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 SECOND MEETING OF THE EU JOINT TRANSFER PRICING FORUM

## held in Brussels on 4th December 2002

## I. ADOPTION OF THE AGENDA (DOC JTPF005/2002/EN/FR/DE)

1. The proposed agenda was adopted by consensus.

## II. ADOPTION OF THE SUMMARY RECORD OF THE JTPF MEETING OF 3RD OCTOBER 2002 (DOC JTPF002/2002/EN/FR/DE)

2. The summary record was adopted by consensus.

## III. DISCUSSION OF THE DRAFT WORKING PROGRAMME 2002-2004 (DOC JTPF006/2002/EN/FR/DE)

3. There was broad agreement that the work programme should be flexible to accommodate for the progress being made in the FORUM.

4. Members expressed differing views on when documentation requirements should be put on the agenda. One Member stated that a discussion was only useful if a proper working paper was available. Another Member questioned if a questionnaire to Member States' tax administrations on documentation requirements and a summary of available information was not advisable as a starting point for the discussions in the FORUM.

5. The *Chair* indicated that in order to discuss documentation at the April 2003 meeting input from Members would be necessary by 15 January 2003. A Member from business commented he would favour an early discussion of documentation requirements and was prepared to draft a paper on documentation by mid-January 2003.

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6. Some Members from tax administrations felt the deadline 15 January for input was too close. The Member from the *German* tax administration argued that his Ministry was just proposing new legal documentation requirements to the Parliament, which made substantive input by mid-January impossible.

7. A Member from business took the position that an overview on how documentation requirements are dealt with at EU level should be available as soon as possible. The country proposing new legal documentation requirements could thus benefit from that study by taking the results into consideration in the legislative process. Another Member suggested to have a short discussion on documentation without a working paper at the April 2003 meeting. One Member from a tax administration agreed, while another Member cautioned that an early consideration would impede ongoing discussions in the FORUM and could burden the FORUM with Germany's specific problems.

8. The *Chair* concluded that at the April 2003 meeting the FORUM should only deal with the Arbitration Convention and related issues of MAPs. These issues should be finalised at the September 2003 meeting, when there would also be a discussion on documentation requirements.

9. With these changes the working programme 2002-2004 was adopted by consensus.

## IV. DISCUSSION OF THE WORKING PAPER (JTPF007/2002/EN/FR/DE)

### a) Introduction and context

10. Members from business took the floor, requesting the FORUM to consider how new approaches could avoid double taxation for the business community more effectively. To that end they suggested adding the following sentences to para. 5 of the Working Paper: *"In that context the FORUM should also consider if taxpayers should have the right of initiative at all stages of dispute resolution procedures. In the view of Members from business this should include the composition of the advisory commission and the introduction of a complaint procedure with the European Court of Justice or the EU Commission. The FORUM should also examine if mutual agreement procedures under Double Tax Treaties could be merged with or replaced by improved procedures under the Arbitration Convention."*

### b) Procedures to be followed during the interim period when not all Member States have ratified the extension of the Convention (Question 1)

11. Considering that six EU Member States have not yet deposited their instrument of ratification so far, a Member from business maintained that taxpayers were legally entitled to the elimination of double taxation and that he was surprised that some Member States' governments did not comply with the law. In his view the FORUM could be considered a failure if not all Member States have ratified the Prolongation Protocol by end 2004.

12. According to the Members from the relevant tax administrations it was hoped that the Prolongation Protocol would be ratified as follows: *Greece* and *Ireland* in spring 2003, *Belgium* in the course of 2003, and *Portugal* probably in the first six months of 2003 but in any case no later than end 2003.

13. The Member from the *Italian* tax administration could not specify when the Prolongation Protocol would be ratified by Italy but would inform the FORUM at the April 2003 meeting.

14. The Member from the *Swedish* tax administration said his country had not given high priority to the ratification, because the Arbitration Convention would only re-enter into force after the last State had deposited its ratification instrument. He promised Sweden would not be the last State to ratify.

15. As regards the Convention concerning the accession of Austria, Finland and Sweden to the Arbitration Convention, the Members from the *French* and *Greek* tax administration said their countries hoped to ratify in spring 2003. The Member from the *Irish* tax administration indicated his country intended to ratify the Accession Convention and the Prolongation Protocol at the same time.

