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*Analyses and coordination of tax policies*

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## **SUMMARY RECORD OF THE FOURTEENTH MEETING OF THE EU JOINT TRANSFER PRICING FORUM**

**held in Brussels on 12<sup>th</sup> and 13<sup>th</sup> December 2005**

### **1. Adoption of the agenda (doc. JTPF/023/2005/EN/FR/DE)**

1. The proposed agenda was adopted by consensus.

### **2. Adoption of the summary record of the JTPF meeting of 20<sup>th</sup> September 2005 (doc. JTPF/022/2005/EN)**

2. It was agreed by consensus on the following modifications: in paragraph 21 a modified sentence "With reservations from Denmark and The Netherlands, all Members recognised that this kind of un-named application might be accepted even if applicants should not expect too much from such a meeting".; insertion of a new sentence in paragraph 23 "some Member states highlighted the importance of point 8 c" and paragraph 37 will be redrafted: "This document could not be discussed for reasons of time constraints. As for Prof. Maisto's paper, the Chair explained that a majority of Member States validated the content of the tables ...".

### **3. Oral report by the Secretariat on the state of play of the Forum's second report**

3. The Secretariat reported on the adoption of a Commission Communication and a proposal for a Code of Conduct on transfer pricing documentation on 7<sup>th</sup> November which was followed by a press briefing on 10<sup>th</sup> November. It was also explained that the adoption by the Council was expected to take place under Austrian Presidency. Austria confirmed that an adoption by the ECOFIN Council could be envisaged for February or March 2006.

**4. Oral report by Tax Administration Members on the nomination of the independent persons of standing as referred to in Article 7 (1) of the Arbitration Convention (doc. JTPF/010/BACK/REV2/2005/EN)**

4. The updated list has been put on the Commission website. *Sweden* would send its list for the end of December. Denmark will send an updated list by the end of January. Italy raised the point of the date of nomination/confirmation which is inserted in the list (Italy has nominated a new person and confirmed the remaining four). An option would be to mention the first date of nomination with a footnote providing with the date of the last update.
5. It was agreed that Member States will indicate in writing by 31 January 2006 which of the independent persons of standing are eligible to become a chairperson of an advisory board (see point 4.1 of the Code of Conduct on the AC).

**5. Oral report by Tax Administration Members on the state of play of the implementation of the Code of Conduct on the Arbitration Convention, the updated number of pending cases under the Arbitration Convention which were reported as of 31/12/2004 (see report of 30/05/2005 on the re-entry into force of the Arbitration Convention, doc. JTPF/019/REV5/2005/EN), 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**

6. The Chair, after the objection of a tax administration representative that this point is not within the remit of the Forum, 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. It is also of major importance to be able to demonstrate that the AC is now well functioning and that a gradual reduction of the number of pending cases as of 31/12/2004 is taking place.
7. As regards the implementation of the Code of Conduct on the Arbitration Convention, it was agreed that the Secretariat will distribute a questionnaire to Member States to report what steps they have taken so far to implement the Code into national legislation or administrative practice. The tax administration member from France explained that the Code of Conduct was included in a new administrative instruction and that tax collection will be suspended during the arbitration procedure.
8. On the number of pending MAP cases under the Arbitration Convention as of 31/12/2004 (107 cases in total – see Annex III of the report on the re-entry into force of the AC) it was agreed that the Secretariat will distribute a questionnaire to Member States to take stock of the development (in particular with respect to the 24 cases where the taxpayer made the request prior to 1 January 2000) The result of this questionnaire will be discussed at the March meeting.
9. As regards the ratification of the Accession Convention, until the meeting only one Member State (*Slovakia*) has ratified it. It was agreed that Member States should tell 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).
10. All questionnaires should be answered by the end of February 2006.

