



Brussels, 21 January 2005
Taxud.E1/WB

Doc: JTPF/002/2005/EN

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

held in Brussels on 14th December 2004

1. OPENING OF THE MEETING

1. The *Chair* opened the meeting reminding Members of the success of the Forum's work in 2003 and expressing his hope that this would continue with the new report to be completed at the current meeting. The Vice-Chair for business also expressed his hope that the report on documentation requirements would be adopted by consensus.

2. ADOPTION OF THE AGENDA (DOC. JTPF/022/2004/EN/FR/DE)

2. The proposed agenda was adopted by consensus.

3. ADOPTION OF THE SUMMARY RECORD OF THE JTPF MEETING OF 16TH SEPTEMBER 2004 (DOC. JTPF/021/2004/EN)

3. The summary record was adopted by consensus.

4. ORAL REPORT ON THE STATE OF PLAY OF THE FORUM'S FIRST REPORT

4. The *Chair* reported that the ECOFIN Council of 7 December 2004 had adopted the Code of Conduct and the draft Convention on the accession of the new Member States to the Arbitration Convention. The Council had also welcomed in its Conclusions the Commission's decision to extend the mandate of the Forum until the end of 2006.
5. The *Chair* underlined that it was now up to the Member States to properly implement the Code of Conduct. The Member from the *French Tax*

Administration stated that his country planned to issue regulations in the first quarter of 2005 implementing the Code of Conduct. He indicated that these regulations would provide for the suspension of tax collection during mutual agreement procedures and added that France's second arbitration case was pending with Germany.

6. The Member of the *Greek* tax administration informed the FORUM that the Greek Parliament had ratified the 1995 Convention concerning the accession of Austria, Finland and Sweden to the Arbitration Convention and that the instrument of ratification would soon be deposited.

**5. FORMAL APPROVAL OF THE WORK PROGRAMME 2005-2006
(DOC. JTPF/008/REV4/2004/EN)**

7. The work programme 2005-2006, as already agreed in written procedure, was formally adopted.
8. The FORUM agreed to the suggestion of the Member of the *French* tax administration to take stock of pending mutual agreement procedures under the Arbitration Convention. The Secretariat was, therefore, asked to prepare a questionnaire to be distributed to national tax administrations by the end of December 2004. On the issue of monitoring it was concluded that once a year the FORUM should discuss practical difficulties that have emerged in the application of the Arbitration Convention. A peer review as part of the monitoring exercise was also considered helpful at a later stage once Member States had made some experience with the application of the Code of Conduct.

**6. DISCUSSION AND ADOPTION OF THE DRAFT REPORT ON THE FORUM'S
ACTIVITIES FROM JANUARY 2004 TO DECEMBER 2004
(DOC. JTPF/020/2004/EN)**

9. The Secretariat presented the document explaining that the draft working paper was based on the discussions in the Forum on 16 September 2004, in the documentation sub-group on 19 October 2004, and on written comments received from FORUM Members on the version of 29 October 2004.
10. The *Chair* asked FORUM Members to focus the discussions on substantial issues and to submit drafting suggestions in writing.
11. Some Members suggested revisiting the summary of proceedings (paras. 1 to 13) once the final conclusions were agreed.
12. The suggestion by a Business Member to insert language in paras. 8, 88, 99 and 28 of the Annex that the EU TPD should be optional per country, per business segment and per legal entity, was withdrawn.
13. On para. 15, which states that the range of corporate tax rates for retained earnings is a reason for transfer pricing manipulation, the *Chair* explained that this paragraph only described a factual situation and did not voice an opinion. The FORUM, nevertheless, agreed that this paragraph should be redrafted to

better reflect its actual relevance for the report. The Member from the *UK Tax Administration*, however, maintained his reservation.