16. The FORUM agreed that those countries that had not yet ratified the Prolongation Protocol or the Accession Convention should give a progress report on the ratification process at each meeting of the FORUM. Those countries that were unable to indicate the date of ratification should give an indication of likely progress.

17. Concerning each Member State's five independent persons of standing for the list provided for in Article 9.4 of the Convention the *Chair* stated that five Member States had not yet appointed their nominees. It was also noted that some of the persons in the list might have changed position in the meantime.

18. A Member from business said the list should be more balanced in that not only lawyers but also economists and generally more members from the business sector should be nominated. Another Member from business seconded his colleague stressing that transfer pricing needed more economic than judicial analyses.

19. Another Member from business questioned if the independent persons should not be independent from the tax administration, i.e. not be an official of a tax administration at all, and if Article 9.4 of the Convention, therefore, should not be changed. A Member from a tax administration responded that the existence of too many procedural rules could be an obstacle to the functioning of the Convention.

20. The overall view, however, was that the text of the Convention should not be changed. The FORUM agreed it was desirable that also non-lawyers and persons from the private sector be represented in the list of independent persons.

21. The *Chair* concluded that the issue of qualification of the independent persons for the advisory commission should be abandoned. On Question 1 of the Working Paper, which the *Chair* described as a question of principle, the FORUM agreed by consensus that taxpayers should have access to double tax relief and should not suffer from the lack of ratification of the 1999 Prolongation Protocol by some Member States.

22. The *Commission services* suggested that the Council Secretariat should publish the list of independent persons of standing every year and remind Member States to update it on a regular basis. The FORUM agreed to include this suggestion in the Report to the Council.

*i) Procedure in cases where a request has been made by a taxpayer before 1 January 2000 (Question 2)*

23. The *Chair* stressed that pragmatic solutions were sought rather than a legal debate. A Member from the tax administration commented that while the answers in the Questionnaire and Working Paper reflected Member States positions on a legal basis, there was considerable scope in tax treaty provisions how to handle cases.

24. The Member from the French tax administration informed the FORUM that the competent authorities of France and Italy had set up the first advisory commission under the rules of the Arbitration Convention. The first meeting of that commission took place in November 2002. He added that he would report on the practical experience of setting up the advisory commission at the next meeting of the FORUM.

25. Members from business stressed that all Member States should ratify the Prolongation Protocol and Accession Convention as fast as possible, because a practical approach or administrative agreements between Member States did not grant taxpayers the same rights and advantages as the Arbitration Convention, e.g. the limited time frame and mandatory arbitration. One Member from business expressed some scepticism that the ratification procedure would be completed by the time the Commission had to report to the Council. Therefore, he suggested that business should report that all procedural problems during the interim period were caused by the delay of some Member States in depositing the ratification instruments.

26. The Member from the German tax administration confirmed that his country would join the majority view as regards Questions 2 to 4, i.e. specifically that cases, which had been initiated under the Arbitration Convention prior to 1 January 2000, would be completed according to the rules of the Convention. He added Germany was prepared (i) to treat a request under the Arbitration Convention automatically as a request for MAP under the pertinent double tax treaty and (ii) to agree bilaterally to initiate the arbitration procedure.

27. The statement by the Member from the German tax administration was welcomed by Members from business who underlined that the Convention according to its Article 18 sentence 2 was fully applicable to cases submitted before 1 January 2000. Moreover, it was unfair towards taxpayers that the last Member State to ratify the Prolongation Protocol might block the whole process.

28. The discussions showed that Question 2 was practically only relevant for Denmark, which feels unable to complete cases submitted before 1 January 2000 under the rules of the Convention. All other Member States either have no cases submitted before 1 January 2000 or complete such cases according to the rules of the Convention. The Member from the *Danish* tax administration asserted that a change of Denmark's position constituted a legal matter and that it was not possible to involve the Parliament. He added, *Denmark* continued, however, MAP procedures under the pertinent double tax treaty.

