



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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DRAFT
SUMMARY RECORD OF THE SIXTH MEETING OF THE
EU JOINT TRANSFER PRICING FORUM

held in Brussels on 10th June 2004

I OPENING OF THE MEETING

1. The *Chair* welcomed the Members from the 10 new Member States as full Members of the FORUM.

II ADOPTION OF THE AGENDA (DOC JTPF/009/REV1/2004/EN/FR/DE)

2. The proposed agenda was adopted by consensus.

III ADOPTION OF THE SUMMARY RECORD OF THE JTPF MEETING OF
18TH MARCH 2004 (DOC JTPF/010/2004/EN)

3. The Tax Administration Members from Italy and Greece proposed drafting amendments to paras. 4 and 5 respectively. With these changes the summary record was adopted by consensus.

IV 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 after approval by the Parliament the ratification of the Prolongation Protocol had been published in the official gazette on 25 May 2004. The instrument of ratification would soon be deposited with the Secretary-General of the Council.
6. The Member from the tax administration of *Portugal* indicated that the Prolongation Protocol had been ratified on 8 June 2004 and that the instrument of ratification would be deposited with the Secretary-General of the Council very shortly.
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.
8. The *Chair* expressed his satisfaction that the Prolongation Protocol had been ratified by all Member States. He reminded Members that the Protocol would enter into force on the first day of the third month following the deposit of the instrument of ratification by the last Signatory State to take this step. He concluded that the Arbitration Convention would, therefore, be expected to re-enter into force before the end of 2004.

V ORAL REPORT FROM THE COMMISSION ON THE STATE OF PLAY OF THE FORUM'S FIRST REPORT

9. The *Secretariat* and the *Irish Presidency* informed the FORUM that on 23 April 2004 the Commission had issued a Communication to the Council, the European Parliament and the ECOSOC on the work of the FORUM from October 2002 to December 2003 and on a proposal for a Code of Conduct. The *Secretariat* added that this Communication still had to be discussed at Council level.
10. The *Irish Presidency* reported that the 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. The draft Convention had been amended in that the Arbitration Convention should automatically be applied between any two Member States who had ratified the Accession Convention.
11. The *Irish Presidency* added that *Belgium* had proposed inserting a provision to the effect that the Arbitration Convention would be open for accession to any new Member States in future without all Member States having to ratify an Accession Convention and that the details of such accession would be provided for in the relevant Treaty of Accession to the EU. The legal implications of such a provision, however, still had to be examined by Member States. It was hoped to have a finalised text soon.
12. The Member from the *Dutch* Tax Administration informed the FORUM that the Dutch Presidency as from July 2004 intended to hold a Working Group meeting on the Council Communication and the Code of Conduct at the end of July 2004. The *Chair* concluded that the ECOFIN Council could hopefully adopt the Code of Conduct in autumn 2004.

VI DISCUSSION ON THE PROLONGATION OF THE FORUM'S MANDATE AND ON THE WORK PROGRAM (DOC JTPF/008/REV1/2004/EN)

