



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 SIXTH MEETING OF THE EU JOINT TRANSFER PRICING FORUM

held in Brussels on 11th December 2003

I ADOPTION OF THE AGENDA (DOC JTPF/017/2003/EN/FR/DE)

1. The proposed agenda was adopted by consensus.

II ADOPTION OF THE SUMMARY RECORD OF THE JTPF MEETING OF 11TH SEPTEMBER 2003 (DOC JTPF/018/2003/EN)

2. The summary record was adopted by consensus.

III ORAL REPORT FROM TAX ADMINISTRATION MEMBERS ON THE RATIFICATION PROCESS

3. 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.
4. The Member from the *Swedish* tax administration informed the FORUM that his country had notified the Secretariat of the Council of the ratification of the Prolongation Protocol.
5. The Member from the *Irish* tax administration informed the FORUM that it was expected that both the Prolongation Protocol and the Accession Convention would be ratified in January 2004.
6. The *Italian* tax administration Member informed the FORUM that the Prolongation Protocol had been introduced in Parliament and that it was hoped that it would be ratified soon.

7. The Member from the tax administration of *Portugal* indicated that the draft bill pertaining to the Prolongation Protocol had been submitted to the Council of Ministers of her country and that it would be introduced to Parliament in the next few weeks.
8. The *Chair* concluded that encouraging progress on the ratification process had been made and that those countries which had not yet ratified the Prolongation Protocol or the Accession Convention should provide a progress report at each meeting of the FORUM. He added that the report of the JTPF would report on the state of play of the Prolongation Protocol and the Accession Convention and it would be desirable, therefore, that all Member States had ratified both instruments before the report was submitted to the Council.

IV DRAFT REPORT ON THE ACTIVITIES OF THE JTPF OCTOBER 2002 - DECEMBER 2003 (DOC JTPF/013/REV1/2003/EN)

9. The *Chair* mentioned the Commission's Communication of 24 November 2003 (COM(2003)726 final) which expressed some concern about the relatively slow progress compared to the work program agreed by the Forum in 2002. He said that perhaps not everybody was completely satisfied with the results but in his view a good compromise had been reached. It was hoped that the pace of the future work on the remaining issues of the Forum's work program could be accelerated. Referring to the conference on company taxation in Rome on 5-6 December 2003, he reported that the Director-General of TAXUD had underlined the importance of the Forum's work.
10. On the draft report itself, the Forum agreed to make the following amendments:
 - delete *Sweden* from the list of Member States in para. 2.1 that still have not ratified the Prolongation Protocol;
 - delete *Denmark* and *Spain* from the footnotes concerning the definition of Article 6 (1) of the Convention as both Member States withdrew their scrutiny reservations and in future will concur with the majority view that double taxation may also occur in cases other than transfer pricing adjustments.
11. The Member from the *Italian* tax administration informed the Forum that her country would maintain its reservation on the scope of the Arbitration Convention but would consider a slight amendment of the text.
12. Paras. 2.2 to 2.4 of the descriptive part of the draft report were approved without further changes. As regards paras. 2.5 and 2.6 the Forum agreed by consensus to publish the contribution from the Business Members of the Forum on the review of some outstanding issues in connection with dispute resolution procedures (doc. JTPF/0020/Back/2003/EN of 14 November 2003) and to discuss the issues contained in this contribution at a later stage.
13. With respect to para. 2.7 of the descriptive part of the draft report the Secretariat informed the Forum that the Commission services and the Council would soon discuss the procedure relating to the accession of EU Acceding States to the Arbitration Convention and that those countries would be informed about the proper procedure in early 2004.

