



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 FIFTH MEETING OF THE EU JOINT TRANSFER PRICING FORUM

held in Brussels on 11th September 2003

I ADOPTION OF THE AGENDA (DOC JTPF/011/2003/EN/FR/DE)

1. The proposed agenda was adopted by consensus.

II ADOPTION OF THE SUMMARY RECORD OF THE JTPF MEETING OF 19TH JUNI 2003 (DOC JTPF/012/2003/EN/FR/DE)

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 *Greek* tax administration informed the FORUM that his country had notified the Secretariat of the Council of the ratification of the Prolongation Protocol and the Accession Convention.
5. The Member from the *Irish* tax administration informed the FORUM that the parliamentary procedure concerning both the Prolongation Protocol and the Accession Convention had advanced and that it was hoped that both instruments would be ratified by the end of 2003.
6. The *Italian* tax administration Member informed the FORUM that the Prolongation Protocol had been introduced to 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 still not been submitted to Parliament.
8. The Member from the *Swedish* tax administration informed the FORUM that the Prolongation Protocol was before Parliament and that it was expected that a decision would be taken by the end of October 2003.
9. 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 expressed some concern, however, about the state of play of the ratification process in *Portugal*. He added that the JTPF had to report to the Council on the state of play of the Prolongation Protocol and the Accession Convention and it would be desirable, therefore, to make significant progress in that regard.

IV DRAFT REPORT FROM THE JTPF TO THE COUNCIL (DOC JTPF/013/2003/EN)

10. The *Chair* expressed his hope that the essentials of the draft interim report would be adopted by the FORUM at this meeting with only minor reservations. He added that the Secretariat had tried to reflect consensus in the draft report on as many issues as possible. Where this was not possible, both the majority and the dissenting views were mentioned in the draft report. He stressed that the credibility of the JTPF depended on the finalisation of the draft report at the December 2003 meeting and the submission of the interim report to the ECOFIN Council in early 2004. Therefore, only substantial issues should be discussed at the meeting; drafting suggestions should be submitted to the Secretariat in writing.
11. On the French note on the functioning of the first arbitration case he suggested that some important points should be taken into account in the FORUM'S report to the Council, but the note itself should not be discussed.
12. Some Members from tax administrations suggested shortening the descriptive part of the draft report and one Member from a tax administration remarked that the descriptive part of the draft report and the draft Code of Conduct often referred to the same subject using a different language. It was suggested that the text in the draft Code of Conduct should stand, because the Code of Conduct was the operative part of the Forum's recommendation to the Council, whereas the text addressing the same issues in the descriptive part could be deleted.
13. The *Chair* explained that the descriptive part of the report and the draft Code of Conduct were complimentary and although tax practitioners might find a more lengthy descriptive part helpful because it described and clarified the Code of Conduct, the suggestions to shorten the descriptive part and use the same terms as in the Code of Conduct for the same issues would be taken into account in the redraft.
14. In response to the proposal from a business Member to replace the words „could“, „should“ and „would“ in the Code of Conduct in most cases by the word „must“ the *Chair* cautioned that the Code of Conduct was only a recommendation to the Council and not a proposal for a Directive.

a) Summary of the proceedings of the meetings of the JTPF

15. The summary was adopted by consensus.

b) Conclusions and recommendations on issues related to the Arbitration Convention and on certain related issues of mutual agreement procedures under double tax treaties between Member States

(i) *Proceedings during the interim period when not all contracting states have ratified the Accession Convention of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden (Accession Convention) and the Protocol amending the original Convention (Prolongation Protocol)*

16. The *Chair* asked all tax administration Members to check if Annex I (Member States' position during the interim period) was correct. One Member suggested that it would be useful if Accession Countries would also fill in the table in the Annex to the draft Code of Conduct (definition under national legislation of the starting point of the three-year period and translation of the definition into English). The *Chair* took up this proposal and asked the observers from Accession States to have the table completed by the tax administrations of their countries by 11 November 2003.

17. The *Chair* asked all tax administration Members to check if the Annex to the draft Code of Conduct was correct in light of the new wording that had been agreed upon for the definition of the relevant date triggering the start of the three-year period provided for in Article 6 (1) of the Arbitration Convention („the date of the first tax assessment notice or equivalent which results, or is likely to result, in double taxation within the meaning of Article 1, e.g. due to a transfer pricing adjustment“). The Member from the *Greek* tax administration informed the FORUM that the definition under Greek legislation was incorrect and that he would shortly provide the correct definition.

18. With the above mentioned changes para. 2.1 of the descriptive part of the draft report was adopted by consensus.

(ii) *The starting point of the three-year period (deadline for submitting the request)*

19. Differing views were expressed on the scope of application of the Arbitration Convention. A majority of tax administration Members together with those from business favour a broad scope of application, i.e. covering all sorts of transfer pricing cases resulting in double taxation. The Members from the *Danish, Italian* and *Spanish* tax administration, however, lodged a scrutiny reservation since they consider that the scope of the Arbitration Convention is limited to those transfer pricing cases where there is an "adjustment".

