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EU JOINT TRANSFER PRICING FORUM

Draft Secretariat working document for the EU Joint Transfer Pricing Forum on its work program

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Working Paper

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1. BACKGROUND

After discussing the paper "Issues for debate" (doc. JTPF 003/2002/EN/FR/DE of 2 August 2002) at the meeting on 3 October 2002, the Forum adopted at its second meeting on 4 December 2002 its two year work program which is annexed to this document (see § 3 to 9 of doc. JTPF 002/2003 EN/FR/DE: "Summary record of the second meeting of the EU Joint Transfer Pricing Forum held in Brussels on 4th December 2002" of 7 March 2003).

The Forum also agreed by consensus that generally two topics should be discussed at each of the Forum's meetings.

Considering the intensive discussions held on the Arbitration Convention and related mutual agreement issues and in spite of holding an additional meeting on 19 June 2003, the Forum was unable to deal with all the issues as initially adopted in its work program. As it was agreed that the work program should be flexible to take into account progress, the initial work programme should therefore be updated and revised.

Taking into account the remaining important issues in the Forum's work programme adopted in 2002 that are still to be discussed, the Commission announced in its Communication to the Council, transmitting the Forum's report on its activities from October 2002 to December 2003, its intention to extend until the end of 2004 the initial period of two years foreseen for the activities of the Forum.

In the light of the overall results and further issues for discussion identified and proposed by the Forum, the Commission may decide to extend the Forum's mandate for a further period of two years ie until the end of 2006.

2. REVISING AND CONTINUING THE 2002 WORK PROGRAM

Considering that the discussions on documentation requirements should be finalised before the end of 2004, two other issues of the 2002 work program remain to be discussed:

i) The examination of possible preventive measures to avoid double taxation:

This issue would include discussions on:

- Transparency between tax administrations and business: state of play and identification of "best practices" in the EU and its main trading partners
- Cross-border consultation before making TP adjustments: discussion on the potential of such a measure and in particular its compulsory/voluntary character
- Other possible preventive measures and exchange of views on a possible common approach

ii) Acceptability of transfer prices to tax administrations (including APAs)

Discussions would deal with:

- State of play in the EU, overview of situation with main trading partners, identification of common features
- Exchange of views on a possible common approach and the potential of a code of best practices

It should also be noted that the Forum will be called upon to adopt a report on its activities from January 2004 to December 2004. This report would require a first discussion during the September 2004 meeting and formal adoption in December 2004.

In the light of the above, and in spite of the already extended mandate, the achievement of the full work program established in 2002 seems to be too ambitious.

Taking into account the serious time constraints, an attempt should however be made to maximize the benefits of the work of the Forum.

Considering that APAs are also being discussed at a more global level in the OECD context, the maximisation of the value added of the Forum may lie in recommendations that help to create an internal market without double taxation.

Discussing in the Forum from the June meeting onwards possible preventive measures to avoid double taxation arising from transfer pricing adjustments, could constitute an important step in that direction.

As announced in Chapter 4 of the Commission's Communication "'Towards an Internal Market without tax obstacles – A strategy for providing companies with a consolidated corporate tax base for their EU-wide activities'" COM (2001) 582 of 23 October 2001", the establishment of a framework for prior agreement between the tax administrations involved or at least consultation before tax administrations enforce transfer pricing adjustments, could be envisaged.

The work programme for the next meetings of the Forum in 2004 would then be as follows:

June 2004 meeting:

- Continuation of discussions on documentation requirements
- Exchange of views on a discussion paper on preventive measures to avoid double taxation and the potential of a Code of best practice on prior consultation between tax administrations before adjusting transfer prices

September 2004 meeting:

- Continuation of discussions on documentation requirements and if possible, conclusions on certain issues
- Continuation of discussions on preventive measures to avoid double taxation
- Exchange of views on the draft report on the Forum's activities in 2004

December 2004 meeting:

Discussion and adoption of the draft report on the Forum's activities in 2004 including:

- Conclusions on documentation requirements
- Conclusions on preventive measures to avoid double taxation

Question 1: Does the Forum agree to the proposed work program for June- December 2004?

3. NEW 2-YEAR MANDATE FOR THE FORUM ?

As announced in the above Commission Communication, the Commission may decide to extend the Forum's mandate for another period of two years, depending on the overall results of the first term and any further issues for discussion identified and proposed by the Forum.

In addition to the issue possibly carried over from the 2002 work program as described above, some of these further issues have already been identified in the Forum's first report and in the business paper "Review of some outstanding issues in connection with the dispute resolution procedure" (doc. JTPF 0020/BACK/2003/EN) and concern:

- Interest charges for late tax payments.
- Penalties levied on transfer pricing adjustments.
- Certain aspects of the interaction of the mutual agreement and arbitration procedure with administrative and judicial appeals.

As stated already in the report, these are complex issues which will require in-depth examination and discussion to arrive at a tangible result. Moreover, a possible outcome would most likely affect Member States' domestic legislation and in some instances the provisions of the Arbitration Convention itself.

Question 2: Which issues would Forum Members like to discuss if the Commission decides to extend the mandate of the Forum and its Members for another two years?