13. There was an extensive discussion on the possible prolongation of the FORUM's mandate beyond 2004 and on the future work program. Most Tax Administration Members and all Members from Business expressed their desire to extend the FORUM'S mandate beyond the end of 2004. Several Members from Business observed that the FORUM's work was very useful and provided an excellent opportunity to exchange views on tax issues with Members from Tax Administrations.
14. Some Tax Administration Members stated that the issues to be discussed in future should be clear before a decision on the extension of the mandate was taken. With regard to the Council's support in 2002 to establish the FORUM, a few Tax Administration Members took the view that the issue of extending the FORUM's mandate should first be discussed at Council level and only after the Council's endorsement should the FORUM's mandate be extended.
15. The *Chair* explained, however, that the FORUM was a Commission working group and that it was up to the Commission to decide on the extension of the FORUM'S mandate. Member States could, however, decide whether or not to participate in the FORUM'S work. The Secretariat indicated that its decision would be made after the September meeting on the basis of the progress made and the remaining issues to be discussed after 2004.
16. The Secretariat also clarified that in 2002 the Council had welcomed the Commission's intention to establish the FORUM and had taken note of the way in which the Commission would establish the FORUM. It was expected, therefore, that the Council would also support the Commission's decision to extend the FORUM's mandate beyond 2004 provided that a work program for 2005 and 2006 was agreed. The Secretariat added that the work program could be discussed and agreed in the FORUM and that there was no need to discuss this in the Council. In 2002 the situation had been different because Member States had not had the opportunity to discuss these issues outside of the Council.
17. On the substantive issues, one Member from a Tax Administration stressed that uniform accounting standards for transfer pricing purposes were necessary to secure that profits from cross-border transactions were taxed properly. Some Business Members cautioned that due to the lack of experience it would be difficult for the FORUM to discuss the impact of the introduction of IAS on transfer pricing.
18. One Tax Administration Member suggested that Member States should regularly report on the implementation and effect in practice of the Code of Conduct, i.e. communicate to the FORUM the number of MAPs with other Member States, how long they dated back, how much time it took on average to resolve them and the number of cases that exceeded the two-year period as provided for in Article 7 (1) of the Arbitration Convention.
19. The discussion revealed that the issues of interest payments, penalties and the interaction of mutual agreement and arbitration procedures with administrative and judicial appeals were sensitive issues for Business and Tax Administration Members alike. Business Members considered these issues important because of their financial impact and several Tax

Administration Members expressed hesitance to discuss these issues because of the legislative implications.

20. One Tax Administration Member suggested the FORUM should discuss these issues, albeit in a limited time, and develop recommendations that could lead to Commission proposals which did not oblige Member States to change their legislation. Business Members and some Tax Administration Members supported this suggestion underlining that it was important to find practical solutions to these problems and achieve a level playing field. The FORUM, therefore, agreed by consensus to determine the state of play in Member States on these issues first before developing recommendations.
21. As a compromise solution that was supported by the vast majority of FORUM Members the *Chair* finally concluded that the following issues should be discussed provided that the FORUM's mandate was prolonged:
 - Examination of possible preventive measures to avoid double taxation;
 - Acceptability of transfer prices to tax administrations (including APAs);
 - Interest payments;
 - Penalties levied on transfer pricing adjustments;
 - Certain aspects of the interaction of mutual agreement and arbitration procedures with administrative and judicial appeals;
 - The influence of accounting systems on transfer pricing; and
 - Monitoring of the implementation of the Arbitration Convention.

VII DISCUSSION ON DOCUMENTATION REQUIREMENTS

a) Draft revised discussion paper on documentation requirements (doc. JTPF/019/REV2/2003/EN)

22. The *Chair* explained that the discussion paper was an evolving document that should be seen as a framework for a future report of the FORUM. The Secretariat indicated the changes made to the previous version, notably the inclusion of a new chapter on the use of database searches for comparables. The Secretariat also pointed out that this chapter was based on the document JTPF/0005/2004/EN and incorporated the outcome of the discussions on database searches for comparables at the meeting on 18 March 2004.
23. The discussion centered around the wording of para. 121 d). It was finally agreed by consensus to rephrase the paragraph in that tax administrations should only request documentation that has a bearing on the transactions under review.

b) Draft revised discussion paper on the masterfile concept (doc. JTPF/003/REV1/2004/EN)

24. After the Secretariat had given an overview of the document, which had been substantially revised, the *Chair* solicited comments from FORUM Members on the discussion paper.