20. It was agreed by consensus that the dissenting views of the Members from the *Danish, Italian* and *Spanish* tax administration on the scope of application of the Convention should be reflected in a footnote in the report to the Council if those three Members maintained their reservation at the next JTPF meeting. Except for these reservations the FORUM agreed upon the proposed definition of the relevant action that triggers the start of the three-year period as specified in para. 2.2.1 of the draft report.

21. The FORUM then discussed whether this definition of the start of the three-year period should - as a matter of coherence - generally apply to double tax treaties between Member States or if this definition should only apply to transfer pricing cases. Members from business expressed the view that a restricted application in double tax treaties resulting in a different deadline for transfer pricing cases as compared with other cases of double taxation was not justified. By contrast, some Members from tax administrations argued that the definitions and interpretations of the FORUM on specific provisions of the Arbitration Convention could only relate to transfer pricing cases as the scope of application of the Convention was limited to this area.
22. The *Chair* concluded after some discussion that there was consensus on recommending Member States to apply the definition in the report also to double tax treaties between Member States, but only as far as transfer pricing cases are concerned.

(iii) The starting point of the two-year period (Article 7 (1) of the Arbitration Convention)

23. With reference to the minimum information that a taxpayer has to provide when filing his request, a Member from business remarked that businesses do not necessarily have a transfer pricing policy and, therefore, should not be obliged to provide documentation supporting the transfer policy of the case. Another business Member added that the issue was about the avoidance of double taxation and in that context a justification of the transfer prices by the taxpayer did not contribute anything.
24. Concerning the nature of the documentation that has to be at the disposal of the competent authority, some Members suggested that the draft report should be less prescriptive. Members from business expressed concern that the specific additional information that may be requested from the taxpayer could lead to additional, burdensome documentation requirements.
25. A Member from a tax administration pointed out that in complex cases competent authorities needed more than just one month to request additional information from the taxpayer. Some Members said that the descriptive part of the draft report should clarify that in the absence of a request by the competent authority for additional information the two-year period starts on the date as indicated in the draft Code of Conduct.
26. It was finally agreed by consensus to delete the last half sentence and the word "written" in para. 2 (i) g) of the draft Code of Conduct and leave competent authorities two months to request additional information from the taxpayer. There was also consensus to clarify the start of the two-year period in the absence of a request for additional information.

(iv) *Accession of new EU Member States to the Arbitration Convention*

27. The text in the draft report was adopted by consensus.

(v) *Mutual Agreement Procedures under the Arbitration Convention and Double Tax Treaties between Member States*

30. After a short discussion on the relation between the Arbitration Convention and double tax treaties between Member States it was agreed by consensus to delete the words "*and Double Tax Treaties between Member States*" in the headline and redraft para. 3.4 of the draft Code of Conduct to the effect that Member States are recommended to apply the provisions of paras. 1 to 3 of the draft Code of Conduct also to mutual agreement procedures under double tax treaties between Member States, but only as far as transfer pricing cases are concerned.

- *General provisions (para. 3.1 of the draft Code of Conduct)*

31. The Forum agreed by consensus to redraft para. 3.1 d) by making a reference to the provisions of the Code of Conduct and especially to its section 2 (ii).

32. The Member from the *German* tax administration suggested adding a paragraph in para. 3.1 of the draft Code of Conduct stating that a mutual agreement procedure should only be initiated if the person requesting it had waived his right to judicial appeals. He referred to Article 7 (3) of the Arbitration Convention and reasoned that a large majority of Member States were unable to derogate from the decisions of their judicial bodies. For reason of reciprocity taxpayers should, therefore, be obliged to opt for either the MAP or domestic judicial remedies.

33. The discussion showed that none of the Members supported the proposal made by the Member of the *German* tax administration. A Member from business commented that in principle one could agree to the German proposal because it would guarantee a level playing field in respect of interest, suspension of tax collection and penalties. However, the procedure in those countries that apply Article 7 (3) should rather be changed to allow for a MAP and judicial remedies at the same time.

34. Another Member from business said that taxpayers should be allowed to resort to the appeals procedure if the arbitration did not lead to an acceptable result. One Member from business added that the proposal of the Member from the *German* tax administration would be tantamount to the declaration made by France and the UK with respect to Article 7 (3). The proposal was, however, incompatible with German law. He continued that the proposal was not only an interpretation of Article 7 but a restriction, i.e. a substantial change, of that provision. He stressed there was no room for restrictions of Article 7.

35. Another Member from business pointed out that Article 7 (3) of the Convention only referred to the arbitration phase and only applied to those Member States that could not derogate from the decisions of their judicial bodies. Therefore, *Germany* could not refer to Article 7 (3).

36. The Member from the *German* tax administration replied that Article 7 (3) was self-executing. He indicated his wish for a scrutiny reservation stating that for reasons of reciprocity *Germany* reserved its right to initiate a mutual agreement procedure under the Arbitration Convention with those Contracting States that apply Article 7 (3) of the Convention only if the enterprise of such a Contracting State waived its right to judicial appeals. A Member from business suggested publishing a list of those Member States.

