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DIRECTORATE-GENERAL
TAXATION AND CUSTOMS UNION
Analyses and tax policies
Analysis and coordination of tax policies

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SUMMARY RECORD OF THE SIXTEENH MEETING OF THE EU JOINT TRANSFER PRICING FORUM

held in Brussels on 20th June 2006

1. ADOPTION OF THE AGENDA (DOC. JTPF/012/2006/EN/FR)

The proposed agenda was adopted by consensus.

2. ADOPTION OF THE MINUTES OF THE MEETING OF 21ST MARCH 2006 (DOC. JTPF/011/2006/EN)

The Chair explained that the Secretariat received requests for amendments from Italy and Germany. Unfortunately the request from Germany was received too late and therefore the amended minutes will be distributed for an approval through written procedure.

The Forum agreed that in the future the minutes will be approved through written procedures.

3. ORAL REPORT BY THE COUNCIL PRESIDENCY ON THE STATE OF PLAY OF THE FORUM'S SECOND REPORT

The Austrian delegate explained that the Code of conduct on documentation was expected to be adopted by the Council through a resolution before the end of June. Paragraph 24 of the Code had been amended to clarify a language problem.

4. STATE OF PLAY OF THE NOMINATION OF THE INDEPENDENT PERSONS OF STANDING, ELIGIBLE TO BECOME A MEMBER OF THE ADVISORY COMMISSION AS REFERRED TO IN ARTICLE 7 (1) OF THE ARBITRATION CONVENTION (FINALIZED LIST OF THE INDEPENDENT PERSONS OF STANDING: DOC. JTPF/010/BACK/REV4/2005/EN)

The Chair explained that the list was complete but will be amended to take into consideration the sad death of Dr Kari S TIKKA (*Finland*) who will be replaced by Dr Helminen (who is not eligible as Chair person).

The Chair also invited the new Member States who had ratified the Accession Convention to the Arbitration Convention to communicate the names of the persons eligible as Chair persons.

The updated list will be published as soon as possible on the website.

5. STATE OF PLAY OF THE IMPLEMENTATION OF THE CODE OF CONDUCT ON THE ARBITRATION CONVENTION (DOC. JTPF/006/BACK/REV1/2006)

The Chair explained that this examination had to be considered as part of the monitoring item included in the work programme. The new version of the document includes a summary table and **it was agreed to include the legal reference allowing the suspension of tax collection. Therefore all members are invited to revise the table and send it back to the Secretariat by the end of August.** The document will be published on the website after the September meeting. As regards the summary table the following remarks were made:

Belgium clarified that they respected all the rules of the Code even before its adoption by the Council.

Greece explained that they were examining to what extent their legislation had to be amended.

Denmark mentioned that the "yes" in the table should be put into brackets because it is not yet clear whether their national legislation will have to be amended.

Finland clarified that they will amend the law in order to allow the suspension of tax collection.

Italy said that the law is from 1993 and not 2003

Germany explained that they were examining whether their legislation had to be amended to allow the suspension of tax collection outside of an appeal procedure and that the "yes" in the table therefore should be put into brackets.

France published on 23/02/2006 a new instruction on this issue.

Spain will amend the law to allow the suspension of tax collection and the "yes" in the table therefore should be put into brackets.

6. UPDATED NUMBER OF PENDING CASES UNDER THE ARBITRATION CONVENTION WHICH WERE REPORTED AS OF 31/12/2005 (DOC.JTPF/009/BACK/REV1/2006/EN)

The Chair explained that this document is an important and useful tool for monitoring the implementation of the Arbitration Convention and make sure that progress is realised in the elimination of double taxation. After the first document which examined the number of open cases at the end of 2004, the JTPF needs to examine the situation at the end of 2005.

The table was completed by mid April and MS were invited to eliminate the discrepancies. One Tax administration (supported by several MS in the meeting) stressed the need to agree within the Forum on a common understanding on record keeping to avoid such discrepancies in the future. However, it was not clear that all the discrepancies were attributable to different ways of keeping records.