14. The Members from the *Slovenian* and *UK Tax Administration* withdrew their proposals made in para. 16.
15. FORUM Members agreed to delete the reference to "domestic investments/ transactions" in para. 17.
16. The proposal from a Tax Administration Member to delete para. 25 was also agreed considering that the last sentence of this paragraph had to do with the work program and not with the report as such and that the paragraph did not add much to the work of the FORUM.
17. One Tax Administration Member proposed deleting paras. 26 to 31 since in his opinion the Forum's task was not to comment on other international agreements. Considering that this section describes the context of the Forum's work, it was finally agreed to redraft this section in a more descriptive and factual manner.
18. On paras. 34 to 36, Forum Members expressed different views. Some were of the opinion that this section should be deleted since the issue of risk assessment had not been discussed in detail. Others, however, were in favour of retaining the reference to risk assessment in the report. After some discussion it was agreed to retain this section but delete the reference to a risk assessment questionnaire.
19. Several Members from tax administrations intervened on para. 40 insisting that taxpayers should prepare written materials for tax purposes not only in exceptional cases. After a controversial discussion it was agreed by consensus to delete the words " in exceptional cases" in the first sentence of that paragraph.
20. On para. 43, not all Members agreed to replace "written documentation" with "evidence" since the latter was a broader concept than the former which might lead to confusion. It was suggested and agreed to delete "written" but to retain "documentation" instead of "evidence".
21. As para. 54 was partly contained in para. 51, the Secretariat was asked to examine these paragraphs and remedy any redundancies. Also, the term "transfer pricing policy" in the third indent of para. 51 seemed not to apply to all items listed thereafter.
22. The Member from the *UK Tax Administration* withdrew his proposal on para. 55.
23. Since some Members considered the reference superfluous, it was decided to delete the last sentence of para. 60.
24. After some discussion the FORUM agreed to retain the second sentence of para. 64.
25. Although a Business Member initially considered the new wording in para. 65 as a useful clarification, it was agreed to take out the words "after specific demand of a tax administration during an audit" since the issue of timing was dealt with later in the report.

26. On para. 67, it was agreed to delete the last sentence referring to other international fora and, as suggested by a Business Member, to add in the first sentence "many" before "multinational enterprises" and delete "in principle".
27. An intensive debate was held on the amendment to para. 69 suggested by a Business Member specifying whether and when additional information could be requested in order to protect taxpayers from unreasonable requests for information. Whereas Members from tax administrations were of the opinion that there should be no constraints on their actions, Business Members wanted some clarification and rejected additional requirements going beyond the EU TPD. Business Members tabled a drafting proposal which could, however, not be discussed due to time constraints.
28. The Member from the *UK* tax administration questioned whether it was appropriate to have para. 73 in the text since in his view the "best practice approach" had not been discussed sufficiently. Other Members, however, strongly supported the Secretariat's draft, stating that it was merely a factual definition and an introduction to the next paragraph. It was finally agreed by consensus to retain this paragraph and rather discuss the issue addressed in para. 73 in the context of para. 87.
29. Upon suggestion of a Tax Administration Member, it was agreed to replace in the last sentence of para. 85 the words "is not appropriate" with "may not in all cases be appropriate".
30. The Member of the *UK* tax administration and one Business Member were opposed to the table in para. 86 listing the pros and cons of the different documentation approaches reasoning that the content of that table had never been discussed in detail and that some of its findings might be questionable. The *Chair*, however, pointed out that the table had already been included in the document of 24 May 2004 (JTPF/019/REV2/2003/EN) and had subsequently been submitted to the written comments procedure. He added that the table was only an illustrative overview and, unless its content was inaccurate, should, therefore, be kept. After some discussion it was agreed to redraft paras. 86 and 87 underlining that the FORUM had not discussed the three approaches in detail and that the table was only based on a preliminary analysis. It was also agreed to maintain the table with a reservation from the Member of the *UK* tax administration.
31. Para. 88 was discussed in conjunction with para. 125. Business Members claimed that some business segments of a MNE were as large as some other MNEs and were not always suitable to apply the EU TPD. They were, therefore, looking to ensure the necessary flexibility in applying the EU TPD by providing for certain countries or business segments the possibility of not being included in the EU TPD, for example, where the divisions of a MNE have no inter-company transactions.
32. Business Members also suggested deleting the words "in exceptional cases" in para. 125 claiming these cases were actually not exceptional, i.e. rare, in practice. Some Members from tax administrations rejected this proposal because it would reduce transparency and might lead to "cherry picking" by business.