14. The Member from the *UK* tax administration stated that his country would maintain its reservation on the two-year time period contained in the commitment of Member States for the ratification of the accession treaties to the Arbitration Convention, because the *UK* still considered the reasons expressed in its reservation as valid.
15. With the aforementioned changes and para. 2.7 to be brought in line with para. 2.1 sub-para. 1, which states that only one country has not ratified the Accession Protocol, the descriptive part of the draft report including paras. 3 and 4 and Annex I was approved by consensus.
16. On Annex II of the draft report, i.e. the draft Code of Conduct, the Forum adopted the following amendments:
 - redraft para. 2. (ii) a) on the request of the Member from the *Danish* tax administration as follows "*the date of the tax assessment notice, i.e. a final decision of the tax administration on the additional income, or equivalent*" and amend para. 4.2 a) accordingly;
 - delete the footnotes N^o 5, 10, 11, 12 and 14 as the *Netherlands, Portugal* and the *UK* withdrew their scrutiny reservations.
17. The *Chair* concluded that with the changes as described above the draft report of the JTPF was approved by consensus. He added that the report had to be translated into all official EU languages before submitting it to the ECOFIN Council in the first quarter of 2004. It was hoped that the Council would formally adopt the Code of Conduct during the Irish Presidency. To facilitate processing the report, the Forum gave the Secretariat and the Bureau the mandate to make technical amendments to the report if necessary.

V DISCUSSION ON THE WORKING PAPER ON DOCUMENTATION REQUIREMENTS (DOC JTPF/019/2003/EN)

a) General observations (including questions 1 and 2 of the working paper)

18. The Secretariat gave an overview of the document highlighting that within the Forum's remit to reduce compliance costs the objective was a common approach of Member States on documentation requirements. To this effect it was desirable to reach agreement in the course of future discussions on one of the possible concepts of EU-wide documentation.
19. The *Chair* then invited the Forum Members to make general comments on the working paper. Business Members expressed understanding for the concern of tax administrations that transfer pricing might be used for profit shifting. The tendency among Member States to combat possible manipulation of transfer pricing with increasingly onerous documentation requirements would, however, put an impossible burden on taxpayers.
20. In the context of reducing compliance costs business was looking for pragmatism. Safe harbour rules should be considered in that context. Although they might be incompatible with the arm's length principle, safe harbour rules could help prevent both taxpayers and tax administrations from wasting efforts.

21. For Business Members, an important objective was to prepare transfer pricing documentation with a minimum level of work. The documentation process should be efficient and timely for both taxpayers and tax administrations. In this context an important question was when to prepare and submit documentation. Detailed and exhaustive transfer pricing documentation were not really necessary if a company had complied with the arm's length principle. Too many documents requested by tax administrations proved finally to be irrelevant.
22. A Member from a tax administration remarked that the issue of timing was indeed important because due to staff rotation and changes in a company's ownership there was a risk of not being able to obtain the necessary documentation if it was not prepared at an early stage.
23. The Observer from the *OECD* explained that the issue of comparability was intensely discussed at the OECD as it was regarded as a fundamental issue that touched to the heart of the arm's length principle, and that ultimately these discussions might have an impact on Member States' documentation requirements. The OECD was also considering a revision of the transactional profit methods.
24. One Member from business expressed his concern that tax administrations might use extensive documentations requirements to shift the burden of proof from the tax administration to the taxpayer. Another Member from business pointed out that pragmatic solutions were necessary not least because the persons applying documentation rules were not normally tax experts but operational staff for whom documentation requirements seemed of less importance than the company's overall profit. He added that a more uniform approach within the EU was necessary and the rules had to be user-friendly.
25. A Member from a tax administration commented that it was in the taxpayer's organisational domain whether tax experts or non-tax experts had to deal with documentation requirements. He underlined that the issue of documentation requirements was not merely a formality but an integral part of applying arm's length transfer pricing rules. Another Tax Administration Member added that in order to make progress Tax Administration Members were open-minded towards business, but it was necessary to seek a balanced solution taking into account the role of tax administrations to protect their tax bases.
26. Another Tax Administration Member stressed the importance of finding a compromise between the legitimate interests of taxpayers, i.e. a reduction of compliance costs and protection from penalties, and the legitimate interests of tax administrations to protect their tax revenues. Both taxpayers and tax administrations had only limited resources and, therefore, had the common interest to put more resources into areas where a substantial amount of tax was at risk.
27. This Member added that two different objectives had to be weighed: the benefits from flexibility and pragmatism on one side and the benefits from standardisation on the other hand. He conceded that there was some tension between these two objectives and that some tax administrations were prepared to be more flexible than others. In his view a Code of best practice should include, but not be limited to, the time when documentation had to be prepared and filed, rules on the aggregation of transactions, the interaction of documentation requirements with penalties and simplifications for SMEs.