6. **Discussion of the Secretariat draft discussion paper on specific issues on Advance Pricing Agreements (APAs) (doc. JTPF/016/2005/EN) and written Comments from Tax Administration Members (doc. JTPF/025/BACK/2005/EN) and tax administration sub group comments (doc. JTPF/026/BACK/2005/EN – distributed as a room document).**
11. Ms Montse Trape, chair of the tax administrations sub-group, opened the debate by presenting the room document (doc. JTPF/026/BACK/2005/EN). Firstly she explained that the document could not be distributed before to all Forum members because it represented only the positions of the sub-group and had to be discussed between all tax administrations before being distributed to the Business members. This general discussion had taken place in the morning of 12<sup>th</sup> December and therefore this document - which could still be briefly amended to reflect the morning's debates and conclusions- can be considered as Member States' considerations on the draft discussion paper on specific issues on APAs. Therefore the Chair recommended using this document as a reference document for the discussions on the different questions.
12. ***Question 1: Does the Forum accept that APAs should be legally binding for both the tax administration(s) and the taxpayer(s)?***
13. The answer provided by tax administrations is to be found under paragraphs 3 and 4 of the room document. A first clarification seemed to be necessary as regards the difference between monitoring an APA and auditing an APA and it was agreed that the report will include a description of the different steps in the monitoring, checking and auditing of an APA in order to clarify the concepts. The chair said that this point had already been debated in the previous meeting. The representative of the OECD requested a clarification about the absence of reference to the OECD guidelines in this paper. The Chair explained that the OECD position on the different issues are part of another document (doc: JTPF/003/2005/EN) which will be included in the final report on APAs. The general discussion was mainly focused on the legal effects of an APA. All Member States agreed that a bilateral APA was binding for the two tax administrations which is in conformity with the OECD guidelines and which provides certainty for the taxpayers. As regards taxpayers' commitment, they can decide not to follow the agreement with the potential consequence of a transfer pricing adjustment.
14. ***Question 2: What is the Forum's view on the issue of fees?***
15. This question is covered by paragraph 5 and 6 of the room document.
16. It was agreed that different approaches are possible but that none amount to bad practice. Poland and the Czech Republic will introduce a fee from 1<sup>st</sup> January 2006 and Germany could introduce it in the future. Several Member States explained that it was a kind of "entry test" to avoid having too many applicants even if a fee will never cover all the costs and should never discourage companies to apply for an APA. All tax administrations insisted on the absence of link between a fee and an efficient APA procedure. Business members felt that ideally fees should never be demanded but accepted that in specific country situations fees can be a tool to facilitate the setting-up of an APA procedure. The Forum discussed two kinds of fees that could exist: fees linked to the costs of the tax administration and a pure entry fee.

17. ***Question 3: Does the Forum accept that there will sometimes be valid reasons for a taxpayer excluding a particular entity from the APA, for example, when the entity is resident in a country that does not offer APAs?***
18. ***Question 4: Should the taxpayer still put in place a coherent transfer pricing policy for all entities which reflects the transfer pricing policy in the APA?***
19. These questions are answered by tax administrations in paragraph 7 of the room document.
20. A single answer to these questions could not be provided because each case is different. Business members had different views on the idea that a MNE should justify why several transactions were not included in the APA, even if this could be part of the discussions during the pre-filing. From the discussions two principles could finally be highlighted: the need for flexibility (for companies and by tax administrations) and consistency (of the transfer pricing policy). The Forum agreed that where there were valid reasons for excluding entities from an APA then these should be explained by the MNE.
21. ***Question 5: Does the Forum accept that while unilateral APAs may have advantages in specific circumstances, they are not a tool for avoiding cross-border disputes?***
22. This question is answered by tax administrations in paragraph 8 to 16 of the room document.
23. A Business member suggested that it must be possible for a taxpayer to opt at any moment for a Bilateral APA. A consensus was found on the idea that only bilateral APAs provide for certainty for MNEs. Tax administration members agreed that where a unilateral APA had been negotiated, it could later be revisited during a Mutual Agreement Procedure (MAP.)
24. ***Question 6: Does the Forum agree that the taxpayer should not be compelled to include all connected transactions in an APA?***
25. This question was already covered by the discussions held on Q3 and Q4. The Forum accepted that the transactions appropriate to an APA would differ on a case by case basis but that a taxpayer could not be compelled to include all inter-company transactions. Often this would be impossible and/or inappropriate. But where transactions were excluded and a tax administration thought it appropriate to include them, the taxpayer should be ready to explain its belief.
26. ***Question 7: Does the Forum accept that complexity thresholds can be appropriate in an APA procedure?***
27. This question is covered by paragraph 17 to 20 of the room document (it must be noted that paragraph 18 does not exist).
28. No consensus could be found on the necessity to have or not thresholds. However it was accepted by the Forum that a Member State could have complexity thresholds if it so wished and that these could form an appropriate "entry test" to the APA procedure. Where complexity thresholds did exist, even if subjective, they must be applied equitably for all taxpayers.

