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

held in Brussels on 3rd October 2002

EXECUTIVE SUMMARY

The FORUM adopted its rules of procedure agreeing that all working documents should be considered public unless the FORUM decided otherwise by consensus or a Member opposed the disclosure of its proprietary documents. Minutes of meetings should also be made public after approval by the FORUM.

Business experts elected *Mr. Guy Kersch*, Director European Taxes of Pharmacia S.A., Luxemburg, and Member States elected *Mrs. Montserrat Trape Viladomat*, Deputy Head of the International Taxation Unit from Spain as Vice-Chairpersons.

The FORUM held an exhaustive exchange of views on its working programme and the priorities for the next two years.

The discussion showed that most Members were of the opinion that the highest priority should be attributed to practical solutions for a more uniform application of the Arbitration Convention in order to achieve more certainty as regards the procedural issues of the Arbitration Convention. That included both the first phase of the Arbitration Convention, i.e. the mutual agreement procedure, and the second phase, i.e. the arbitration itself.

The FORUM agreed to give more clarification and develop a common approach on the starting point of the three-year application period according to Article 6.1 of the Arbitration Convention and the two-year period provided for reaching an agreement, i.e. the first phase according to Article 7.1 of the Arbitration Convention.

There was also consensus that the FORUM should give more specific guidance as regards the proceedings during the Convention's arbitration phase and should seek a common view on a uniform, pragmatic and transparent solution on how to handle cases, both pending and new ones, during the interim period.

It was however decided not to address the issue of interpretation of definitions for the time being.

On more general transfer pricing issues, and despite some reservations from certain Members, the majority view was that the issue of documentation requirements on transfer prices should be addressed by the FORUM.

It was also concluded that despite the demand for APAs from businesses, APAs faced quite some scepticism and criticism because of the shortcomings linked to them. The FORUM should therefore in the first place study other procedural means to enable taxpayers to achieve greater certainty and in particular the possibility of prior consultation before making adjustments between tax administrations. Both issues should be examined together but were attributed low priority.

Simultaneous examination of transfer pricing cases by different tax administrations was to be dealt with only after further progress on the above was made.

On the establishment of a detailed calendar there was consensus that generally two topics should be discussed at each of the FORUM's meetings.

However, considering the high priority given to the issue, it was decided that at the next meeting of the FORUM only procedural improvements of the Arbitration Convention and related issues of the mutual agreement procedure, e.g. suspension of tax collection, interest charges etc., should be discussed. At the following meeting the FORUM will continue these discussions and will in addition deal with other transfer pricing aspects of dispute settlement.

I. OPENING OF THE MEETING

1. *The Commission services* welcomed the Members of the FORUM, recalling the history of the establishment of the FORUM (the Commission's Company Tax Study and its Communication « Towards an Internal Market without tax obstacles – A strategy for providing companies with a consolidated corporate tax base for their EU-wide activities » and the Council Conclusions of 11 March 2002). The Commission services highlighted that the aim of the FORUM was to work on the basis of consensus in order to examine possible non-legislative improvements to the practical problems related to the application of the transfer pricing rules in the Internal Market and to those related to the implementation of the Arbitration Convention. The Chairman of the FORUM, *Mr. Gibert*, partner with CMS Bureau Francis Lefebvre, a French law firm, was presented as a distinguished expert in international taxation with experience both in the private sector and the tax administration.
2. The Chair addressed the FORUM stressing the importance of its subject and the high expectations raised by the business community. He described the important aspects of the FORUM, notably that for the first time in the area of international taxation Members from tax administrations, industry and consultancy had a forum to work together as transfer pricing specialists in comparing positions and trying to find solutions. He explained that in the light of globalisation much tax revenue was involved both for business and tax administrations. He added that transfer pricing, especially documentation, required substantial management resources and that business therefore attached much importance to the FORUM, which business considered the preferred working area for finding pragmatic solutions to improve dispute resolution procedures.
3. The Chair noted that taxation being a sensitive issue, in particular for governments, the aim to work by consensus was a substantial aspect of the FORUM's working method. While the OECD Transfer Pricing Guidelines formed the fundamental global framework for transfer pricing, the EU had its special rules, e.g. the Internal Market, legislative competence etc. Therefore, the work of the FORUM should be consistent with and complement these Guidelines. Highlighting the close co-operation with the OECD in the area of harmful tax competition and the Code of Conduct, he said the aim was to co-operate and interact with the OECD in a beneficial way. As regards the work programme of the FORUM he stressed that not all problems of transfer pricing or dispute resolution could be solved by the FORUM, and some restraints would still remain. In the scope of the Council conclusions and the two years remit the FORUM's objective was to identify subjects for examination, set priorities and a time-frame in order to report to the Council not later than the end of 2004.