The Chair suggested that the next meeting should be partly dedicated to the question of what the Forum understands by monitoring and what should be included in the monitoring. It would probably be worthwhile to examine why at this stage only two arbitration commissions were set up. The question is not to interfere with the competence of the Competent Authorities but well to understand in general terms how the AC is implemented and whether any improvement can be achieved. And after all, the question was of vital importance to taxpayers as well.

The Chair explained that in a seminar in Trier the participants raised the problem of the timeframe of the setting up of arbitration commissions: there is no deadline mentioned in the Code of conduct and Prof. Hinnekens said that civil law principles applied (normal or reasonable time). The Chair said that the JTPF never dealt with this issue and that in the future it could probably envisage including a timeframe of 3 to 6 months for the setting-up. There might be other areas where the operation of the AC still needed to be clarified

After a general discussion everybody agreed that the aim of the AC is not to have arbitration commissions put in place but to eliminate double taxations. Speeding up the elimination of double tax was always a desirable outcome.

The Chair concluded by inviting the Secretariat to prepare a discussion paper and/or a questionnaire on this issue for discussion in September.

MS were invited to revise the table of pending cases by mid-July. The secretariat was invited to put the document on the website after the 15th July even if discrepancies are not eliminated.

7. 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 (DOC.JTPF/005/BACK/REV1/2006/EN).

The Code of Conduct states that MS will endeavour to ratify the Convention at the latest two years after the accession of the ten new MS (1st May 2006). Therefore this document is an assessment of the situation within the different MS.

Greece declared that the matter had been submitted to the Parliament.

Italy declared that the initial step of the procedure had been started by the Ministry of Foreign Affairs.

Spain declared that the initial step of the procedure had been started by the Ministry of Foreign Affairs.

Germany said that the notification to the Council will soon take place.

Finland said that the notification had been sent to the Council.

Czech Rep. explained that the bill had been adopted by the Parliament and sent to the President for ratification.

Luxembourg had ratified in April.

Sweden said that the notification had been sent to the Council.

The Chair invited Latvia and the UK to report to the Secretariat by mid July.

8. FINALIZATION OF THE DRAFT JTPF REPORT ON ALTERNATIVE DISPUTE AVOIDANCE AND RESOLUTIONS (DOC. JTPF/001/REV3/2006/EN) ON THE BASIS OF THE COMMENTS PROVIDED BY THE MEMBERS (DOC.JTPF/014 TO 020/BACK/2006)

The Chair summarized the situation by reminding the Forum that the principles to be included in the document had been discussed in the March, June, September, and December meetings of 2005. The “key points” and “specific issues” papers which have been combined into this document had been discussed and subject to written procedures. The current document has been itself available for discussion before the March meeting, subject to written comments before the March meeting, partly (paras. 1-65) discussed at the March meeting and then subject to a second round of written comments after the March meeting.

At the March meeting, because of the slow progress, the Secretariat was asked to produce a preferred text from the written comments received so far for paras 66-142 and to redraft paras 52-53 (new) and para. 66 (new) on "anonymous approaches".

After the March meeting there were some new comments received on points not previously discussed up to para 66. These have been incorporated in track changes in the document JTPF/001/REV/2006 of 7 June and have attracted no written comments within the deadline.

The Chair explained that the secretariat (supported by the Bureau) had chosen between conflicting suggestions from Forum members and that the revised document includes the written suggestions received after the March meeting and before 7 June.

Even though the deadline for written comments had been extended, comments from a Business member and one Tax administration were received after this and too late to include in the main document; however they had been put on Circa on 15th June (docs JTPF/022 and 023/BACK/2006 respectively).

The Chair explained that late replies were prejudicial for the quality of the meeting and of the documents. He added that the 65 first paragraphs were considered as agreed in principle at the March meeting and the discussion should therefore start with para. 66.

One Tax administration strongly disagreed with the statement of the Chair to consider the 65 first paragraphs as agreed, arguing that not all amendments agreed at the March meeting were incorporated in the document and some new suggestions were incorporated but not yet discussed. However, the Chair pointed out that the new comments up to para 65 had been made available on Circa for written comments.