25. Business Members suggested redrafting para. 2 so as to better reflect the purpose of a masterfile for business. They also suggested new wording in paras. 3, 7 a) and 25 to clarify that tax administrations should have access to the same documentation and information only as far as they are relevant for the Member State concerned.
26. One Tax Administration Member disagreed with para. 5 a) reasoning that the decision to impose documentation related penalties depended on aspects of evaluation and judgement and could only be made on a case-by-case basis.
27. The discussion showed that Tax Administration Members had divergent views on documentation related penalties. Some of them did not want to include any reference on documentation related penalties in the document, whereas others were ready to further examine this issue. One Tax Administration Member considered that a taxpayer acting in good faith and providing appropriate documentation and implementing it properly to determine its arm's length transfer prices should not be subjected to penalties. He added that the OECD Transfer Pricing Guidelines disapproved of so-called "no-fault" penalties.
28. Business Members were concerned about the position of some Tax Administration Members arguing that the masterfile concept would be useless if business did not gain any certainty and predictability as regards penalties, and specifically relief from "serious penalties" in the context of the Arbitration Convention.
29. One Tax Administration Member responded that any automatism with respect to penalties would be unacceptable. Several Administration Members added that adjustment related penalties were beyond the scope of the FORUM's work and that a position on documentation related penalties could only be taken when the exact contents of the masterfile was known.
30. The proposal from two Business Members to make a presentation to the FORUM on their company's documentation so as to give practical examples what to expect from a masterfile and what its contents could be was welcomed by Tax Administration Members. It was agreed that such a presentation should be made at the pre-meeting of Members from Tax Administrations and Business on 15 September 2004.
31. One Business Member pointed out that the time when the masterfile had to be submitted to the tax administration also needed to be discussed. He expressed the view of Business that companies should not be obliged to submit the masterfile at the time when the tax return was filed but only at the beginning of a tax audit or upon specific request. When filing the tax return, a taxpayer could only be required to submit a form of two or three pages that could easily be filled in.
32. A Member from a Tax Administration suggested adding another indent to para. 7 to clarify that a masterfile would allow Member States to assess the transfer prices of the inter-company transactions.
33. The Secretariat explained that a necessary feature of the masterfile concept was a standardisation of the type of information and documents required by Member States' tax administrations. The *Chair* added that in order for taxpayers to fully benefit from the advantages of the masterfile concept, i.e. notably the reduction of compliance costs and the avoidance of documentation related penalties, it would be desirable that all Member States accepted this concept.

34. One Tax Administration Member emphasized that a company should be free to develop a single transfer pricing policy and apply that in all EU Member States. The positive effect for the company would be that it could operate according to one single transfer pricing policy. Tax administrations would benefit because they would be treated in the same way in relation to other countries where the company performed similar functions. For this Member a transparent and comprehensible transfer pricing system was more important than standardisation of the documents required.
35. The FORUM agreed by consensus that the use of the masterfile concept should be optional for businesses. A company should, however, not arbitrarily opt in and out of the masterfile concept for its documentation purposes but retain a certain degree of consistency and continuity in its documentation policy. Also, a multinational group of companies should apply the masterfile concept collectively to all group members within the EU.
36. On the question if the masterfile should only be applied to the business as a whole or if a company should be allowed to apply the masterfile at division or product line level, Tax Administration Members commented that this would contradict the purpose of facilitation and complicate matters. A Business Member remarked that the company he was working for had six divisions and six different masterfiles. There was a controversial discussion if this was compatible with the masterfile concept and what features of standardisation were necessary for this concept. The *Chair* concluded that this issue should be further examined at the joint sub-group meeting of Business and Tax Administration Members.
37. A Tax Administration Member raised the question if tax administrations in Member States could enforce a subsidiary's obligation to submit the masterfile. Another Tax Administration Member assumed that this would probably require legislation in each of the other 24 Member States to give that other Member State that right.
38. One Tax Administration Member indicated that in practice, however, tax administrations would often not receive documentation from a foreign parent company or the submission was delayed. Another Tax Administration Member expressed his concern that according to the masterfile concept a subsidiary would not itself keep documentation any more because the parent company or headquarter would prepare and store the masterfile. If years later the parent company refused to submit the masterfile to the tax administration, the subsidiary, not having acted in bad faith, could not be held responsible and penalties could not be imposed.
39. The *Chair* commented that the masterfile would not change the current situation. It was irrelevant if the documentation was kept by the parent company or by the subsidiary. The obligation to submit documentation would rest with the subsidiary. The time limits for the submission of the masterfile would also remain the same and the information technology, i.e. electronic storage of documentation, would facilitate the procedure. Also, Member States could require that a copy of the masterfile be kept in each Member State.
40. A Business Member added that non-submission of documentation would imply penalties. Besides that, Member States could request the documentation from the other Member State on the basis of the EU Mutual Assistance Directive. Members from Tax Administrations, however, found it difficult to penalise a subsidiary because the parent company had failed to prepare or submit the necessary documentation.