- *Practical functioning and transparency (para. 3.2 of the draft Code of Conduct)*

37. The FORUM agreed to change para. 3.2 a) in order to allow the exchange of position papers not only in a common working language but also in a manner having the same effect to accommodate the concerns of those countries that are prohibited by domestic legislation from sending official letters in a foreign language.

38. It was also agreed by consensus that para. 3.2 d) should be deleted as it was considered redundant and that the order of para. 3.2 f) (i) should be altered. With these changes and a few clarifications and linguistic changes in other paragraphs, the text of para. 3.2 was adopted by consensus.

- *Exchange of position papers (para. 3.3 of the draft Code of Conduct)*

39. The Member from the *UK* tax administration suggested a new wording of paras. 3.3 a) and d), replacing the reference to issuing or intending to issue a tax assessment notice or equivalent with making a tax assessment or equivalent. He explained that in a self-assessment system like in the *UK* double taxation could occur without any action of a tax administration.

40. The FORUM agreed by consensus to make the changes suggested by the Member from the *UK* tax administration and to replace the word "explanation" with "justification" in para. 3.3 b). Some Members from tax administrations expressed their wish to examine if the new wording proposed by the Member from the *UK* tax administration was consistent with the rest of the draft report.

- *Double Tax Treaties between Member States (para. 3.4 of the draft Code of Conduct)*

41. With a few linguistic changes the text was adopted by consensus.

(vi) *Proceedings during the second phase of the Arbitration Convention*

- *List of independent persons of standing (para. 4.1 of the draft Code of Conduct)*

42. Most Members considered it important to have an up-to-date list of independent persons of standing and to know the qualifications of these persons, especially in order to establish which persons met the criteria of Article 9 para. 5 of the Arbitration Convention for being elected as chairman of an advisory commission. The Member from the *Swedish* tax administration cautioned that for those Contracting States where the independent persons of standing are nominated by the government it might be difficult to indicate the qualifications of these persons.

43. After some discussion the *Chair* concluded that there was consensus on adding a subparagraph in para. 4.1 of the draft Code of Conduct stating that Contracting States should enclose a curriculum vitae of the independent persons of standing who were nominated. The CV should, among other things, describe their legal, tax and, in particular, transfer pricing experience.
- *Establishment of the advisory commission (para. 4.2 of the draft Code of Conduct)*
44. In response to a proposal by the Member from the *French* tax administration the FORUM agreed on the deletion of para. 4.2 e) of the draft Code of Conduct.
- *Functioning of the advisory commission (para. 4.3 of the draft Code of Conduct)*
45. The Member from the *UK* tax administration suggested deleting the last sentence in para. 4.3 d) of the draft Code of Conduct. The Observer from the *OECD* added that under Article 26 of the OECD Model Tax Convention and with regard to tax secrecy and confidentiality it might be difficult for a country to transmit information about similar MAPs for the same enterprise to the chairman of the advisory commission if the country was, for example, not party to the actual arbitration or not even a Contracting State to the Arbitration Convention.
46. There was a rather intense discussion on the reimbursement of expenses and on the fees of the independent persons of standing. Some Members from tax administrations said that the costs for the independent persons should be paid on condition of prior approval by the competent authorities involved. Members from business, however, argued that approval of the reimbursement of expenses and the payment of fees was not useful as it restricted the flexibility of the independent persons.
47. The *Chair* concluded that there was consensus on taking the suggestions explained in para. 45 above into account but not to make any other substantive changes.
48. Para. 4.3 e) et seq. of the draft Code of Conduct and paras. 2.6, 2.8, 3 and 4 of the descriptive part of the report could not be discussed because of time constraints.

V DISCUSSION ON THE WORK ON DOCUMENTATION REQUIREMENTS

49. This agenda item was not discussed because of time constraints.

VI ANY OTHER BUSINESS

50. The *Chair* stated that any comments and/or drafting suggestions on the issues not yet discussed, i.e. paras. 2.6, 2.8, 3 and 4 of the descriptive part of the draft report and para. 4.3 e) onwards of the draft Code of Conduct, should be submitted to the Secretariat by end of September 2003. Any non-substantive drafting suggestions on the issues already discussed, i.e. paras. 1 to 2.5 and para. 2.7 of the descriptive part of the draft report and paras. 1 to 4.3 d) of the draft Code of Conduct, should be submitted to the Secretariat by end of October 2003.

51. Comments, in particular suggestions on additional issues, on the Secretariat's paper on documentation requirements - "issues for discussion" (doc. JTPF/0016/BACK/2003) - should be submitted to the Secretariat no later than 15 October 2003.
52. After a short discussion on the proposal by some Members to have a 1 ½ or 2 day meeting in December 2003, it was agreed by consensus that the next JTPF meeting on 11 December 2003 should be a one-day meeting and that the following meeting should take place on 18 March 2004.