28. Both Business and Tax Administration Members agreed that taxpayers who did not comply with documentation requirements as a result of gross negligence had to face negative consequences. They also agreed that a so-called two-layer approach might be envisaged: when filing his tax return a taxpayer should be allowed to make available to the tax administration only basic documentation, whereas more detailed and comprehensive documentation should be available during a tax audit. The discussion showed that transparency and simpler documentation rules were in the common interest of both business and tax administrations and that the PATA approach was rejected by all Forum Members.
29. The *Chair* welcomed the spirit of co-operation in the Forum and concluded from the discussions that the Forum supported the Commission's position on questions 1 and 2 of the working paper.

b) Purpose of the working paper, purpose and content of good and effective documentation (questions 3 to 5 of the working paper)

30. On the issue of risk assessment the *Chair* remarked that targeting the limited resources of both business and tax administrations on areas where tax is at risk might lead to assessing risk profiles and in this context a questionnaire to be filled in by enterprises might prove useful.
31. One Tax Administration Member cautioned that the goal of risk assessment and how this goal could be achieved still had to be examined. He added that risk assessment could be a useful decision making tool, because taxpayers had to decide what amount of documentation was necessary and tax administrations had to decide which areas to examine. He continued that an important question was how to identify whether a large amount of tax was at risk. In this context, risk indications, e.g. effective tax rates, might be useful. One should not, however, jump to conclusions and a priori favour a standardised risk assessment questionnaire. Another possible solution could be a Code of best practice.
32. Several Members from tax administrations found financial ratios and statistical data particularly helpful. A risk assessment questionnaire could be an integral part of making a risk assessment, but tax administrations should not be confined to the use of such a form. They cautioned that there was a risk that only certain enterprises that had properly filled in the form would be examined.
33. The discussion revealed that the *Danish* tax administration requires multinational enterprises to file a questionnaire concerning controlled transactions which has to be attached to the income tax return.
34. Some Business Members expressed their concern that a risk assessment questionnaire might be too detailed and onerous to fill in. On the other hand, as such a form could be beneficial also for business, it should not be too vague. Business Members argued that only factual and not qualitative data should be requested.
35. One Member from business stated that only tax administrations had a real interest in a risk assessment questionnaire, because from the business perspective the only benefit could be to identify tax areas that were likely to be examined. The main interest of business was to

comply with documentation requirements and avoid penalties. He added that in his view a risk assessment questionnaire was, however, not part of the documentation.

36. Referring to question 3 of the working paper the *Chair* concluded that there was general agreement that a risk assessment questionnaire could be an appropriate tool to identify risk enterprises and tax risk areas. If such a questionnaire had to be submitted when filing the tax return it should, however, be limited.
37. It was agreed by consensus to establish a joint documentation sub-group consisting of Members from business and tax administrations. This sub-group should elaborate the issues related to risk assessment, e.g. risk indicators, timing, i.e. preparation and submission of a risk assessment questionnaire, the elements to be included in a risk assessment questionnaire etc. The Secretariat was asked to prepare a separate working paper on risk assessment including some guidance in transfer pricing inquiries for the following meeting of the Forum.
38. On the issue of comparables Business Members remarked that more and more tax administrations requested third party data and increasingly used local databases. In contrast, pan-European database searches would substantially reduce taxpayers' compliance costs. In this context, the main questions were if or in which circumstances Member States' tax administrations could accept data from non-domestic sources and to what extent they could dispense with comparable data if the taxpayer had prepared sufficient and comprehensive documentation.
39. One Member from business pointed to the difficulty in having access to "comparables" considering, for example, that in many cases these comparable data were with a company's competitors. Due diligence should, therefore, be sufficient if comparable data was not available. In addition, the obligation to identify comparable third party transactions could lead to a shift of the burden of proof. Some Members from tax administrations, however, stated that in the framework of documentation rules the burden of proof should generally not be shifted on to the taxpayer.
40. A Member from business stressed that the prudent and diligent business manager principle should govern any documentation concept. He added that not all inter-company transactions should be examined with reference to comparables, and the forum should, therefore, consider certain safe harbours or thresholds.
41. After some discussion, the *Chair* stated that third party comparable searches should not be mandatory. Enterprises should, however, be given the opportunity to present comparables to demonstrate that their transfer pricing is at arm's length. He added that in some cases comparables might be helpful but the decisive question remained in what cases tax administrations should be entitled to request comparables from a taxpayer. The objective was, therefore, to identify areas where comparables were necessary and areas where the search for comparables was feasible.
42. One Tax Administration Member cautioned that the Forum should wait for the OECD to complete its work on comparability analysis in order to avoid duplication of work and conflict with the OECD's work in that field. In response, the *Chair* and some other Forum Members argued that as long as the OECD had not yet come to a conclusion, the Forum could develop its own position and together with business present this EU position to the OECD. As the discussions on comparables were within the remit of the Forum, this work was also