II. ADOPTION OF THE AGENDA (DOC JTPF001/20027EN/FR/D)

4. The proposed agenda was adopted by consensus.

III. DISCUSSION AND ADOPTION OF INTERNAL RULES OF PROCEDURE (DOC JTPF002/2002/EN/FR/D)

5. The Chair recalled that the FORUM, as stated in the Council Conclusions, should aim to work by consensus but if no consensus could be reached decisions on procedural issues would be taken by simple majority. On the issue of confidentiality of working documents (para. 4 sub-para. 2 and para. 8 of the document JTPF001/20027EN/FR/D) the Chair, having regard to the Code of Conduct Group (the minutes of the meetings of that Group are on the Council's website) proposed a maximum of transparency stating that a Member may always request that its proprietary documents be kept confidential.
6. While some Members supported this suggestion, indicating the wide interest to the Forum's work from outside and stating that transparency would help the Forum's work, others were concerned about the disclosure of working documents and the minutes of the Forum's meetings, because that might inhibit Members from working informally and spontaneously.
7. One Member argued that the Council Conclusions concerning the establishment of the JTPF did not take a position against public disclosure of working documents and as the final decision on the FORUM's recommendations would be taken only later on by the ECOFIN Council, the FORUM should make working documents available already during the decision-making process.
8. *The Commission services* explained that, while they were aware of the problems some Members had with the disclosure of documents, the general principles of public access to EU documents was established in Regulation 1049/2001 of the European Parliament and the Council and added that furthermore the policy of the EU Commission was governed by transparency. The current rules on access to documents provide only in very specific cases and circumstances, which would not apply to the activities of the Forum, derogation from the principles established in the aforementioned Regulation.
9. The FORUM finally adopted the rules of procedure and agreed that for the interpretation of para. 4 sub-para. 2 and para. 8 of the document JTPF001/20027EN/FR/D it was decided by consensus that all working documents should be considered public unless the FORUM decided otherwise by consensus or a Member was opposed to the disclosure of its proprietary documents. In addition, the minutes of the meetings should be made public after approval by the FORUM.
10. The FORUM also decided that a timetable with the approximate meeting dates in 2003 and 2004 should be presented at the December meeting.

IV. ELECTION OF VICE-CHAIRPERSONS FOR MEMBER STATES AND BUSINESS EXPERTS

11. After the Chair had addressed the FORUM stressing the need to come to a balanced solution in terms of geographical spread and gender, business experts elected *Mr. Guy Kersch*, Director European Taxes of Pharmacia S.A., Luxemburg, and Member States elected *Mrs. Montserrat Trape Viladomat*, Deputy Head of the International Taxation Unit from Spain as Vice-Chairpersons.