29. ***Question 8: Does the Forum agree that the volume of connected transactions is not an infallible guide to transfer pricing risk?***
30. It was agreed that the volume as such is not an infallible criterion however the financial stakes involved should be considered (even if the transaction itself is not complex).
31. ***Question 9: Does the Forum think that it is a good idea that where a critical assumption is not met, then the taxpayer and tax administration should have the opportunity to discuss how the APA could continue and not be cancelled automatically?***
32. This question is answered by tax administrations in paragraph 21 of the room document.
33. Several members said that critical assumptions should not be written in a too formal way (some flexibility should be introduced in the drafting) where others completely disagreed with this statement because a critical assumption as such is not flexible. It was concluded that paragraph 21 will be inserted in the report with several amendments contained in the Secretariat's paper. The Forum felt that critical assumptions had to be carefully drafted to avoid the APA descending into mere prediction. However, it was best practice for discussions to be held between all parties if a critical assumption was not met.
34. ***Question 10: Does the Forum agree that there will be advantages to allowing retrospection/ rollback in an APA?***
35. This question is answered by tax administrations in paragraph 22 of the room document.
36. It was agreed that a rollback should never be automatic or applied without the agreement of the taxpayer. The Chair underlined the difficulty to apply the same starting date to an APA and the importance in this case to have the possibility to apply rollbacks.
37. It was suggested to include in the report the following sentences: "An APA should start at the date the application was made, when this is not in contradiction with national rules or legislation" and "it is recommended that the APA should start on the date the parties have agreed". It was acknowledged that while appropriate roll back can be a useful tool for resolving open issues but that the main concern of an APA should be the future.
38. ***Question 11: Does the Forum think that a modified APA procedure should exist for SMEs?***
39. A long discussion took place on the opportunity of having specific rules for SMEs. Several members stated that the rules should not be different between MNEs and SMEs because this would create discrimination. The tax administration member from France explained that France does not have specific rules for SMES but that a specific support is given to them (for the choice of the method and for the search for comparables) and several requirements are weakened (documentation and report). Several Business members objected to the idea that a Member State will suggest the method and provide for comparables: will the tax administration really make the

best choice? Several members stated that it is irrelevant to have simplified rules for non-complex or less-complex transactions because these transactions should not be covered by an APA anyway. Everybody agreed that the European definition of SME must be applied. Different Member States explained that more and more SMEs are interested in APAs and that they want to facilitate the use of APAs by SMEs. In the case of the UK, transfer pricing rule do not apply to SMEs except in very specific circumstances. Several members suggested the creation of a sub-group which could examine how and what to simplify. The Chair concluded by explaining that there was a consensus for facilitating the access to APAs for SMEs and on the use of the European definition. Two tax administrations representatives expressed their concerns on the administrative cost of any simplification and the consequences in terms of human resources. As regards the simplification of the requirements, paragraphs 98 to 106 give several possible tracks which will be reflected in the report. But it is only in the light of the practical experience that a consensus on simplified rules will be possible to reach.

40. ***Question 12: Should a MNE be able to gain access to a modified APA procedure under some circumstances?***

- 41. It was considered that the debates on SMEs covered also this issue.
- 42. It was agreed that the example in the annex would not be included in the report.
- 43. The Chair concluded by explaining the follow up on this issue: the Secretariat will write a draft report which will be sent at the beginning of February for written comments by the end of February (the idea is to avoid big drafting discussions like in March). In the meantime, the sub-groups would meet by mid-February.

**7. Discussion of the Secretariat draft discussion paper on early notification (doc. JTPF/014/2005/EN)**

- 44. The Secretariat had prepared a background document on Early Notification, Prior Notification, Prior Consultation and Prior Agreement definitions (doc. JTPF/024/BACK/2005/EN). This document was presented only to facilitate the discussions and to clarify the concepts.
- 45. The Tax administration member from France explained that they had already a similar procedure in place when a MAP is requested and the Tax administration member from Germany expressed his concern that due to the Federal structure of Germany this early notification would lead to an enormous administrative burden. A Tax administration member found paragraph 1 describing the approach inconsistent: "tax administration could notify another tax administration automatically". Several business members were also reluctant that tax administrations could automatically take contact without informing the taxpayer. The Chair clarified again the aim of this exercise: find solutions to avoid double taxation. Several members stressed that audit and taxation deadlines were so different between Member States that it is impossible to put in place such a system. Finally there was a majority of members of tax administrations and business who agreed that the possibilities offered under the Arbitration Convention and by the Tax treaties were sufficient to solve double taxation problems. However this lack of proposal doesn't necessarily mean that the idea does not possess any merit at all.

46. In the light of this majority decision the Chair raised the issue of prior notification. The Forum agreed to stop the debates on this option. However one tax administration insisted on the need for tax administrations to discuss of double taxations at an early stage. A consensus could be found on this conclusion which will be included in the report.
47. The Chair concluded by explaining that the Secretariat will write a report on "Alternative dispute resolution and dispute avoidance" explaining that the Forum examined different possibilities (which will be described in the report) but that it was concluded that the best solution was APAs. However in order to facilitate the resolution of double taxation, Member States are invited to discuss as soon as possible cases where double taxation is likely to be in point.