The Chair suggested not to spend too much time on formal issues and to start the discussions on para. 66.

Paragraph 66 on anonymous approach: it was agreed to replace in the bold text the word "can" with "might".

Paragraph 70 on pre-filing stage: it was agreed to replace in the bold text the words "the parties" with "taxpayer and tax administration".

Paragraph 71 on formal application: after an exchange of views it was agreed to modify the bold text by adding the words "for processing" after "has been formally accepted".

Paragraph 72 on formal application: it was agreed to amend the sentence related to the appendices A and B by changing the words "is likely to be necessary in all instances" by "might often be necessary" in order to introduce more flexibility.

Paragraph 74 on the evaluation : agreement to replace the word "price" with "transfer pricing".

Paragraph 76 on the evaluation: it was agreed to replace the bold text by the bold text presented in the Tax administration's document.

Paragraph 79 on the evaluation: a consensus was reached for the deletion of the bold text which is redundant due to other paragraphs.

Paragraph 83 on the evaluation: the last sentence of the bold text on the involvement of the taxpayer was considered as ambiguous and therefore deleted by consensus.

Paragraphs 84 and 87 on the evaluation: it was agreed by consensus to keep the text of the Secretariat.

Paragraph 89 on the content of CA position papers: agreement with the Tax administration's proposal.

Paragraph 90 on the content of CA position papers: partial agreement on the Tax administration's proposal by including the word "significant".

Paragraph 91 on the content of CA position papers: it was agreed by consensus to delete the word "sometimes" in the first sentence and to modify the bold text by including the Tax administration's suggestions.

Paragraph 92 on the formal agreement of APA : one tax administration suggested that once a taxpayer has agreed to the APA he should be bound to the tax treatment agreed in the APA and should therefore submit a binding declaration that the taxpayer waives legal

remedies in respect of tax assessments that correctly implement the APA. Two reasons were provided: it is a fair equivalent for the APA being binding on the tax administrations and it has been confronted with unfair behaviour by a particular taxpayer who appealed against a correct implementation of a bilateral APA thus creating untaxed income, the disagreement arising after a change of shareholder

Business representatives from Germany could understand, without condoning this request even if they expressed doubts that a legal provision existed in German law to apply such a principle.

Although some JTPF members were sympathetic to the principle, a majority of members expressed serious concerns about this proposal for legal and conceptual reasons.

It was finally agreed by the majority of the Forum members to add the following sentence in the "normal" text without taking it on board in the bold text: *"Equally, tax administrations may require certainty that the tax treatment of transactions covered by the APA will be accepted by the taxpayers provided it is consistent with the APA. For the APA to become effective, tax administrations may therefore require the taxpayers to submit a binding declaration that they waive legal remedies, i.e. judicial and administrative appeals, in respect of tax assessments that correctly implement the APA"*.

The Italian tax administration –at the end of the meeting – reserved to examine more deeply the content of paragraph 92 (both normal text and bold).

The German tax administration requested a reservation because the additional sentence was not reflected in the bold text.

Paragraph 95 on transactions and participants in the APA: a consensus was found to keep the last bold paragraph of the Secretariat but to add "*in the APA*" after "*to involve*" in the last sentence of the bold text.

Paragraph 96 on critical assumptions: one Tax administration had proposed additions here that were not taken up in the text and spoke on this proposal. Another Tax administration argued against the proposal. A Business member pointed out that the proposal contained some inaccuracies which would have to be changed if it was to be included. The Secretariat suggested a version which the Forum agreed should be included in the paragraph but not in the bold text.

Paragraph 98 on critical assumptions: one Tax administration suggested several amendments. The Forum agreed to adopt these amendments except for the word "*accurate*" before "*arm's length*" and with reservation on the last sentence referring to the examples provided in annex E (because this point will be considered when examining the annexes).

Paragraph 99 on critical assumptions: the German drafting suggestions on the bold text were rejected by consensus.