V. DISCUSSION OF THE ISSUES PAPER (DOC JTPF003/2002/EN/FR/D)

12. *The Commission services* first gave an overview of the issue paper, stressing that at this stage there should be no in-depth discussion on each of the subjects, but that the aim of the issues paper was rather to support drafting a two-year work programme. The Chair then offered Members the opportunity to express their opinion on the paper.
13. A number of Members took the floor, welcoming the creation of the FORUM and in particular the participation of business and expressing satisfaction with the draft of the issues paper.
14. One Member said the FORUM was innovative and Members expected a lot but were confident in its success. However, one should neither under- nor over-estimate differences between the business community and governments.
15. *The OECD observer* added that the OECD equally welcomed the work of the Commission on improving dispute resolution processes, a more uniform application of transfer pricing rules within the EU, and the reduction of compliance cost. He noted that the objective of the OECD was that its Transfer Pricing Guidelines were applied in practice at best by all 30 OECD Member States. A coherent approach in the 15 EU Member States could, therefore, be seen as a first step towards achieving this goal.
16. *The Chair* indicated that a questionnaire on the application of transfer pricing rules had been sent to Member States, which would be made available to Members from business. The summary of the answers to that questionnaire would be submitted to the FORUM.

a) Application of transfer pricing rules within the EU

i) Documentation requirements

17. One Member referred to the relationship of the practical rules to be set up by the FORUM with the OECD Transfer Pricing Guidelines. While these Guidelines were the fundamental basis for transfer pricing in the EU, the EU could go even further and, for example, standardise documentation requirements. Another Member cautioned that there were conflicts in the OECD Transfer Pricing Guidelines and that those Guidelines were not sufficient. On the issue of standardisation, one Member weighed the benefits of standardisation, i.e. having only one set of rules, against its possible constraints, because standardisation could lead to too many rules in order to cover everything. Another Member added that standardisation could not solve all problems of tax administrations and businesses as regards the necessary data for transfer pricing. First, the exchange of information procedures should be improved and used.

18. One Member from a tax administration clarified the difference between documentation and evidence. In practice, documentation meant what evidence a taxpayer needed to provide to the tax administration or, in other words, what evidence a tax administration might require. A common approach on documentation requirements did not mean a standardised set of documents.
19. Some Members from tax administrations however, found it important to formulate standardised rules, which, for reason of certainty, was also in the interest of taxpayers. The important question in that respect was which documents should be made available to the tax administration.
20. Members from business stated what was required for tax purposes should be proportionate to what was needed for a company's operational decisions. Only documents that were kept in the normal course of business and were needed for a company's own purposes to set its transfer prices should be required. Some Members from business mentioned that different documentation requirements increased the possible risk of double taxation and that increasing documentation requirements also lead to increasing compliance costs for taxpayers. Especially for SMEs, which did not normally have sufficient resources and experiences, documentation requirements should be minimised.
21. For most Members the question of language comes down to the question if certain languages were acceptable to tax administrations and what languages were compulsory. It was considered a question of translation only and most Members did not find it advisable to enforce a particular language.
22. Most Members from tax administrations stated that the question of burden of proof, which differs in Member States, should not be addressed by the FORUM, because they considered it a question of fiscal sovereignty. They argued that in most countries the question of burden of proof was a fundamental issue of the underlying legal system that went beyond taxation.
23. Most Members agreed, however, that the issue of documentation in terms of what evidence a tax administration might require from taxpayers, was one of the most practical issues in transfer pricing and, therefore, should be discussed. In practice that meant indicating which documents might be helpful and which documents should not be asked for by tax administrations.
24. *The Chair* concluded that the issue of documentation should be addressed by the FORUM despite some reservation from certain Members.

ii) Acceptability of transfer prices to tax administrations

25. A Member from a tax administration considered APAs beneficial for both taxpayers and tax administrations. However, as they were resource-intensive, they were suitable only for large enterprises. In order to provide and publish some guidance to taxpayers, tax administrations had to go beyond APAs, which was an even more ambitious objective.
26. Another Member from a tax administration added that many taxpayers and especially tax administrations were reluctant to conclude APAs because of the resource constraints and lengthy procedure. His government was, therefore, sceptical if APAs could improve dispute resolution procedures.