**8. Discussion of the Secretariat draft discussion paper on penalties (doc. JTPF/017/2005/EN) and contribution from Prof. Maisto (doc. JTPF/011/BACK/REV3/2005/EN) as background document**

48. The Chair explained that the penalties issue was already briefly discussed during the first mandate of the JTPF and that criminal and documentation penalties were excluded from the scope of this paper. He also outlined that the issues in this penalty paper were not resolved by the Arbitration Convention.
49. A first discussion took place on the definition of transfer pricing penalty and the need to consider interest for late payment of tax as a penalty if it is above the commercial rate. Several tax administrations members claimed that this issue was not a specific transfer pricing problem and that this issue could only be addressed by national parliaments. Some tax administrations stated that according to court decisions and parliamentary opinions, interest for late payment are never considered as penalties. It was finally agreed not to consider this question as a relevant question and therefore it will be deleted from the document.
50. For questions 2, 3 and 4 it was agreed that Member States will provide written answers by the end of first week of February.
51. On question 5 a consensus was found that transfer pricing adjustments should not be automatically considered as negligence or wilful conduct of the taxpayer.
52. Question 6 on the idea that no adjustment related penalties should be imposed in the absence of wilful intent or gross negligence of the taxpayer was discussed even if it was agreed that this question and question 7 will be answered in the light of the answers provided on questions 2, 3 and 4. A tax administration member expressed some concern because a tax administration could decide to impose penalties in any case and giving an answer now would infringe on Member States sovereignty. One delegate suggested using the concept of "prudent business management" instead of negligence. A business representative supported by a tax administration member insisted that even the OECD expressed in its guidelines that transfer pricing is not an exact science and therefore the question of not applying penalties in the absence of wilful intent or gross negligence is very important. The tax administration member from Portugal explained that in their legislation it is not possible to exclude imposing penalties in case of negligence. A tax administration representative suggested not imposing a penalty in the absence of wilful intent or gross negligence

only if the national rules are compatible with this suggestion. The Chair reminded that the Czech and Slovak Republics and Greece impose an automatic penalty (which can be reduced in the Czech and Slovak Republics).

53. Question 8 on the "reasonable documentation test" was briefly discussed in the absence of the author of the proposal (the proposal was included in the first part of Prof. Maisto's report). Several business and tax administration members stated that it was not relevant to re-open the debates on documentation. It was agreed to come back on this issue next time with Prof. Maisto.
54. Question 9 on the cancellation or mitigation of a penalty in case of a withdrawal or reduction of a transfer pricing adjustment resulting from a dispute resolution procedure was generally welcomed. A tax administration member wanted to see included that the question did not cover documentation and non-collaboration penalties. A Business member requested more explanations on the situation prevailing in Italy and Greece (see paragraph 26). The tax administration member from Italy explained its situation and requested to delete any reference to Italy in paragraph 26 as the described position was not correct. The tax administration member from Greece will provide more information for the next meeting. The Chair suggested that a consensus could be found on the suggestion that transfer pricing adjustments related penalties should be reduced at the same time an agreement is reached in a MAP and for other penalties tax administrations could commit themselves to examine again the facts in the light of documents and arguments presented during Arbitration. A tax administration member suggested that the Secretariat would provide a written proposal with a draft text.

## **9. Any other business**

55. The Chair explained that for several months the Secretariat has faced a lot of problems due to the size of the documents sent to the members: a lot of non-delivery messages were received and several members complained that their mailboxes were blocked by emails sent by the Secretariat. Therefore during the next meeting the Secretariat will make a presentation on the use of the "CIRCA" system. CIRCA is an IT tool (an application based on internet standards) which offers a "private space" on the internet for groups of people who need to collaborate to achieve common objectives and tasks (called "interest groups") and which are geographically spread across Europe. To have access to CIRCA members would only need an internet access, an User ID and a password. Members would be informed that new documents are available on this website and they would have the possibility to download them.
56. The Chair invited the members to think about the future of the JTPF: do they think that its mandate should be prolonged and do they have any suggestions for the next working programme. Forum Members could provide written contribution to the Secretariat by 4<sup>th</sup> February 2006 explaining which issues and why these issues should be discussed in future. These contributions will constitute a first discussion document for the March 2006 meeting.
57. In 2006, the two next meetings are planned for the 21st March and 20th June.