33. The compromise suggestion from a Tax Administration Member to delete "exceptional" and add some wording giving guidance on the term "well justified", e.g. by adding "with genuine commercial circumstances", was accepted. The FORUM also agreed to clarify in para. 88 that the masterfile and the country specific documentation was one single file and asked the Secretariat to harmonise the use of the word "uniform" in para. 88 and para. 18 of the annex. Business Members withdrew their proposal that businesses should have the option to apply the EU TPD to only selected Member States.
34. Members from tax administrations circulated a room document with a new draft of para. 94 particularly stating that a taxpayer should "in principle" not be liable to documentation related penalties. The room document also contained additional definitions for the glossary on documentation related penalties, co-operation related penalties and adjustment related penalties.
35. Several Business Members wondered what the exceptions of the principle could be, i.e. when taxpayers were liable to documentation related penalties. Members from tax administrations explained that the intention was to clarify the concept of penalty relief at the different stages of the tax procedure.
36. One Business Member noted that the last part of the first sentence of para. 94 ("...or denied access to the EU Arbitration Convention for documentation related reasons") was redundant as it was not conceivable that a taxpayer could be denied access to the EU Arbitration Convention for documentation related reasons, i.e. because of a serious penalty in the meaning of Article 8 of the Arbitration Convention, if he was not liable to documentation related penalties.
37. A Tax Administration Member remarked that the report would not constitute a binding obligation but only an appeal to tax administrations to adapt their penalty rules to the recommendations of the report.
38. The *Chair* confirmed that this was indeed the case but the Forum should, nevertheless, issue conclusions it thought useful without having in mind the decision making process in the future. He also expressed the opinion that adding the words "in principle" in para. 94 did not contribute to more legal certainty and clarity.
39. It was finally agreed by consensus to delete the words "in principle" in the first sentence and amend the last sentence in para. 94 so as to make reference to "non-cooperation related penalties" and to replace "documentation" with "information and documents in addition to the EU TPD". The additional definitions for the glossary were adopted with adding the words "or the domestic documentation requirements of a Member State" in the definition of the the co-operation related penalties.
40. The Member from the *Portuguese* tax administration disagreed with the first sentence of para. 94 arguing that the issue of penalties should be considered independently from the issue of documentation requirements as it raised questions in relation to equal treatment of taxpayers. She added that the issue of penalties should only be discussed in the context of the new work program.
41. Extensive discussions were held on the substance of para. 98. Several Tax Administration Members were opposed to the term "mandatory" in the title of

section 4.4.1.. The *Chair* responded that even if the Forum was not proposing a legislative instrument, it was of fundamental importance for the EU TPD approach to work that a maximum of Member States would accept it.

42. One Tax Administration Member asked what "mandatory acceptance" and "departure from the EU TPD approach" meant. He was also concerned about the possible consequences of mandatory acceptance, e.g. whether Member States could request less or more documentation than recommended in the report. For another Tax Administration Member, however, the text was fully clear. He wondered, echoed by a Business Member, whether tax administrations were willing to commit themselves to relieve taxpayers from documentation related penalties.
43. Several Tax Administration Members expressed the view that considering the differences in domestic legislation and the very limited experience of certain Member States with transfer pricing documentation, the new approach should not be made mandatory to tax administrations. They added that the conclusions on the EU TPD, which they considered a good compromise taking into account the interests of both tax administrations and business, was only a political commitment and should be considered as a framework that Member States should implement in good faith and in a way they find appropriate. Interpretation of the conclusions of the report should be left exclusively with the Member States and not the ECJ. They also remarked that the EU TPD approach was a collective experiment and future developments and practical experience might show that it needed to be amended. It was, therefore, important to monitor the implementation and application of the EU TPD.
44. Business Members pointed out that before multinational enterprises could opt for the EU TPD Member States would have to implement this approach first. They added that Member States which would not implement the EU TPD would not get the masterfile documentation and the pertaining information.
45. One Tax Administration Member suggested deleting the word "mandatory" in the title of section 4.4.1. but keeping the statement on penalty relief in the text. The FORUM agreed to this suggestion underlining that it was desirable that all Member States would apply the EUTPD.
46. The suggestion of a Business Member to add a revision clause to allow for later amendmends if necessary was in principle agreed by the Forum but it was considered more appropriate to insert it at a later stage, i.e. in the Commission proposal.
47. A Member from a tax administration proposed adding language that the interpretation of the conclusions in the annex of the FORUM's report and the wording of any provisions implementing the conclusions in national legislation, guidance, administrative practice, etc. would exclusively be left to Member States.
48. The *Chair* responded that this was in substance already stated in para. 102 but could be clarified. The Member from the *German* tax administration stated that he would make written comments on para. 102, while the Member from the *Danish* tax administration kept his reservation as regards the legal form of the Commission proposals.