27. Most Members stated that there was an increasing demand for bilateral and multilateral APAs and they agreed that only bilateral or multilateral APAs should be concluded.
28. A Member from business suggested that if one Member State concluded an APA the other Member States should be obliged to follow suit. Members from tax administrations, however, were opposed to that proposal.
29. Another Member from business suggested that the Commission Services should carry out a study in this area underlining that there was a demand by large enterprises for widespread, swift APAs, albeit under simpler procedures than in the USA. The Member continued that due to different legislation in Member States it was necessary to ensure that tax administrations were able to handle bilateral and multilateral APAs.
30. Some Members from smaller Member States were concerned that, with regard to the costs and human resources involved, they could not possibly process APAs. These Members also suggested that a comparative study on Member States' experience with APAs should be conducted with special focus on the resources required for both tax administrations and taxpayers. One Member conceded that apart from one or two Member States a rule of best practice did not yet exist.
31. One Member from a tax administration noted that the Code of Best practice on APA's, which is included in the Annex to the OECD Guidelines, should be the starting point for further work.
32. The discussion showed that most Member States do not have specific legislation and experience about APAs, but nevertheless are in a position to conclude bilateral and multilateral APAs under the mutual agreement procedure of the relevant double tax treaty. One Member State was reported to have domestic legislation on both unilateral and bilateral APAs, but taxpayers have not yet used it.
33. One Member from business cautioned that APAs in theory provided certainty to the taxpayer, however, in practice, they were a long lasting procedure, during which a lot of documentation was demanded from the taxpayer. Once concluded, this Member added, APAs were no longer "advance" and, therefore, were sometimes quickly outdated. Another Member from business seconded that APAs were only beneficial if they were concluded in substantially less time than a tax audit.
34. A Member from business stressed that APAs could prevent tax disputes and despite the need for confidentiality of taxpayers' data, publication of requests and requirements for APAs could help setting up preventive measures.
35. Members from business assumed that the rising number of APA requests was a result of the increasing number of transfer pricing audits, more risks as regards documentation requirements, and a greater likelihood of penalties. Taxpayers wanted to achieve certainty, avoid financial risks, interests and penalties. If a taxpayer voluntarily wanted prior confirmation, the tax administration should not refuse that request, but also should not set up very detailed rules.

36. Some Members from business raised the question if safe harbours could be a viable means to simplify the procedure and achieve certainty in order to avoid double taxation and penalties. A Member from a tax administration cautioned, however, that safe harbours presented a fundamental issue, as they deviated from the arm's length principle. As the OECD Transfer Pricing Guidelines had reaffirmed the arm's length principle as the international transfer pricing standard, a discussion of safe harbours would therefore be difficult and not advisable.
37. *The OECD observer* mentioned that from a global perspective APAs were only one possible way to avoid double taxation. One should also look at guidance. APAs were especially advantageous if a rollback concept was adopted that not only established a set of criteria for the determination of transfer pricing for future transactions but also allowed for resolving existing transfer pricing audits. He noted that some Non-EU Member States had worked on so-called Mini-APAs, but had not taken up that concept because of practical problems. Mini-APAs could be useful, he added, with regard to the Internal Market, e.g. when concluded once a SME becomes international.
38. The Chair concluded that despite the demand for APAs from businesses, APAs faced quite some scepticism and criticism because of the shortcomings linked with APAs. The FORUM should therefore in the first place study other procedural means to enable taxpayers to achieve greater certainty.

