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ANALYSES AND TAX POLICIES  
*Analyses and coordination of tax policies*

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## **DRAFT**

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

**held in Brussels on 16<sup>th</sup> September 2004**

### **1. OPENING OF THE MEETING**

1. The *Chair* opened the meeting and reminded Members that the mandate of the Forum would end in December and that at the next meeting a report to the Commission would need to be adopted.

### **2. ADOPTION OF THE AGENDA (DOC. JTPF/015/2004/EN/FR/DE)**

2. The proposed agenda was adopted by consensus.

### **3. ADOPTION OF THE SUMMARY RECORD OF THE JTPF MEETING OF 10<sup>TH</sup> JUNE 2004 (DOC. JTPF/016/2004/EN)**

3. Two proposals for amendments were introduced by Business Members. In the context of the working procedure of the Forum, one amendment was withdrawn, whereas the one on para.28 was adopted. With these changes the summary record was adopted by consensus.

### **4. ORAL REPORT FROM TAX ADMINISTRATION MEMBERS ON THE RATIFICATION PROCESS**

4. Members from the relevant tax administrations reported on the state of play of the ratification of the Prolongation Protocol and the Convention concerning the accession of Austria, Finland and Sweden to the Arbitration Convention.

5. The *Italian* Tax Administration Member informed the FORUM that the instrument of ratification of the Prolongation Protocol had been deposited with the Secretary-General of the Council on 4<sup>th</sup> August 2004.
6. As *Portugal* deposited the instrument of ratification on 27 July 2004, the Prolongation Protocol will enter into force on 1<sup>st</sup> November 2004.
7. The Member from the *Greek* tax administration informed the FORUM that the Convention concerning the accession of Austria, Finland and Sweden to the Arbitration Convention still had to be dealt with by the Parliament of her country but that it was hoped that the Convention would be ratified soon.

**5. ORAL REPORT FROM THE COMMISSION ON THE STATE OF PLAY OF THE FORUM'S FIRST REPORT AND ON THE ACCESSION OF THE NEW MEMBER STATES TO THE ARBITRATION CONVENTION**

8. The *Secretariat* informed the FORUM that the Commission's proposal for a Code of conduct on the implementation of the Arbitration Convention as well as a draft Convention on the accession of the new Member States to the Arbitration Convention had been discussed in the Council's Working Party on Tax Questions on 23 July. Discussions had been short and, subject to some technical amendments without any substantial impact, had been concluded with an agreement.
9. The *Dutch Presidency* reported that both documents, after translation into all Community languages, would go together to COREPER and subsequently to the ECOFIN Council for final approval and signature on 16 November 2004.

**6. RE-ENTRY INTO FORCE OF THE ARBITRATION CONVENTION (DOC. JTPF/019/2004/EN)**

10. The *Chair* asked the Members of the Contracting States of the Prolongation Protocol to reply to the questions in the working document in writing to the Secretariat by the end of October so as to allow the preparation of a new draft for the December meeting.

**7. PROCEDURE CONCERNING THE "JANUARY 2004 - DECEMBER 2004" REPORT OF THE JTPF**

11. The *Secretariat* explained the implications for the Forum's work of the new internal translation rules of the Commission which set limitations to the translations according to the type of documents that can be provided. Concretely, this would mean that the JTPF report itself would not be translated but that the Commission's Communication to the Council and the Commission's proposal, which is the most important document in the decision making process, still would be available in all Community languages.
12. One Member of a Tax Administration asked for further clarifications on this point and in particular on the compatibility of these procedures with Council rules. The Secretariat confirmed that the Council rules would be respected.

13. The Forum concluded by taking note of the procedure.

**8. DRAFT REVISED DISCUSSION PAPER ON THE MASTERFILE CONCEPT (DOC.JTPF/003/REV3/2004/EN)**

14. The *Vice-Chair* for Tax Administrations summarised the discussions during the preparatory meeting of its Members and observed that the change in the concept of the masterfile required now an update of the terminology throughout the document. "EU Transfer Pricing Documentation" (EU TPD) seemed to be the preferred term, the masterfile together with the country specific documentation being the EU documentation package.

15. A Member of a Tax Administration supported this proposal questioning at the same time the status of the document, parts of which should be transformed into genuine recommendations.

16. The *Chair* explained that drafting was a progressive process, as was demonstrated by the regular updating of the discussion paper on documentation requirements (doc. JTPF/019/REV3/2003/EN) which constituted the framework for the future report of the Forum. After the meeting, which should lead to an agreement, this latter document would be redrafted by the Secretariat and contain a descriptive and a recommendation part. This revised document would then be sent to all Members by the end of October and comments should be forwarded by mid-November so as to allow a final discussion during the next Forum meeting on 14 December.

17. Entering into the substance of the discussions, one Tax Administration Member expressed the opinion that linking the masterfile with the issue of penalties only made discussions more difficult since national penalty regimes often went beyond transfer pricing documentation requirements. This Member proposed, therefore, discussing penalty regimes at a later stage. Even without being linked to the issue of penalties the EU TPD had advantages for business in terms of reducing compliance costs.

