



EUROPEAN COMMISSION
DIRECTORATE-GENERAL
TAXATION AND CUSTOMS UNION
TAX POLICY
Coordination of tax matters

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Taxud/C1/WB/LDH

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

held in Brussels on 19th June 2003

I ADOPTION OF THE AGENDA (DOC JTPF/006/2003/EN/FR/DE)

1. The Chair proposed to deal with item 5 of the proposed agenda before item 4. With this change the agenda was adopted by consensus.

II ADOPTION OF THE SUMMARY RECORD OF THE JTPF MEETING OF 2ND APRIL 2003 (DOC JTPF/007/2003/EN)

2. The Member from the French tax administration proposed to change the wording of para. 16 in that the member of the tax administration who formed the secretariat of the advisory commission was responsible only to the Chairman in order to remain independent towards the tax administration to which he belonged. With these changes the summary record was adopted by consensus.

III ORAL REPORT FROM TAX ADMINISTRATION MEMBERS ON THE RATIFICATION PROCESS

3. Members from the relevant tax administrations reported on the state of play of the ratification of the Prolongation Protocol and the Convention concerning the accession of Austria, Finland and Sweden to the Arbitration Convention.
4. The FORUM took note that *Belgium* deposited its instrument of ratification relating to the Prolongation Protocol on 7 April 2003.
5. The Member from the *Greek* tax administration informed the FORUM that the parliamentary procedure concerning both the Prolongation Protocol and the Accession Convention had been completed and that his country would soon notify the Secretariat of the Council.

6. The Member from the *Irish* tax administration indicated that the Prolongation Protocol and the Accession Convention were still before Parliament and that it was hoped that both instruments would be ratified soon.
7. The *Italian* tax administration Member informed the FORUM that the Prolongation Protocol would be introduced to Parliament by the end of June 2003.
8. The Member from the tax administration of *Portugal* indicated that the draft bill pertaining to the Prolongation Protocol had not yet been approved by the Government but it was still hoped that the Prolongation Protocol would be ratified within the next six months.
9. The Member from the *Swedish* tax administration informed the FORUM that the Prolongation Protocol was before Parliament and would be ratified by the end of 2003.
10. The *Chair* concluded that encouraging progress on the ratification process had been made and that those countries which had not yet ratified the Prolongation Protocol or the Accession Convention were expected to give a progress report at each meeting of the FORUM.

IV REPORT OF THE FRENCH TAX AUTHORITIES ON THE MEETING OF THE ADVISORY COMMISSION

11. The Member from the French tax administration informed the FORUM of the state of play of the proceedings of the first advisory commission under the rules of the Arbitration Convention, which had been set up by the competent authorities of France and Italy. The advisory commission delivered its opinion at its fifth meeting on 19 May 2003, i.e. within six months from the date of the first meeting. In the absence of a precise definition in Article 11 (1) of the Convention and for practical reasons, the two competent authorities considered the date of the first meeting as the date on which the case was referred to the advisory commission.
12. The Member from the Italian tax administration pointed out that the opinion of the advisory commission was not adopted unanimously but by a simple majority of its members with two dissenting views. The French and Italian tax administrations had not yet decided whether or not to publish the advisory commission's opinion.
13. The *Chair* concluded that the fact that double taxation had been successfully eliminated showed the attractiveness of the Arbitration Convention.

V DISCUSSION OF THE WORKING PAPER ON THE CONCLUSIONS OF THE MEETINGS OF THE JTPF SO FAR (DOC JTPF/003/2003/REV1/EN)

a) Draft conclusions on the arbitration phase (Annex I to doc. JTPF/003/2003/REV1/EN)

14. The FORUM agreed by consensus that the conclusion under item 2 (ad Article 7 (1) of the Convention) should be redrafted in order to align the wording with para. 2 of Annex III to the working paper (starting point of the three-year period).