iii) Speedier and more streamlined dispute resolution procedures

39. There was broad agreement that this was the single most important issue for the FORUM. Members from business stressed that for them the issue of suspension of tax collection until a final settlement is reached and the issue of interest charges was a critical issue because of the liquidity problems connected therewith.
40. Some Members argued that the FORUM should look at the whole range of dispute resolution procedures and not solely focus on arbitration. Bearing in mind the overall objective to reduce the resources that both tax administrations and taxpayers need to devote to dispute resolution procedures, the FORUM should try to make progress on a broad front.
41. One Member from a tax administration drew the attention to the administrative arrangements between the USA and the UK in the matter of progressing mutual agreement procedures. He stated that an improvement in the management of tax disputes involving transfer pricing was embedded in that arrangement.
42. Greater transparency in dispute resolution procedures was considered important by many Members.
43. Several Members expressed their dissatisfaction with the backlog of unresolved transfer pricing cases and alluded to the possibility of "prior consultation" to alleviate that problem in future. According to those Members it was better to try to resolve transfer pricing disputes before initiating a mutual agreement or arbitration procedure.
44. A Member from a tax administration stated that prior consultations were already used by its tax administration and were not found problematic. Prior consultations could help prevent Member States from changing tax assessments after the fact.

45. One Member from business argued that prior consultation could put increasing pressure on taxpayers to submit documents and could also lead to resource savings in total, because they could help avoid later disputes. Another Member found a code of conduct might be helpful.
46. Although some Members from business and tax administrations expressed the view that tax administrations should contact each other before making a transfer pricing adjustment, most Members did not consider consultation procedures prior to making adjustments an issue of high priority. Some Members from tax administrations remarked that such consultations needed to be made through the appropriate channels and that resource constraints made it difficult to apply that procedure in practice. Another argument brought forward against prior consultation was that they might delay tax audits.
47. One Member argued that joint or simultaneous tax audits were also a possible means to resolve transfer pricing disputes at an early stage, but due to the lack of co-operation of tax administrations they were almost never used.
48. Members expressed differing views about the issue of interest charges – or similar supplementary payments – and interests on tax refunds and about the desirability of having tax collection suspended during a mutual agreement and arbitration procedure. One Member noted that a mismatch in charging interest and/or penalties for tax arrears and tax refunds between Member States could lead to unjustified double penalties or double advantages for taxpayers.
49. A Member from a tax administration observed that the problems of interest charges and suspension of taxes were interlinked with domestic legislation. Some Member States' legislation, for example, provided for suspension of tax collection only in cases of appeals and litigation.
50. Another Member from a tax administration argued that the issues of interest charges and suspension of tax collection should be left to each Member State's own legislative decision. Other Members disagreed with this view and argued that payment of back taxes due to transfer pricing adjustments should be suspended as long as a mutual agreement or arbitration procedure was still pending.
51. In conclusion, there was agreement to work further on these issues despite the conflicting views expressed, particularly on prior consultation.

b) Improvement of the practical functioning of the Arbitration Convention

i) The starting points of the three and two year periods

52. The overall view was that the FORUM should give more clarification and develop a common approach on the starting point of the three-year application period according to Article 6.1 of the Arbitration Convention and the two-year period provided for reaching an agreement, i.e. the first phase according to Article 7.1 of the Arbitration Convention.

ii) Interpretations of definitions

53. The discussion focused primarily on the question whether the FORUM should address possible differences in interpretation of definitions in the Arbitration Convention. A Member from a tax administration remarked that the FORUM should clarify which requirements a taxpayer had to meet to have access to arbitration. Otherwise, discrimination was possible because of, for example, different documentation requirements.
54. A Member from business raised the issue of serious penalties in relation to Article 8.1 of the Convention and argued that tax administrations should guarantee taxpayers access to arbitration. That view was rejected by most other Members indicating that definitions of serious penalties were already given in the annex to the Convention. That annex might be updated some time.
55. Some Members observed that due to different laws in Member States it might be very difficult to harmonise definitions and, apart from their conceivable use in a EU Model Tax Convention, common European definitions might not even help in dispute resolution procedures.
56. The discussion showed that Members had not experienced difficulties in the application of the Arbitration Convention resulting from differences in interpreting definitions.
57. As questions of definition were very complex and resource-intensive, it was finally agreed that given the limited time and capacity of the FORUM it should not deal with issues of definition for the time being. If difficulties with definitions emerged, the Commission could tackle these.