18. On behalf of the Tax Administrations, the *Vice-Chair*, proposed some rewording of paras. 4, 5 and 9 mainly aiming to soften the wording on the link between the EU TPD and penalties.

19. Several Business Members contested this approach stating that penalties were a great problem for business and that agreeing and complying with the EU TPD should permit taxpayers not to be imposed any documentation related penalties. If an agreement on this point was not possible, the Forum would have failed its purpose. Penalties related to a failure to cooperate were, however, a different matter.

20. The *Chair* noted that there was indeed a need for clarifying what the consequences of complying with the EU TPD were and reminded Members of the underlying objectives of a common EU TPD approach. Without having an intensive debate on penalty regimes, there should be a clear and unambiguous link between EU TPD and documentation related penalties.

21. Several Tax Administration and Business Members agreed that if an EU TPD was submitted, acting in good faith and in a timely manner, no documentation related penalties should be imposed. They added that the EU TPD concept was in particular intended to define the scope of the documentation needed to meet the objectives of the concept. Reference was made to para. 32 of the discussion paper that states that tax administrations still have the possibility to impose penalties in case the taxpayer refuses to make additional documentation available.
22. One Tax Administration Member responded that taxpayers in any event would need to comply with national legislation before any penalty relief could be granted and argued that certain penalties, i.e. those related to Article 8 of the Arbitration Convention, might have a different character than those related to transfer pricing documentation requirements.
23. Another Tax Administration Member, although favourable to reduce the compliance cost for businesses and operating costs for tax administrations, expressed its support to this view pointing out that there were currently no provisions in national legislations to grant penalty exemption if a taxpayer complied with EU TPD.
24. The *Chair* clarified that there were different types of penalties: those related to documentation requirements, others related to transfer pricing adjustments as such, and those related to non-cooperation of taxpayers. The penalties on which the Forum should focus were only those related to the first category, leaving aside the others which could be discussed in the future in case the Forum's mandate was extended.
25. One Tax Administration Member shared this view, emphasising that particularly the penalties listed in Article 8 of the Arbitration Convention could not be part of a general exemption, since they were clearly integrated in an international Convention. Another Tax Administration Member said that there was some need for flexibility and a judgemental element in assessing compliance.
26. One Business Member claimed that on penalties and in the light of discussions and agreements in other international fora, there should indeed be a EU approach. One Tax Administration Member, however, confirmed its position that taxpayers should first comply with national rules before any penalty relief could be considered.
27. The *Chair* concluded on this point that the Forum moved towards consensus by providing relief for documentation related penalties, leaving aside adjustment related or non-cooperation related penalties. He added that a more general discussion on penalties is foreseen in the 2005-2006 working program.
28. In this context, the *Secretariat* explained that a proposal to extend the Forum's mandate was submitted with a positive advice to hierarchy but that probably the decision of the new Commissioner should be awaited.
29. On the chart included in section 1.1 of the discussion paper, the *Vice-Chair* for Business Members questioned the scope of the masterfile. MNEs might have different large divisions which could hardly prepare their transfer pricing documentation in one single masterfile and, therefore, these MNEs should be allowed to keep different masterfiles for each division.

30. Whereas one Tax Administration Member considered this as being reasonable when well justified, another Member opposed the idea that a MNE should be allowed to only opt for certain of its divisions to compile an EU TPD, whereas other parts of the company would not adhere to this concept. Several other Tax Administration Members underlined that the whole group should be covered by the EU TPD once the group had opted in. They added that the EU TPD was optional and each MNE, therefore, had to make the most appropriate choice for its type of business. A penalty relief for the whole group could only be considered if all divisions were covered by the EU TPD.
31. Business Members, from their point of view, emphasised that business divisions of some MNEs were as large as other MNEs as a whole and that sometimes these divisions were structured completely independently and often having no transactions with other divisions of the same MNE. This would make it impossible for the MNE to prepare one single set of EU TPD covering all divisions or group entities. In these cases, Business Members considered some flexibility as highly desirable. They also stated that flexibility as regards the implementation of the EU TPD, e.g. after the acquisition of new companies, was necessary.
32. Tax Administration Members considered the examples given by Business Members as being exceptional situations and in general favoured retaining the original and transparent "masterfile" concept, one advantage of which was to have an overview of the group's transactions as a whole. One Tax Administration Member advocated that tax administrations should also have the right to opt out of the EU TPD concept.
33. The Chair concluded that a compromise could consist of adding language to para.10 that in exceptional and well justified cases, not all group members of a MNE should have to be covered by the EU TPD.
34. To clarify the interaction between paras. 9 and 31, a Business Member's proposal to make a cross reference was accepted. The Forum also agreed on some drafting changes, proposed by Tax Administration Members, to clarify the new EU TPD concept and the issues mentioned in the above para. 33, in paras.17 and 18 and the title 1.2 of the working document.
35. The *Greek* Tax Administration Member explained that the reasons for proposing a central "masterfile" database were inspired by the need to get access to the appropriate information. However, considering the practical and confidentiality issues related to this proposal, it was perhaps too premature to insist on this proposal.
36. The *UK* Tax Administration Member maintained his proposal on paras. 15 and 16 so as to preserve the right of tax administrations not to adhere to the EU TPD.
37. A Business Member suggested moving the item "benchmark studies if available" in para. 26 b) vi) further down in order to keep the logical consequence of events.
38. This suggestion initiated a lively discussion between certain Tax Administration and Business Members on the need to include, whether or not on a compulsory basis, benchmark studies in the EU TPD. Business Members claimed that there was already sufficient information available to make a first assessment of the