*ii) Procedure in cases where a request is made by a taxpayer after 1 January 2000 (Questions 3 and 4)*

29. Members from tax administrations expressed differing views on how to deal with cases that were submitted after 1 January 2000. The discussions showed that five Member States (Luxembourg, the Netherlands, Spain, Ireland and the United Kingdom) are in a position to continue the procedure as foreseen in the Convention if and when the other Member State agrees. If the other Member State does not agree, those Member States will – with the taxpayer's consent - initiate a mutual agreement procedure under the double taxation agreement with the other Member State.

30. Most Members States, however, consider the Convention, or rather the two-year period for the MAP, suspended. As regards the first phase of the Convention, i.e. the MAP, those Member States initiate a mutual agreement procedure but under the double taxation agreement with the other Member State. These Member States initiate the MAP automatically (Belgium, Denmark, Finland, France, Germany, Portugal and Sweden), after information of the taxpayer (Spain, the Netherlands, and Greece), or if so requested by the taxpayer (Austria and Italy).

31. There was consensus that a taxpayer's request to invoke the Arbitration Convention is valid under the Prolongation Protocol. The FORUM, therefore, concluded that in any case tax administrations would apply the Convention including the arbitration phase once the Convention re-enters into force.

32. Discussions on Question 4, centered around the issue whether any time spent by tax administrations on negotiations under the MAP of a double tax treaty was to be subtracted from the 2-year period foreseen in Article 7.1 of the Convention or whether the 2-year period should start again once the competent authorities continue the MAP under the Arbitration Convention.

33. Some Members from tax administrations took the view that the 2-year time limit should automatically be applied retroactively once a case is dealt with under the rules of the Arbitration Convention, i.e. if both Contracting States so agree or no later than the re-entry into force of the Convention.

34. Conversely, some Members from tax administrations were opposed to bringing together the time scales for a MAP under a double tax treaty and under the Convention. Those Members argued that the 2-year period started only when the Convention re-entered into force or once the tax administrations involved initiated the procedures under the Arbitration Convention.

35. One Member from a tax administration cautioned that submitting a case to the advisory body while the Convention was not in force, raised the question whether the opinion delivered by the advisory commission would be binding on the competent authorities.

36. Members from business argued that tax administrations should not be given more than a total of two years for the MAP, especially considering that the negotiators most probably were the same persons.

37. Some Members from tax administrations considered the issue of how to calculate the deadline to submit a case to the advisory commission during the interim period not very important. As Article 7.4 of the Convention allowed for a flexible approach the issue should be decided on a case by case basis.

38. The *Chair* concluded that the majority of Members seemed to support the idea that time spent on a MAP under a double tax treaty should be subtracted from the 2-year period of the Convention.

**c) The starting point of the three- and two year- periods enshrined in the first phase of the Arbitration Convention (Questions 5 and 6)**

*i) The starting point of the three-year period (deadline for submitting the request according to Article 6.1 of the Arbitration Convention and Article 25.1 of the OECD Model Tax Convention) (Question 5)*

39. Members from business stressed the importance of clarity as regards the definition of the "first notification of the action" as laid down in Article 6.1 of the Convention. Considering the severe consequences of missing the deadline to submit a request for a MAP, they said an unequivocal definition, such as the date of the tax re-assessment notice, the date of the tax audit report or the like, was necessary. The relevant event could vary from country to country as long as it was clearly defined.

40. The majority of Member States favoured the "first tax assessment notice or equivalent that reflects the transfer pricing adjustment" as the starting point for the three-year period. Given the need for clarity and the different meaning of this term in each Member State it was agreed that Members from tax administrations should communicate to the secretariat of the JTPF the definition of the relevant event in their national language and in English. These definitions of "first notification of the action" should be explicitly stated in a list, which would be included in the report to the Council.

*ii) The starting point of the two-year period (Article 7.1 of the Arbitration Convention) (Question 6)*

41. The *Chair* pointed out that the date at which one of the competent authorities receives the taxpayer's request was unequivocal and could not be contested. For that reason he favoured this event as starting point of the two-year period.

42. Some Members from tax administrations expressed the view that for the competent authority negotiations to be productive the two-year period could only start when some basic information from the taxpayer was available. One Member from a tax administration stated that in the case of a transfer pricing adjustment made in the other contracting state such information should include, inter alia, all correspondence relating to the examination of the transfer pricing, the audit report, pertinent court decisions, and the taxpayer's position on the transfer pricing adjustment.