iii) Proceedings of the second phase of the Arbitration Convention

58. There was consensus that the FORUM should give more specific guidance as regards the proceedings during the Convention's arbitration phase.

iv) Procedures to be followed during the interim period when not all Member States have ratified the Convention

59. The FORUM agreed to seek for a common view in order to find a uniform, pragmatic and transparent solution on how to handle cases, both pending and new ones, during the interim period.

c) Other issues

60. Some Members expressed their view that no additions were necessary to the issues paper, because there was enough to do. A Member from a tax administration raised the question how the Convention should be amended, i.e. what kind of legal instrument the Convention should be.
61. It was finally agreed that the FORUM for the time being, should focus on the issues mentioned in the issues paper.

d) Priority of issues

62. The Chair pointed out that the FORUM had to make choices and set priorities. On the fundamental question of how many issues should be dealt with at each of the FORUM's meetings, some Members suggested that the FORUM should deal with only one issue at a time. The majority view, however, was that generally two topics should be discussed at each of the FORUM's meetings.
63. There was broad discussion on the issue of priorities. A Member from business stated that the elimination of double taxation was a legal entitlement of taxpayers. The unsolved question, however, was what happened if tax administrations did not meet their obligations. For this Member sanctions imposed on taxpayers, the suspension of tax collection during mutual agreement and arbitration procedures, and the question of burden of proof, which should lie with the tax administration, were also important issues. The issue of documentation, on the other hand, should be postponed, because it was so controversial that it was unlikely that results could be achieved quickly.
64. A Member from a tax administration responded that Member States were not inactive, but felt obliged to resolve the problems reflected in the issues paper, a speedier resolution of tax disputes between tax administrations and a more uniform application of transfer pricing rules being the most important issues.
65. Another Member from a tax administration estimated that due to the lengthy procedures only about 50 per cent of all double taxation cases were submitted to the competent authorities. Therefore, in order to reach concrete results that enable tax administrations to resolve the large amount of open cases, the FORUM should address the problems in connection with the Arbitration Convention first, whereas documentation, which was a highly controversial issue, should be dealt with only later on. By contrast, another Member from a tax administration preferred to deal with arbitration and documentation at the same time, because a quick resolution of tax disputes depended on sufficient documentation.
66. For another Member from a tax administration transparency and communication between tax administration and taxpayer during mutual agreement procedures, e.g. mutual consultation procedures on a regular basis, were also necessary improvements. In addition, mutual agreement procedures should be finalised within two years. For this Member the UK-US agreement on procedural issues was a good example in that respect.
67. Some Members argued that for practical reasons documentation should have priority over dispute resolution procedures, because almost all multinational enterprises were concerned with documentation requirements when establishing their transfer prices. One Member argued that documentation also needed to be appropriate to APAs.
68. The discussion showed that most Members were of the opinion that the highest priority should be attributed to practical solutions for a more uniform application of the Arbitration Convention in order to achieve more certainty as regards the procedural issues of the Convention. That included both the first phase of the Arbitration Convention, i.e. the mutual agreement procedure, and the second phase, i.e. the arbitration itself.

69. Consensus could also be reached that APAs and prior consultation procedures should be taken together but should be attributed only low priority. It was also agreed that simultaneous examination was to be dealt with only after further decisions were taken.
70. Finally, the majority view was that at the next meeting of the FORUM only procedural improvements of the Arbitration Convention and related issues of the mutual agreement procedure, e.g. suspension of tax collection, interest charges etc., should be discussed.
71. At the following meeting the FORUM should deal with issues of the Arbitration Convention and mutual agreement procedures and in addition with other transfer pricing aspects of dispute settlement.
72. The Secretariat would submit to the next meeting of the FORUM a detailed working programme and an indicative calendar.