arm's length nature of a company's transfer pricing and that tax administrations had the right to request additional information at a later stage. One Tax Administration Member, however, stated that in certain domestic legislations presenting evidence that transfer prices had been determined by comparison with third party transactions was compulsory to enable tax administrations to make an appropriate risk assessment and relieve a taxpayer from documentation related penalties. Even after lengthy discussion, no consensus could be reached on this issue.

39. The Forum agreed to replace in para. 24 g) the word "*substantiation*" by "*explanation*" and to delete "*e.g.*".
40. One Business Member questioned the need to include cost contribution agreements, APA's and rulings in the masterfile since these were all agreed by tax administrations. Another Business Member emphasized the confidentiality of those instruments, a list of which could should be sufficient as information. The relevance of this sort of information for all EU tax administrations was another issue for discussion, the alternative being to include this in the country specific documentation.
41. Some recognised that there was a certain aspect of confidentiality related to these instruments, whereas other Tax Administration Members stated that this should not be the case in a European context. Two Tax Administration Members, supported by a business Members, specified that businesses would probably already submit this information on a voluntary basis considering that it was in the taxpayer's interest to make the existence of these instrument known to the tax auditor. It was finally agreed by consensus to amend the drafting of that paragraph to "*a list of Cost Contribution Agreements, APAs and Rulings covering transfer pricing aspects ...*".
42. The *Vice-Chair* for Tax Administrations proposed redrafting para.24 f) by specifying "*legal and economic ownership of intangibles*". Whereas there was agreement that as far as transfer pricing was concerned the "*economic*" ownership was the more important definition, it became clear that this concept was susceptible to different interpretations which would not provide clarity and transparency. It was, therefore, agreed by consensus not to add "*legal and economic*" to "*ownership of intangibles*" as the assessment of these kinds of ownership of intangibles could more usefully be made during a tax audit.
43. The proposal from a Business Member to add to para. 24 a) "*general*" before "*description*", to replace in para. 26 a) "*details of country specific controlled transactions*" by "*information, i.e. description and explanation ...*" and to delete in para. 26 b) ii) "*detailed*" was accepted by the Forum. Some Tax Administration Members and a Business Member asked to clarify in para. 27 the exact meaning of "*minimum requirements*" in the upper boxes of examples 1 and 2. It was clarified that the items listed in the masterfile boxes were the minimum requirements for a masterfile to be provided by the taxpayer. The Secretariat complemented that these items were at the same time the maximum requirements for the masterfile that tax administrations could ask for.
44. The *UK* Tax Administration Member confirmed his position on para. 29.

45. One Tax Administration Member stated that in his national legislation, documentation should be available at the time of the tax return and suggested to specify in para. 30 that upon specific request, and in accordance with para. 35, taxpayers should submit their documentation within 30 days.
46. The delegate from the Danish tax administration explained that his government intended introducing a so-called "declaration requirement" for a company auditor confirming that the company had prepared the documentation required by Danish legislation. The auditor's declaration would have to be submitted together with the tax return of the company. A Danish business opting for the EU TPD would, therefore, have to submit the EU TPD to the company auditor before filing its tax return in order to allow the auditor enough time to assess the EU TPD and provide the declaration. However, as this declaration obligation would not mean that the EU TPD had to be submitted to the tax administration at the time the tax return is filed, the *Chair* concluded that this rule would be in compliance with the EU TPD concept and the recommendations in Annex I.
47. The *Vice-Chair* for Business said that the obligation to submit documentation within 30 days after a specific request had been made would mean that the masterfile would have to be prepared according to the rules of the most demanding EU Member State.
48. One Tax Administration Member expressed doubts about the need to include para. 40 which in his view did not bring any added value and further noted that the current text did not provide for any procedure to notify tax administrations that a company had opted for the masterfile. A Business Member stated that this notification should include the date on which the masterfile would be ready. After some discussion it was agreed by consensus to redraft this paragraph as follows: "*The member of a MNE that has opted for the EU TPD for a given fiscal year should inform the tax administration accordingly in its tax return.*"

## **9. OTHER BUSINESS**

49. Subject to a positive Commission decision as regards the extension of the mandate of the Forum, it was agreed that the first meeting of the Forum in 2005 would take place on 16<sup>th</sup> March 2005.