Paragraph 100 on rollback: a consensus was reached to delete the last sentence.

Paragraph 101 on rollback: a consensus was reached not to adopt the Tax administration's proposal.

Paragraph 102 on rollback: the Forum agreed by consensus to replace in the last sentence of the bold text the words "*re-opening*" with "*making a tax re-assessment concerning*".

One tax administration suggested adding a sentence in the normal text stressing that according to its domestic laws the tax administration cannot refrain from making a tax re-assessment concerning earlier periods if these are incorrect.

A majority of members disagreed with this proposal and therefore it was not adopted. One Tax administration put a reservation on this paragraph.

Paragraph 103 on the publication of statistics: at the March meeting the discussion paper on the publication of statistics was not discussed (doc. JTP/.003/BACK/2006) and therefore the Chair postponed the discussion on para. 103 to the meeting of September..

Paragraphs 104 to 108 on unilateral APAs: one tax administration suggested a new wording for these paragraphs and a majority of Forum Members agreed with the Dutch proposal.

However the representatives from two Tax administrations disagreed with that proposal stressing the need to keep the wording of the Code of Conduct on Business taxation in the bold text.

The Forum finally agreed to replace paras. 104 to 108 with the text proposed by that Tax administration but to keep as best practice the first paragraph of the bold text on the Code of Conduct (Business Taxation) – transfer pricing in para. 107 of the Secretariat document: "*In the context of the "Code of Conduct" (Business Taxation) Member States have committed themselves to spontaneously exchange details of concluded unilateral APAs. The Exchange of Information (EOI) should be made to any other tax administration directly concerned by the unilateral APA and should be done as swiftly as possible after the conclusion of the APA*".

One Tax administration requested a reservation on chapter 4.7 (new).

Paragraphs 117 and 118 on APAs for SMEs: for both paragraphs it was agreed to clarify that SMEs were excluded from the simplified procedure if they would apply for an APA on IP or non routine services by adding the words "*a simplified APA procedure*" after the words "*from the scope of*".

Paragraph 118 on APAs for SME: It was agreed to delete the last sentence.

Paragraph 119 on APAs for SMEs: the forum agreed to delete the following words: "*and the taxpayer's own functional analysis could be accepted without exhaustive scrutiny*".

Paragraph 121 on APAs for SMEs: The proposal by one tax administration to delete this paragraph was not adopted. For reason of consistency and with reference to the reservation made to para. 102, one Tax administration made a reservation to para. 121.

Paragraph 122 on APAs for SMEs: a consensus was found to delete the second part of the sentence (after "*only*"). The proposal by one Tax administration delegate to delete the last part of the bold text was not adopted.

Paragraphs 126, 127 on simultaneous tax examinations: the forum did not adopt the Tax administration's proposals for amendment.

Paragraph 142 on final conclusions of the Forum: the forum did not adopt the Tax administration's proposals for amendment.

9. CONCLUSION

Due to time constraints the other points on the agenda could not be discussed and were postponed to September.

The Chair explained that the Secretariat will prepare a revised document including the amendments adopted in this meeting. He added that the revised document would be considered as adopted except for non-substantive drafting suggestions. One Tax administration delegate, supported by another Tax administration delegate, strongly disagreed with the Chair's statement to consider the revised document as adopted. He referred to his earlier comment that several amendments agreed by the Forum at the March meeting were not incorporated in the document, and stated that the document could only be considered as adopted when the final version of the document, including all amendments, has been approved by the Forum.

The Chair concluded by inviting members to comment on the annexes, the publication of statistics and the document on the number of pending cases at the end of 2005 by mid July. The list of independent persons and the document on the number of pending cases will be published on the website before the end of July.

One Tax administration suggested that the future work programme should be communicated to the Council.

The next meeting will take place on **THURSDAY 14th September** and the points on the agenda will be the finalization and the adoption of the APA report, the monitoring issue (and in particular the implementation of the Arbitration Convention), the future work programme and the penalty paper.