15. There was also consensus that a case should be considered to be referred to the advisory commission on the date when the Chairman confirms that the Members of the commission have received all relevant documentation and information as specified under item 6 of Annex I .
16. The Member from the French tax administration agreed to present a paper on the experience in setting up the first advisory commission and its proceedings for the next JTPF meeting. He suggested that one copy of each advisory commission's opinion should be kept at the Council Secretariat' archives. As the Council Secretariat had to be asked for approval, a decision on that issue was postponed to the next JTPF meeting.
17. The Member from the UK tax administration expressed his concern about the draft conclusion under item 4 (2) (ad. Article 9 (1) of the Convention). He cautioned that members of the advisory commission's Secretariat could be public officials who would, at some level, remain responsible to their Governments and could not be responsible only to the Chairman of the commission. He suggested, therefore, deleting the words "and only be responsible to him".
18. The *Chair* commented that the Secretariat of the advisory commission was responsible for the pending case. There was agreement to take the proposal of the Member from the UK tax administration into account.
19. Members expressed differing views on the fees of the independent persons of standing. The discussion showed that the majority of the Members from tax administrations favoured an indicative fixed amount per meeting day. The provision should, however, allow for some flexibility by adding the words "unless the competent authorities decide otherwise".
20. One Member from business suggested using the salary of a Member of the European Parliament as reference for fixing the fees of the independent persons of standing. A Member from a tax administration suggested not to include any reference at all in the conclusion paper.
21. Several Members from tax administrations, however, preferred a specific amount to be fixed in order to avoid difficult negotiations. Some Members from tax administrations added that the fees of the independent persons of standing should be limited to a specific maximum amount. Conversely, one Member from a tax administration cautioned that there was no legal basis for a limited fee and the only justification could be budgetary certainty.
22. Most Members from business were opposed to a limitation of those fees questioning if the advisory commission should stop working simply because the ceiling of fees was reached. One Member from business suggested that the competent authorities should negotiate with the independent persons of standing about the fees.
23. Some Members from tax administrations argued that it was difficult to monitor the days spent on a case by the independent persons of standing. To overcome this problem the fees should rather be fixed with reference to meeting days.

24. The FORUM agreed by consensus on the principle that the fees of the independent persons of standing should be fixed at a specific amount per meeting day with no limitation of the total amount of fees spent on a case to a maximum amount.
25. The *Chair* concluded that any technical comments on the conclusion paper or its annexes should be submitted to the Secretariat by mid-July.

**b) Member States' positions during the interim period
(Annex II to doc. JTPF/003/2003/REV1/EN)**

26. The Member from the Portuguese tax administration informed the FORUM that her country had changed its view and in future would take the position that the Arbitration Convention is suspended and arbitration procedures could only be taken up when it re-enters into force.

**c) Starting point of the three-year period
(Annex III to doc. JTPF/003/2003/REV1/EN)**

27. The Member from the Greek tax administration clarified that the receipt of the first notification was the relevant date. The Members from the French and Swedish tax administration stated that they would clarify their positions in writing.
28. The controversial discussion centered around the question whether the Arbitration Convention, and in particular the definition of the term “first notification of the action” in Article 6 (1) of the Convention, should only apply to transfer pricing adjustments. Conversely, the Secretariat in its explanatory note in the marked version of Annex III took the view that the Arbitration Convention should also apply to cases of double taxation where there is no transfer pricing adjustment.
29. Some Members from tax administrations stated that the vast majority of the relevant cases related to transfer pricing adjustments. One Member from a tax administration added that both the title of the Arbitration Convention and Article 5 referred to “the adjustment of profits”. Double taxation not resulting from a transfer pricing adjustment, therefore, seemed not to be covered by the Convention.
30. Several Members, in particular from business, spoke up for a broad scope of the Convention, i.e. including cases outside transfer pricing adjustments, pointing to Article 1 which deals with the scope of the Convention and does not refer to the adjustment of profits. Conversely, one Member from business took the view that there was no need for clarification. He suggested relying on the Commentary to Article 9 of the OECD Model Tax Convention, because Article 4 of the Convention was only applicable in cases of Article 9 of the OECD Model Tax Convention.
31. The Observer from the OECD stated that Article 9 of the OECD Model Tax Convention generally did not prevent the application of national rules on thin capitalisation.
32. The discussion showed that a large majority of Members favoured a broad scope of application for the Arbitration Convention and wished to keep the new wording as suggested by the Secretariat without, however, the explanatory note. Those two Members who opposed to the suggested changes were asked to reconsider their

position in order to reach consensus. In answer to it, they expressed their intention to study further this issue.

