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DIRECTORATE-GENERAL  
TAXATION AND CUSTOMS UNION  
Direct Taxation, Tax Coordination, Economic Analysis and Evaluation  
**Unit D1 Company Taxation Initiatives**

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## **EU JOINT TRANSFER PRICING FORUM**

### **JTPF Members' replies to the written consultation on secondary adjustments**

**Meeting of 8 March 2012**

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Replies received by 22 February 2012: AT, BE, BG, CY, DE, ES, IE, FR, IT, NL, RO, SE, UK, and PSM.

## **Introduction**

JTPF members were invited to send comments on the 3 options under consideration for further proceeding with secondary adjustments by answering the following questions:

### **Question to the members:**

1. Do JTPF Members wish to suggest further options?
2. Which option is preferred by JTPF Members?

### **Option 1: limit the JTPF outcome to the publication of a state of play table**

This option would result in the publication of the country survey together with some general conclusions on secondary adjustments similar to what has been developed in the OECD MEMAP. Additionally some reference to the parent-subsidiary directive could be included.

### **Option 2: issue a recommendation rejecting the application of secondary adjustments**

This option would build on option 1 (i.e. publish the survey) supplemented by a recommendation based on the JTPF conclusions and the MEMAP.

As the MEMAP includes a recommended best practice for several issues but not for secondary adjustments, the JTPF considers developing a specific recommendation that would be applied amongst MS.

The recommendation could read as follows:

Considering the EU context where the Parent-Subsidiary Directive prevents in most cases the application of withholding taxes on any distribution (hidden or not) and the low number of MS allowing secondary adjustments, it is recommended not to apply any secondary adjustment linked to a primary adjustment between EU related parties.

### **Option 3: issue a limited recommendation to consider secondary adjustments as covered by the AC**

This option would build on option 1 (i.e. publish the survey), supplemented by a recommendation to consider secondary adjustments under the AC.

## SUMMARY OF JTPF MEMBERS' REPLIES

Member	Q1	Q2 chosen option			Comment
		1	2	3	
Austria		x		x	Not 2
Belgium		x			
Bulgaria		x			Not 2 or 3
Cyprus	NO		X		
Czech Republic					
Denmark					
Estonia					
Finland					
France	YES			x	Support a recommendation similar to option 3 that would build upon a part of the MEMAP recommendation.
Germany	YES	x			Option 2 seems possible with some amendments. See below full reply.
Greece					
Hungary					
Italy	NO	x			
Ireland		x	x		Not 3
Latvia					
Lithuania					
Luxembourg					
Malta					
Netherlands	NO		x		Ready to investigate 2 and if it fails go to option 1.
Poland					
Portugal					
Romania	NO		x		
Slovak Republic					
Slovenia					
Spain	NO	x			Secondary adjustments are not covered by AC. No recommendation at all is better.
Sweden		x			
United Kingdom	YES	x			Suggest further questionnaire based on 4.68 of the OECD TPG.
Private sector	YES				Suggest investigating further by combining options 2 and 3 or by including the repatriation of funds under option 3 as a recommendation.
Total		9	4	2	

## JTPF MEMBERS' REPLIES

Member State	
Austria	We are neutral with regard to Option 1 and 3. However, we strongly oppose against Option 2. Secondary adjustments are not only about the question of withholding taxes but about changes in companies business assets. These changes have to be reflected, ie if a company made a hidden distribution to its related company in another country, its assets are reduced through this hidden distribution and it is necessary to reflect this reduction in the books and accounts. The question of withholding taxes on such a hidden distribution is a completely different question and already dealt with in the parent subsidiary directive within the EU. Austria is certainly prepared to further elaborate on this during the next meeting.
Belgium	Q2: We would prefer option 1
Bulgaria	We support option 1. We do not prefer to further address the other two options.
Cyprus	Q1 No Q2 We prefer option 2. We agree with justification provided by Commission. Furthermore we prefer option 2 as ALP adjustments are for tax purposes only and therefore price of transaction in books may differ. As we have already informed the Commission, per our legislation ALP adjustments are for tax purposes only. We are not concerned with price of transaction in books but whether price is at AL. If price not at AL an adjustment is made in tax computation. Cyprus has no legislation relating to secondary adjustments.
Czech Republic	
Denmark	
Estonia	
Finland	
France	The French TA would welcome an option similar to option 3, ie the issuance by the Forum of a recommendation that the treatment of a secondary adjustment should be linked to the primary adjustment of transfer prices covered by the AC. Such a recommendation could also build upon the OECD "MEMAP" OECD recommendation, that States should make efforts to eliminate double taxation resulting from secondary adjustments, particularly in the context of the bilateral tax treaties, or provide for the possibility of cancellation of the secondary adjustment, for example in case of repatriation (or similar operations) of the amounts wrongfully transferred.
Germany	We are not sure that the wording of the paper is adequate saying that "only" nine MS have legislation on secondary