49. The Member from the *UK* tax administration wanted the third sentence of para. 98 to be amended clarifying that a Member State could ask for more information and documents than provided for in the EU TPD so as to retain Member States' right to request all the information and documents as permitted in their domestic laws. Another Member from a tax administration proposed deleting the penultimate sentence since it seemed unbalanced.
50. The *Chair* recalled that the possibility for tax administrations to request additional information and documents was already addressed in the draft report and the conclusions (paras. 107, 120 and 3 respectively). Several Business Members commented that additional documentation requirements going beyond the EU TPD were unacceptable for them. The *Chair*, therefore, concluded to retain the third sentence of para. 98 and the Member from the *UK* tax administration made a reservation on this sentence which, he said, might be revisited once the final recommendations were examined. It was also agreed by consensus to delete the penultimate sentence of para. 98.
51. There was a controversial discussion on the legal form that the Commission proposals to the Council should take. Tax Administration Members were concerned that the proposals would be strictly binding and that the ECJ might rule against a Member State for not properly having implemented the proposals into national legislation. Some Tax Administration Members, therefore, expressed the view that the report of the JTPF should clearly indicate that the Commission proposals should be a Code of Conduct and not a Commission Recommendation.
52. The *Secretariat* expressed understanding for the concerns of Member States but underlined that the FORUM had no competence to decide on the format of the Commission's proposals but that it was up to the Commission to decide in what form it wanted to submit its proposals to the Council. The Secretariat also stated that neither the Forum's report nor the Commission proposals were legally binding. Member States would discuss the Commission proposals in the Council and decide whether or not the form of the proposals as suggested by the Commission should be adopted.
53. The Secretariat also pointed out that the EC Treaty and the ECJ considered true recommendations not legally binding on Member States. In addition, there was no significant legal difference between a Code of Conduct and a Recommendation as both instruments were soft law and, therefore, not binding. It could, nevertheless, not completely be excluded that a national court might rely on either instrument for purposes of interpreting a national law.
54. The FORUM agreed by consensus to delete the new text in para. 104 proposed by the Member from the *German* tax administration, and the Member from the *UK* tax administration agreed to delete his footnote on para. 105. The words "...that transfer pricing documentation is required" in the first sentence of para. 105 were replaced by "...to implement the EU TPD".
55. Due to time constraints, paras. 109 et seq. of the draft report could not be discussed. The Secretariat was asked to revise the first part of the draft report in the light of the discussions and circulate the redraft to FORUM Members for written comments to be received by end of January / early February 2005.

7. DISCUSSION ON THE FOLLOW-UP OF THE RE-ENTRY INTO FORCE OF THE ARBITRATION CONVENTION (DOC. JTPF/019/REV1/2004/EN)

56. The *Chair* reminded Members from tax administrations that three Member States still needed to reply to the questions asked in the referred document.

8. OTHER BUSINESS

57. It was agreed that the next meetings of the Forum would take place on 16th March and 21st June 2005 and that the meeting of 16th March would primarily be devoted to completing the draft report. At that meeting the FORUM would also have a first round of discussions on a new working document on preventive measures to avoid double taxation related to transfer pricing adjustments. The Secretariat was asked to circulate a first draft of that new working document by mid-February 2005.