**d) Minimum information requirements to start the two -year period
(Annex IV Rev 1 to doc. JTPF/003/2003/REV1/EN)**

33. The crucial issue for tax administrations was how to deal with non-co-operative taxpayers. Members from business argued that the FORUM should not focus on the small minority of no-cooperative taxpayer but on the vast majority of normal cases.
34. One Member from a tax administration expressed the view that tax administrations and taxpayers had the same objective: greater clarity when the two-year period starts. He added that a “case” as referred in Article 7 (1) of the Convention was different from a taxpayer’s complaint. A “case”, he said, must be more than a complaint which, according to Article 6 (2) of the Convention, had to be well-founded to trigger a mutual agreement procedure. Taxpayers should, in any case, be entitled to know when the two-year period starts.
35. Several Members from business objected to any judgmental element, such as preliminary evaluation by the competent authority if a case was well-founded, because this would lead to uncertainty and delays of the two-year period with a lot of money at risk. Also, additional information requirements not covered by the Convention were not acceptable, as they would force taxpayers to comply with documentation requirements not provided for in the Convention. In addition, the tax administration that had conducted a tax audit should have all information available.
36. Opinions among Members from tax administrations with respect to possible safeguards against un-cooperative taxpayers varied substantially. Some Members from tax administrations supported the Secretariat’s draft as a compromise that provides for sufficient information for tax administrations and gives taxpayers certainty on what documents are required. Other Members from tax administrations requested more information and a judgmental element.
37. One Member from a tax administration suggested to include a provision in the draft proposal from several Member States on “target time scales for mutual agreement procedures” (doc. JTPF/004/2003/EN) that the advisory commission should be able to reject a case if the information provided by the taxpayer was insufficient, in particular in cases of estimation.
38. The *Chair* commented that the advisory commission was sovereign to reject a case. He pointed out that the issue to be discussed was the elimination of double taxation and not examination or taxpayer co-operation, which were both dealt with during the tax audit. The FORUM had to solve the problem of the long duration of MAPs which left no scope for a preliminary evaluation. A long duration until the two-year period starts was incompatible with the Convention.
39. The Secretariat proposed the following changes to the wording of Annex IV:
 - (i) (f) an explanation by the enterprise of why it thinks that the principles set out in Article 4 of the Arbitration Convention have not been observed and

- g) an undertaking that the enterprise shall respond as completely and quickly as possible to all reasonable and appropriate requests made by a competent authority and have written documentation at the disposal of the competent authorities supporting the transfer pricing policy concerning the case
 - h) any specific additional information requested by the competent authority within one month after the receipt of the taxpayer's request
- (ii) the two-year period starts on the latest of the following dates:
- a) the date of the tax assessment notice or equivalent;
 - b) the date on which the competent authority receives the request together with the minimum information as stated under item (i)
40. Following some discussion the *Chair* concluded that there was broad agreement on the proposal subject to examination by those Members who did not fully support it. He asked Members to submit written comments to the Secretariat by mid-July.
41. The *Chair* added that the contribution from the business members (doc. JTPF/010/BACK/2003/EN) on the interplay between internal judicial proceedings and the procedure under the Arbitration Convention would be discussed in the context of the relevant items of the agenda. If time allowed, a more in-depth discussion of that paper could be possible at the September or December meeting of the FORUM.
42. Prof. Maisto gave an overview of the paper highlighting that a taxpayer having to choose between domestic complaint procedures and the Arbitration Convention could be damaged with respect to the duration of the procedure under the Arbitration Convention, the suspension of tax collection, accrual of interests for late payments etc. In his view, Article 7 (1), second sub-paragraph of the Convention constituted a disincentive for the Arbitration Convention.

VI DISCUSSION OF THE WORKING PAPER ON THE DRAFT PROPOSAL FROM SEVERAL TAX ADMINISTRATION MEMBERS ON “TARGET TIME SCALES FOR MUTUAL AGREEMENT PROCEDURES” (DOC JTPF/004/2003/EN)

43. Several Members commended the paper as well-balanced and acceptable. The Member from the German tax administration requested that the document should also deal with the problem of the interplay between internal judicial proceedings and the procedure under the Arbitration Convention, in particular Article 7 (3) of the Convention.
44. The Member from the Belgian tax administration said the only problem was the application of Article 7(3) of the Convention. She added that there were cases where taxpayers dropped their appeals in order to invoke the Arbitration Convention, because Belgium required the withdrawal at the beginning of the procedure.
45. A Member from business commented that the Arbitration Convention superseded domestic law. He also noted that Belgium had not declared that it would apply

Article 7 (3). The FORUM agreed by consensus that Member States should inform the Secretariat by 15 July of their position as regards Article 7 (3).