43. Some Members from tax administrations supported the position of *Germany*, i.e. that the two-year period should be delayed if the taxpayer did not co-operate or submit sufficient information. One Member from a tax administration replied that Article 6

of the Convention only required that the taxpayer's request was well-founded, i.e. the taxpayer had to show that double taxation had occurred. No provision of the Convention, however, provided for a delay of the two-year period.

44. Members from business commented that because of the legal consequences consensus on an unequivocal, non-subjective date triggering the two-year period was necessary. The notification of the other Member State that it is not prepared to make a corresponding adjustment and/or comprehensive documentation requirements were not in line with the Convention. The Member from the *Greek* tax administration stated his country would join the majority view and no longer require the notification of the other Member State that it is not prepared to make a corresponding adjustment.

45. A Member from business saw the risk that the three-year application deadline according to Article 6.1 of the Convention could elapse if the taxpayer's request was considered insufficient by the tax administration. Tax administrations could revert to the exchange of information if necessary. This view, however, was contested by some Members from tax administrations. Members from business conceded, however, that a minimum of information was necessary to initiate a MAP.

46. The majority view was that taxpayers should not be obliged to state if and why a transfer pricing adjustment was justified or not. It was concluded that each Member from a tax administration should communicate to the secretariat the minimum information required by its tax administration for the start of the two-year period. The secretariat would then draft a paper with a view to reach consensus on the conditions for the start of the two-year period.

**d) Proceedings during MAP (also including here the first phase of the Arbitration Convention): discussion on the principles of a possible common approach (Questions 7–15)**

*i) Expediting the MAP procedure (Questions 7 and 8)*

47. Members from tax administrations expressed their intention to improve the procedure of MAPs. They suggested implementing an intermediate, voluntary target time-scale for dealing with MAPs that should, however, not be legally binding and leave some room for flexibility. Also, the issue of taxpayer participation in the MAP process, e.g. transparency towards the taxpayer when, for example, the other competent authority was contacted, was considered important. Some Members from tax administrations would create a sub-group and submit a paper for the April 2003 meeting.

*ii) Suspension of assessment and collection of tax during mutual agreement procedures (Questions 9 and 10) and interest charges and refunds during mutual agreement procedures (Question 11)*

48. A Member from business requested that the scope of the issue should be expanded to include penalties, because it was intolerable that penalties were imposed when the other state had already collected taxes on the transaction. He expressed his dissatisfaction that interest payments – as opposed to interest received – were not deductible in Germany.

49. Another Member from business stated that it was not important for a company in which country it paid taxes as long as it paid only once. While it was legitimate for tax administrations to collect taxes due, it was important that financial neutrality for businesses be achieved.

50. Several Members from tax administrations described the rules governing the suspension of tax collection and interest charges and refunds in their countries. The presentations revealed a broad range of different rules in Member States, especially in respect of the applicability of such rules in a MAP.

51. The discussions showed, for example, that in some Member States suspension of tax collection during a MAP is granted on a case by case basis, while in some other Member States suspension of tax collection during a MAP is not permissible. In most Member States, however, suspension of tax collection is provided for in an appeals procedure.

52. Similarly, some Member States pay interest to a taxpayer in case of a corresponding adjustment, while some other Member States generally do not pay interest on tax refunds.

53. For one Member from a tax administration two approaches were possible concerning the suspension of tax collection at EU level. One was the establishment of best practices, the other the harmonisation of domestic legislation, which in his view was unrealistic. Another Member from a tax administration cautioned that the suspension of tax collection was a matter of domestic legislation that fell outside the competence of the EU Commission, while the FORUM was to discuss only non-legislative instruments. Some other Members from tax administrations expressed their view that the issue of suspension of tax collection was not in the framework of the Arbitration Convention, which made the examination of this issue in the FORUM problematic.

54. It was decided by consensus that the secretariat should draft a Questionnaire to Member States on the suspension of tax collection, interests and penalties. Members should also try to find other tentative solutions to alleviate or even eliminate double payment of taxes. It was agreed that the report to the Council should include recommendations as regards the suspension of tax collection.

55. In order to facilitate and expedite discussions at the April 2003 meeting of the FORUM the *Chair* asked Members to submit their comments to the secretariat on Questions 12 to 19 of the Working Paper by 30 January 2003.