compatible with the work underway at the OECD.

43. The Observer from the *OECD* informed the Forum that the OECD was examining different kinds of comparables, including internal comparables (i.e. transactions between the taxpayer and third parties), that should be given preference over external comparables whenever such internal comparables existed. She added that the OECD did not take a country-by-country but a market-by-market approach. Difficulties often emerged if comparables were not available, for example because the relevant market was too small or the business was too integrated. But the OECD would not favour analyses that do not make a proper attempt to find the best available comparables.
44. The *Chair* concluded that the documentation sub-group should elaborate more on the issue of comparables and report back to the Forum at the next meeting. The work should be limited to the question whether and in what way non-domestic comparables could be used if comparable searches were necessary or considered helpful. A related question was whether there were substantial differences between the results of local as compared to pan-European databases.
45. As regards question 5 of the working paper the *Chair* asked the Members of the Forum if they preferred a more prescriptive approach like PATA gaining more certainty or a more general approach leaving taxpayers and tax administrations more flexibility. Members expressed different views with some Members stating that documentation requirements should in any case fit the size of a company and the nature of its business.
46. Some Members argued that a prescriptive approach was more burdensome and could force companies to change their transfer pricing system. One Member from business expressed dissatisfaction with para. 43 of the working paper as he considered the obligations described therein as unacceptable.
47. One Business Member observed that the issue of documentation had two different aspects: (i) in what way should the taxpayer prepare its documentation and (ii) what concrete information and documents did he have to make available to the tax administration. The taxpayer should be flexible in the way he prepares his documentation, but considering the legal consequences of non-compliance, the precise description of the necessary information and documentation was of great importance.

c) Possible concepts of EU-wide documentation (question 6 of the working paper)

48. The discussion showed that Forum Members expressed a range of different views on the three documentation concepts. Business Members claimed standardised documentation as the minimum, but generally favoured centralised documentation, conceding, however, that this concept was not suitable for decentralised group structures. They indicated that from their perspective the "Best Practice" approach was not favourable because it would leave Member States' tax administrations too many options to apply the rules differently. This could cause uncertainties and exposure to penalties.
49. One Tax Administration Member favoured the centralised documentation concept because it provided for more transparency for tax administrations. He observed that local documentation in most cases did not allow tax officials to see the whole picture.

50. Another Tax Administration Member cautioned that it might be premature to ask Members about their preference concerning documentation concepts or, perhaps, it was the wrong question. He identified two approaches depending on the facts and circumstances of the case: (i) looking at the "Best Practice" approach where the issue was what features a Code of best practice should contain and (ii) looking at standardised documentation where the issue was similarly what elements a standardised set of documentation should contain. The decisive question was, therefore, which concept was appropriate in a given case.
51. Several Members suggested analysing carefully the pros and cons of each of the possible concepts and asked the Secretariat to prepare a paper on the specific pros and cons for the next meeting. It was also agreed by consensus that a centralised documentation concept ("masterfile" approach) should in any case be optional for taxpayers.
52. The *Chair* concluded that the joint documentation sub-group should elaborate more on the content of good and effective documentation and on the documentation concepts. He highlighted that Members should not lose sight of the Forum's objective, i.e. reduce taxpayers' compliance burden. Considering 15 and in future 25 different rules on documentation this seemed feasible only by adopting a standardised approach.

d) Proposed recommendations for documentation rules (question 7 of the working paper)