46. A Member from a tax administration wished paras. 3 (d) and 8 of the working paper to be clarified. The Member from the French tax administration requested changing the wording of para. 3 (f), as France, for constitutional reasons, was unable to use a language other than French in official correspondence with another competent authority. The French competent authority could, however, attach an English translation. He added that in the light of the complexity of some transfer pricing cases, the time limits laid down in the working paper could only be considered as indicative. As regards para. 12 (b), regular meetings, eg. once a year, should be organised by the competent authorities if there is a sufficient number of cases.
47. There was a controversial discussion on the scope of the recommendations of the working paper. Some Members from tax administrations expressed the view that the document should only address MAPs under the Arbitration Convention, whereas other Members from tax administrations and Members from business favoured a broader scope including MAPs under double tax treaties between Member States.
48. Some Members from tax administrations suggested that the working paper should be written in the context of the Arbitration Convention with a note adding that the same principles and time scales – if possible - should be applied to MAPs under double tax treaties between Member States.
49. The discussion revealed a need to clearly indicate which Member State should initiate the preparation of the first position paper. The majority view was that this should be the Member State that made the transfer pricing adjustment, not least to avoid crossing position papers. This Member State should also bear the burden of proof.
50. The Observer from the OECD said that it was up to the FORUM to decide about the scope of the paper. In any case, the interaction between the different procedures and the status of the recommendations should be clarified. As regards drafting suggestions, he stated that the term “profit” also included losses.
51. The Chair concluded that there was broad agreement on the substance of the document. He asked Members to communicate any drafting suggestions in writing to the Secretariat by 15 July.

VII THE ACCESSION OF EU CANDIDATE COUNTRIES TO THE ARBITRATION CONVENTION (DOC JTPF/005/REV1/2003/EN)

52. The *Chair* informed the FORUM that for legal reasons it was impossible to expedite the entry into force of the Convention in relation to the candidate countries. The Convention will, therefore, enter into force between the accession countries and the existing Member States in analogy with the enlargement in 1995.

VIII PROGRESS REPORT ON THE WORK ON DOCUMENTATION REQUIREMENTS (IBFD SURVEY DOC JTPF/009/BACK/2003/EN)

53. Member States were asked to confirm or correct the relevant country statements in the IBFD study by 30 June, otherwise the statements would be deemed valid.
54. Members from business informed the FORUM that a position paper from business on documentation requirements would be available by the end of June. The FORUM noted that five Member States had established a drafting sub-group.
55. Members from this drafting sub-group explained that they were trying to draft a Code of good practice that should be helpful for tax administrations and business. The sub-group would also draft the description of a so-called “masterfile”, which was a set of documents that a multinational enterprise should have available in all Member States where it performs business activities.
56. A Member from business outlined the planned position paper from business stating that it would not propose minimum documentation requirements, because these were only of limited use since they only avoided penalties. The documentation of an enterprise should be sufficient so as to allow a tax inspector to decide where to focus. He argued that business wanted standard documentation requirements that allowed for group transactions.
57. Business Members hoped that two major trends in the EU could be reconciled: more and more detailed, burdensome documentation requirements in some Member States and no legal or administrative documentation requirements in other ones.
58. One Member from business reported about the results of an unofficial business survey in which about 25 companies had reported which transfer pricing documentation areas as required under PATA, IRS Sec. 6662 and the OECD Transfer Pricing Guidelines were “readily available” or “not standard available”. He noted that the survey showed where business envisaged problems with documentation requirements and which problems would be dealt with in future discussions.
59. A Member from a tax administration considered that the business Members in the JTPF were large multinationals and that rules on documentation requirements were needed that were applicable also to SMEs. The question was whether SMEs could apply the same sort of documentation requirements or whether they needed specific rules.

IX DISCUSSION ON THE RESULTS OF THE SURVEY ON THE SUSPENSION OF TAX COLLECTION, INTEREST AND PENALTIES (DOC JTPF/008/2003/EN AND DOC JTPF/010/BACK/2003/EN)

60. A Member from a tax administration argued that the issues addressed in the working paper fell outside of the transfer pricing rules and, in addition, were governed by national legislation. He expressed doubts that any useful conclusions could be drawn on the wide range of issues.
61. Another Member from a tax administration agreed pointing to the complexity of the issues. He added, however, that these issues were very important for businesses and tax administrations and that it was important to see what options were available.

62. On the issue of suspension of tax collection and interest charges a Member from business said that normally, a suspension “disappeared” when a domestic appeal needed to be withdrawn. As suspensions of tax collection and interest charges were in the discretionary power of tax administrations, probably no legislative changes were necessary to change that situation. Another Member of business pointed to the issues of interest for late payment and interest on refunds and the ECJ implications if those rules were only applied domestically.
63. The *Chair* expressed the view that equal treatment was necessary for appeals and MAPs. He pointed to the problem, that the Council, however, had to decide on this issue.

IX ANY OTHER BUSINESS (DOC JTPF/005/2003/EN)

64. The *Chair* clarified that assistants of JTPF Members had the right to speak in the Forum but had no voting right.
65. The FORUM agreed by consensus to submit an interim report to the Council on the first part of the working program, i.e. the Arbitration Convention and related issues of MAPs, in early 2004. The Secretariat will, therefore, present a draft report for the September meeting.
66. It was agreed by consensus that the next JTPF meetings should take place on 11 September and 11 December 2003.