of the suspension of tax collection before the document will be made publicly available. Finally he invited business members to report to the JTPF any misuse or non-application of the Code.
 17. A business member stressed that the industry wants to know if the Convention is effective and therefore a formal monitoring should take place but it is not up to business to monitor.
 18. On the number of pending MAP cases under the Arbitration Convention as of 31/12/2005, the document distributed must only be considered as a first draft because there are still some Member states which have to answer and a lot of discrepancies must be solved through tax administration bilateral exchanges. Italy and the Netherlands said that their answers will be sent very soon.
 19. As regards the ratification of the Accession Convention, until this meeting, only two Member States (*Slovakia and the Netherlands*) have ratified it. It was agreed that Member States that did not reply should tell as soon as possible the Secretariat the stage the ratification process is at (in order to comply with the political commitment made in point 6 of the Code of Conduct, i.e. ratification no later than two years after the accession = 1 May 2006).

6. Discussion of the potential future work programme of the JTPF (2007-2008) (doc. JTPF/007/BACK/2006/EN).

20. The Chair summarized the answers provided to the questionnaire by explaining that only 9 tax administrations replied and amongst these answers few provided reasoning with their suggestions. However a majority of tax administrations seems to be in favour of a continuation of the JTPF and ready to examine more technical or specific issues like Cost Sharing Arrangements (BE, DE, ES, Business), accounting problems (BE, DE, business). Other potential issues identified are: triangular MAP (BE, DE, ES), SME and TP (MT, ES), monitoring and update of the codes of conduct (BE, DE, Business), business restructuring (ES, business), Permanent Establishment (ES), convergence of TP between income tax, customs and VAT (business). Eventually, several members argued in favour of a reduction of the number of meetings on the grounds that this would allow more time for reflection and need not affect the amount of work done

21. Several business members stressed the importance of the suggested topics even if several were already addressed by the OECD.
22. One tax administration interpreted the lack of answers from tax administrations as a signal not to prolong the JTPF: the Forum should not discuss issues already discussed at the OECD level, the Forum was not put in place in order to discuss the substance of the arm's length principle and to find a solution to MAP triangular cases would request an amendment of the Arbitration Convention which is out of the scope of the JTPF mandate. This member suggested bringing the discussion of the renewal at the Council level.
23. In reply to this statement an important majority of tax administrations underlined the good outcomes of the JTPF and supported very strongly the prolongation of the Forum: in the future the JTPF could discuss "academic" or theoretical and practical issues in order to promote the comprehension of transfer pricing principles in Europe. However the number of meetings could be reduced.
24. Business members also supported the prolongation of the JTPF which is considered as a unique opportunity to put business and tax administrations together to look to practical issues and share practical experiences. The existence of the Forum has also contributed to provide more legal certainty since it has been put in place.
25. The OECD representative congratulated the JTPF for the work already achieved and supported its prolongation for another mandate: the OCDE work and the JTPF work are complementary and both can benefit from the other.
26. The only tax administration representative against the prolongation replied that for him the goals were achieved and the JTPF cannot discuss tax policy.
27. The Chair concluded by stressing the strong support for the continuation and important topics are the monitoring, CSA, SME, general debates and exchange of practical experiences.
28. It was agreed that for the next meeting the Secretariat will circulate a draft working programme.

9. Other issues

29. The other topics on the agenda could not be discussed due to a lack of time.