(i) Timing – Preparation and Submission of Documentation

53. The discussion revealed a broad variety of opinions among Forum Members. The *Chair* clarified that generally documentation could be prepared (i) at the time of the transaction, (ii) when filing the tax return and (iii) upon request from the tax administration.
54. Some Members from tax administrations require a taxpayer to prepare his documentation as early as possible, ideally contemporaneously. Other Tax Administration Members and most Business Members, however, prefer to leave it to the discretion of the taxpayer when the documentation is prepared, stressing, however, that the taxpayer bears the risk of non-compliance if he is unable to submit information or documents reasonably requested by the tax administration. One Member from business argued that a taxpayer might work on certain aspects of his documentation even after the tax return had been filed.
55. The Member from the *German* tax administration referred to the ordinance on documentation requirements that his country had recently issued and explained that this ordinance required taxpayers to prepare documentation on exceptional transactions, i.e. corporate restructuring or fundamental changes of functions and risks, within six months after the end of the business year in which the transaction occurred.
56. A Member from a tax administration distinguished between two different kinds of documentation: (i) basic accounting information, e.g. on the value of transactions, related parties involved, adjustments made etc., that need to be in existence when filing the tax return, because otherwise filing the tax return would not be possible; and (ii) the full range of documentation justifying the arm's length character of the taxpayer's transfer pricing. The latter need only be made available to the tax administration after the announcement of an audit.

(ii) Application of Documentation Rules

a) Aggregation of Transactions

57. Business Members strongly requested that a certain degree of aggregation should be allowed, because specific documentation on each single transaction was impossible in practice. The Forum should also consider certain de-minimis rules for SMEs.
58. The Observer from the OECD explained that the OECD Transfer Pricing Guidelines in para. 1.42 provided for aggregation if transactions were so closely linked or continuous that they could not be evaluated separately. In some circumstances it might also be appropriate to determine the transfer pricing on a package basis.
59. In conclusion, the *Chair* noted that there was agreement among Forum Members that aggregation of transactions should be allowed in practice, provided that taxpayer applied the aggregation rules consistently.

b) Availability of Information

60. Some Members suggested redrafting para. 78 to avoid confusion with the so-called best method rule and to insert language on the issue of whether a company can be required to request information from its foreign parent or affiliated company. Business Members cautioned, however, that Member States' tax administrations could receive information under the exchange of information Article of their bilateral double tax treaties and under the EU's Mutual Assistance Directive. Also, in an arm's length situation, unrelated parties would not share commercially sensitive data.
61. A Tax Administration Member rebutted the latter argument reasoning that associated enterprises in that respect could not be compared with unrelated parties.
62. The *Chair* concluded that the issue of availability of information needed to be elaborated in more detail.

c) The Conduct of the Tax Administration

63. Forum Members had no specific observations on this chapter

d) Simplifications for SMEs

64. Both Business and Tax Administration Members considered this issue very important in the effort to alleviate taxpayers' compliance burden. The OECD Observer remarked that simplifications for SMEs would not contravene the OECD Guidelines.
65. The *Chair* explained that only independent SMEs that did not belong to a large multinational group would be eligible to simplifications for SMEs. After some discussion, the Forum agreed by consensus to adopt the SME concept of the EU Commission for this purpose.

e) *Language*

66. The *Chair* remarked that pragmatic solutions were necessary as more and more tax experts spoke at least English. The Forum adopted a Business Member's suggestion to insert in para. 84 of the working paper language that allowed a taxpayer in certain cases and if appropriate to provide a translator who could give explanations to a tax inspector in cases where documents were only available in a foreign language and where translation of these documents was too burdensome.

f) *Penalties*

67. Although the Forum generally agreed with the statement in the working paper that the imposition of penalties in the course of tax administration was a matter going beyond just transfer pricing, some Business Members expressed their dissatisfaction. They argued that as a common principle a taxpayer should not be exposed to penalties if he had complied with the documentation requirements. No consensus could be reached on this issue.

g) *Application to Permanent Establishments*

68. The *Chair* explained that the definition of Article 5 of the OECD Model Tax Convention should apply.

VI ANY OTHER BUSINESS

69. The *Chair* stated that any comments and/or drafting suggestions on the working paper on documentation requirements should be submitted to the Secretariat by end of January 2004.

70. It was agreed by consensus that the next JTPF meetings should take place on 18 March and 10 June 2004. The meeting on 18 March will start at 9 a.m.