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EU JOINT TRANSFER PRICING FORUM

Secretariat information note on the future work programme

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1. INTRODUCTION

This information note is presented in order to give Forum Members the opportunity of preparing a list of the topics that could form the work programme under any new mandate for the Forum. However, the work programme can only be considered provisional until it is formally adopted by the new Forum. Therefore the working programme can only become final when adopted during the first 2007 meeting of the JTPF. However the Commission will only envisage a possible renewal if there seems to be a reasonable prospect of agreeing on a work programme.

The next JTPF could take into consideration the suggestions to limit the number of meetings to a maximum of three per year but increasing the use of written procedures to maintain work-flow. There might also be a need to have Business Members representing SMEs.

2. BACKGROUND

After its first mandate of two years of 2002, the JTPF was prolonged for a further period of two years ending in December 2006.

During the first mandate the Forum mainly discussed the Arbitration Convention and related mutual agreement issues. The agenda of the second mandate was quite ambitious and the following topics were supposed to be examined:

1. Examination of possible preventive measures to avoid double taxation: *carry-over of 2002-2004 work programme*
2. Acceptability of transfer prices to tax administrations (including APAs): *carry-over of 2002-2004 work programme*
3. Interest payments: *discussed but not finalised during 2002-2004; the Forum could identify the exact nature and extent of the problems of interest payments related to transfer pricing adjustments and examine the scope for solutions*
4. Penalties levied on transfer pricing adjustments: *discussed but not finalised during 2002-2004; the Forum could identify the exact nature and extent of the problems of penalties related to transfer pricing (excluding criminal penalties) and examine the scope for solutions.*
5. Certain aspects of the interaction of the mutual agreement and arbitration procedure with administrative and judicial appeals: *discussed during 2002-2004; the Forum could identify the exact nature and extend of the problems of this interaction and examine the scope for solutions*
6. The influence of accounting systems on transfer pricing: *the Forum could discuss and assess the consequences and possibilities of more harmonised and integrated accounting systems on transfer pricing*
7. Monitoring of the code of conduct on the arbitration convention and the ratification process of the Accession Convention.

3. REVISING AND CONTINUING THE 2004 WORK PROGRAMME

We can envisage that at the end of 2006, the JTPF will have examined the topics of possible preventive measures to avoid double taxation, APAs, penalties, interest payments and carried

out monitoring of the first code of conduct. This implies a possible carry over of the issues of judicial appeals and accounting problems. However the Forum should decide whether these topics are still relevant and whether it is necessary to consider these topics in any new work programme.

4. POSSIBLE FUTURE WORK PROGRAMME

In order to decide whether a renewal of the JTPF would be useful, all Forum Members were requested to send written contributions and these suggestions were discussed during the meeting of March 2006. These suggestions are outlined below.

After a first discussion and additional suggestions the following topics are proposed for examination:

4.1.1. Monitoring of the two Codes of Conduct and the effectiveness of their implementations.

Taking into consideration that both Codes of Conduct invite Member States to report to the Commission on their implementation and the practical problems faced with their implementation, this topic is of course of major importance and must be considered as a continuous task of the JTPF. Furthermore, the Forum has an important role to play in checking how the suggestions and best practices developed by the Forum are being implemented across the EU.

4.1.2. Exchange of practical experiences – technical discussions

Several members of the Forum have suggested that the nature of the Forum's output could change to allow for shorter, more focused documents which concentrate on narrower, more detailed topics. These narrower topics might not lend themselves to a "code of conduct" or a similar instrument but nevertheless EU taxpayers would undoubtedly benefit from a discussion and publication of the Forum's conclusions on various topics.

It is envisaged that the programme could be slightly flexible here in order to allow for extra topics to be included if necessary. However, topics so far suggested which would be discussed are:

- Multilateral MAP/arbitration cases and triangular MAP/arbitration cases.

Three MS underlined that they faced problems resolving disputes where more than two countries were involved. The Forum could discuss how the application of Article 25(3) of the OECD Model Convention can resolve these situations.

- Cost Contribution Arrangements (CCAs).

This is a large subject covered by the OECD Guidelines on transfer pricing. However, it is possible that the Forum could usefully explore common approaches to CCAs within the EU. It has been suggested that a discussion could centre on why some MS permit a mark up on services charged through a CCA but some do not. Perhaps of wider interest is the question of what services would be charged for at arm's length and the standards of proof necessary to evidence a charge between associated enterprises.

- Dispute resolution and avoidance

This issue remains of great interest to the Forum and the next work programme could contain further elements under this heading. One MS has already suggested a form of prior consultation – "high level functional analysis" – and this could form the basis of a discussion aimed at developing this approach within the EU. Business member in particular are also interested in further developing prior notification, prior consultation and prior agreement.

- Business members have suggested that the Forum could look at the convergence of arm's length pricing of transactions for corporation tax and customs purposes.
- It is also possible that the Forum could look at the incidence of the application of transfer pricing rules across the EU and perhaps develop some guidance about when a transfer pricing related audit is likely to be a worthwhile, cost effective endeavour for tax administrations.

4.1.3. Small and Medium sized Enterprises (SMEs)

Some Member States suggested reviewing the different achievements of the JTPF to see how they might be applied to SMEs. Indeed it could be envisaged to establish specific practices or guidelines only applying to this type of company. In order to have fruitful debates, it would be desirable to consult with SMEs.

4.1.4. Follow-up of the Arbitration Convention in the light of the OECD work on arbitration and practical experience of arbitration cases.

Time has moved on from the conception of the Arbitration Convention and the Code of Conduct. It is desirable that the experience of how real cases are being decided under the AC and the Code of Conduct continues to inform best practice in the EU. Therefore it is considered that the Forum could usefully consider developing further best practice on how the AC should work in reality.

A carry-over of last work programme remains the interaction of the mutual agreement and arbitration procedure with administrative and judicial appeals (article 7(1) and (3) of the AC. There is a direct link here to the OECD's work on dispute resolution which clearly states (albeit in a different context) that domestic legal remedies should no longer be available if binding arbitration is to be entered into. The Forum could consider whether it is desirable or necessary to align the two approaches.

Other developments at the OECD's Joint Working Group on Dispute Resolution could be discussed and some of the results of the OECD's Joint Working Group possibly taken into account by the Forum.

The definition of a serious penalty in the AC varies considerably between MS. Since incurring a serious penalty will deny access to the AC, it is desirable that this definition of a serious penalty is considered by the Forum and ways of permitting not restricting access be discussed.

The Forum could also give some thought to issuing guidance on the nature of the Arbitration Panel's proceedings and how their deliberations should proceed.

Conclusion

The above work may well represent a work load that is ambitious considering the length of any possible new mandate. This may require some prioritisation of the work. It is also desirable that those members of the Forum who have requested specific areas of work should be prepared to contribute directly to the first drafts of working papers before they are considered by the whole Forum.