	<p>adjustments because these nine MS are not quite unimportant.</p> <p>To the alternatives the Secretariat proposed:</p> <ol style="list-style-type: none"> <li>1. The publication of the results of the questionnaire does not seem to be a problem. It should be mentioned that the issue of repatriation (MEMAP) is a sensitive one because following the German domestic law this is only helpful in certain situations.</li> <li>2. The second alternative is beyond my responsibilities because secondary adjustments are an issue of compulsory domestic law in general and are used in first line in purely domestic situations. I think it would be only possible to find a wording in the document advising the domestic legislator refraining from secondary adjustments in cases of inter company hidden distributions within the EU. In addition it could be pointed out that it makes sense to avoid double taxation caused by a secondary adjustment in MAP.</li> <li>3. The third alternative causes problems, because the German negotiators of the AC obviously thought that the AC does not influence the possibility of secondary adjustments in Germany. A proposal could be to advise the respective taxpayer (applicant in the AC) to simultaneously start the procedure of the AC (for core transfer pricing) and a MAP based on the treaty to find a solution for double taxation caused by a secondary adjustment if all MS can agree to such a procedure.</li> </ol>
Greece	
Hungary	
Italy	<p>Q1: No</p> <p>Q2. Italy strongly prefers Option 1 (limit the JTPF outcome to the publication of a state of play table).</p> <p>We do not support Option 2 and 3.</p> <p>Provided that Italy has no rules on secondary adjustments, we would like to underline the following.</p> <p>With reference to Option 2 (issue a recommendation rejecting the application of secondary adjustments), according to Italy the decision to eliminate these rules is up to the countries that have such rules and cannot be imposed by a</p>

	<p>recommendation of the Forum.</p> <p>With reference to Option 3 (issue a limited recommendation to consider secondary adjustments as covered by the AC), according to Italy this topic falls completely outside the scope of the European Arbitration Convention and, consequently, should not be addressed by the Forum. The double taxation caused by rules on secondary adjustments in the legislation of other member countries could be eliminated through the mutual agreement procedure provided for in the bilateral treaty, but without recourse to the arbitration commission provided for by the European Arbitration Convention. Actually, there cannot be an obligation requirement for Country B to eliminate the double taxation caused by a secondary adjustment in Country A. It should be recalled that the same OECD Guidelines underline that ‘some countries might refuse to grant relief in respect of other countries’ secondary adjustments and indeed there are not required to do so” (cfr. par. 4.69).</p>
Ireland	<p>We can't agree Option 3 as we consider that secondary adjustments are not covered by the AC.</p> <p>We can agree Option 1.</p> <p>We can also agree Option 2: however, in saying this I wish to point out that Ireland does not have domestic legislation that would allow us to impose a secondary adjustment.</p>
Latvia	
Lithuania	
Luxembourg	
Malta	
Netherlands	<p>Q1: NO</p> <p>Q2: The Netherlands have not experienced problems with this issue in practice. However, we are ok to investigate the merits of option 2 a little further. If this fails, we prefer option one.</p>
Poland	
Portugal	
Romania	<p>Q1: NO</p> <p>Q2: We prefer option 2.</p>

Slovak Republic	
Slovenia	
Spain	<p>Q1: NO Q2: option1</p> <p>Spain prefers to recognize the value of the results of the survey carried out but not take the topic any further.</p> <p>Spain considers that the secondary adjustment is a question of internal legislation. Therefore, Spain does not find it necessary to take the topic any further and would not like any recommendation issued regarding the application of the secondary adjustments within the EU.</p> <p>The secondary adjustment, as established in the Spanish legislation, complies with the international accounting standard principle of substance over form, as it implies a reclassification of the income based on the nature of the controlled transaction. Moreover, transactions among domestic related parties are also subject to the secondary adjustment.</p> <p>As for the third option, we consider that normally no transfer pricing issues are at stake in a secondary adjustment; the issue, should it be any, will normally be an issue related to the problem of the characterisation of the income. Therefore, Spain does not consider secondary adjustments under the scope of the Arbitration Convention.</p>
Sweden	We prefer option 1
United Kingdom	<p>The OECD currently has very little guidance on secondary adjustments other than that providing information on what these are. However, there is one bit of guidance in 4.68 of the TPG that is particularly relevant. What this says is that “Where the secondary adjustment takes the form of a constructive dividend any withholding tax which is then imposed may not be relievable because there may not be a deemed receipt under the domestic legislation of the other country”</p> <p>This is very apposite observation as unless the constructive dividend is being taxed in the other country (we are not aware of this arising in any of the Tax Administrations we have dealt with) then double taxation does not arise and as such there is nothing to consider under MAP, apart from the primary adjustment.</p>

	<p>As the majority of secondary adjustments are constructive dividends, given the OECD comments we question whether there is anything here we need to consider further, unless and until the OECD issue any revised guidance.</p> <p>Perhaps we could suggest that before we consider this further we issue a further questionnaire to establish whether any MS tax constructive dividends.</p> <p>We do not support Options 2 and 3.</p>
Private sector members	<p>We have two comments/suggestions:</p> <p>Firstly, would it be possible to explore the possibility of combining Options 2 and 3, i.e. as first option would require issuing a (non-binding) recommendation not to apply secondary adjustments and as second option for countries where first option would not be possible making sure that secondary fall under the AC?</p> <p>Secondly, respecting Option 3, can we suggest that this option (ie "Issue a limited recommendation to consider secondary adjustments as covered by the AC") should go on to recommend the repatriation of funds as best practice to eliminate the adjustment (either at the tax audit or MAP/AC stages), following the Extract of the MEMAP attached, so as to facilitate that the MS can (i) mitigate the number of cases to discuss at the AC or (ii) reach the necessary agreements on this point at the AC phase by having the same approach to the resolution of this issue.</p>