41. One Tax Administration Member remarked that if a subsidiary did not submit the masterfile because the parent company did not hand it over to its subsidiary then the masterfile concept had simply not been applied by the company. In such a case the tax administration should inform all the other tax administrations that the company had not applied the masterfile concept.
42. To ensure easy access to information, the Member from the *Greek* Tax Administration proposed to establish a central database where the masterfile information should be lodged electronically. Certain authorized users from national tax administrations should have direct access to this database. This procedure would also be less expensive than the traditional way of preparing and storing documentation. The proposal was supported by some other Tax Administration Members.
43. A Business Member noted that whilst confidential commercial information could be provided to tax administrations because of the tax secrecy provisions, in many cases this information could not be provided to a subsidiary because of the risk of disclosure. It would, however, be inappropriate to impose a penalty on the subsidiary in such a case. Also, by imposing a penalty on the subsidiary the whole group would be hit.
44. The *Chair* cautioned that the FORUM could not create new legal obligations on parent companies to submit documentation to the tax administrations of their subsidiaries. In that regard paras. 11 and 16 seemed inappropriate and it was concluded by consensus to delete these paragraphs.
45. On para. 24 f) Business Members suggested deleting the word "justification" (about the selection and application of the transfer pricing method) in order to avoid the best method approach and because the burden of proof was with the tax administration. After some discussion the following wording was agreed upon by consensus: "*an explanation about the selection and application of the transfer pricing method, i.e. why a specific transfer pricing method was selected and how it was applied*".
46. One Business Member raised the question of whether the masterfile concept took account of the administrative burden on SMEs. A Tax Administration Member cautioned that the definition of a SME for documentation purposes might be considered arbitrary. However, tax administrations should only request appropriate documentation on a case-by-case basis. That might provide some comfort. Another Tax Administration Member added that the masterfile concept was optional so a SME could choose not to opt for it if it considered it too burdensome.
47. On the issue of timing, i.e. when the masterfile should be prepared and submitted, some Tax Administration Members took the view that the masterfile should already be available at the time of filing the tax return. During a tax audit more comprehensive documents in addition to the masterfile should be available.
48. Business Members and the majority of Tax Administration Members, however, emphasized that the taxpayer should have to submit its documentation to the tax administration only at the beginning of a tax audit or upon specific request. Business Members stressed that it was practically impossible to have the masterfile ready when the tax return was filed and a Tax Administration Member questioned if tax inspectors had the time to examine the masterfile when it was filed with the tax return.

49. One Business Member said that the contents of the masterfile should be limited and should not be too detailed regardless of the time when it had to be submitted. For the masterfile to be beneficial for businesses they should be allowed to prepare the contents on an aggregated level.
50. On para. 24 the FORUM agreed by consensus that the scope of the masterfile should cover relations, transactions etc. "*with and within the EU*". Also, a subsidiary should have access to all information and documents concerning its transactions with related parties. Information and documents, however, that did not relate to a subsidiary's own transactions should not have to be contained in the masterfile. Such information or documents could be requested from the other tax administration involved under the exchange of information article of the bilateral double tax treaty or the EU Mutual Assistance Directive.
51. The *Chair* asked the FORUM Members to submit written comments to the Secretariat on paras. 13-21 and paras. 27-44 of the masterfile discussion paper by 30 June 2004. He added that the work on documentation requirements should be completed by the end of 2004. The Secretariat would, therefore, prepare for the meeting on 16 September 2004 a revised and consolidated version of the discussion paper that would serve as a basis for the FORUM's report.

VIII ANY OTHER BUSINESS

52. Due to time constraints no other issues were discussed. The *Chair* reminded the FORUM that the presentation from business of a practical example on documentation would take place on 15 September 2004 and the next FORUM meeting would start on the following day (16 September 2004) at 9 a.m.