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Taxud.E1/EM

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

held in Brussels on 21st June 2005

1. ADOPTION OF THE AGENDA (DOC. JTPF/001/REV1/2005/EN/FR/DE)

1. The proposed agenda was adopted by consensus.

**2. ADOPTION OF THE SUMMARY RECORD OF THE JTPF MEETING OF
16TH AND 17TH MARCH 2005 (DOC. JTPF/008/REV1/2005/EN)**

2. The summary record was adopted by consensus.

**3. ORAL REPORT BY THE SECRETARIAT ON THE STATE OF PLAY OF THE FORUM'S
SECOND REPORT (DOC. JTPF/020/REV4/2004/EN)**

3. The *Secretariat* reported on the position regarding the Forum's second report and the envisaged Commission Communication. Discussions were taking place with Commission Services and it was expected that the Commission Communication including the Forum's report would be issued some time in autumn 2005.

**4. ADOPTION OF THE DRAFT REPORT ON THE FOLLOW-UP OF THE RE-ENTRY INTO
FORCE OF THE ARBITRATION CONVENTION (DOC. JTPF/019/REV4/2004/EN)**

4. The *Chair* said that the Arbitration Convention had entered into force last November and it was time now to publish the report on the follow-up of the re-entry into force of the Arbitration Convention. However, as regards Annex III of the draft report, there were still some discrepancies in the number of pending cases reported by Member States. The Member from the *French* tax administration commented that certain minor discrepancies had been resolved and that a document had been prepared for circulation to update the situation. He suggested publishing

the list of pending cases and updating it regularly. The *Forum* adopted the report and the *Chair* noted that it would be published on the Commission's website.

5. ORAL REPORT BY TAX ADMINISTRATION MEMBERS ON THE THE NOMINATION OF THE INDEPENDENT PERSONS OF STANDING AS REFERRED TO IN ARTICLE 7 (1) OF THE ARBITRATION CONVENTION (DOC. JTPF/010/BACK/2005/EN)

5. The *Chair* stated that around 60 cases existed where the MAP period had expired and in around 20 cases the taxpayer had made the request prior to 1 January 2000, which meant that these cases were pending for more than five years (unless the two-year time limit had been extended according to Article 7.4 of the Convention). He reminded the Forum of the importance of the nomination of the independent persons of standing by each Member State. Countries should have the choice of arbitrators from any country. The list of independent persons of standing should be published to make this easier. Some *Tax Administration Members* commented that it was difficult to find qualified persons but nevertheless they were endeavouring to do so. It was finally agreed that Member States should update their list of independent persons of standing by 20 September 2005. The period for which people should be appointed was briefly discussed. Five years was mooted and it was noted that this did not mean that the same people could not be appointed in the next five year period. It was therefore possible to re-nominate the same people as before, in which case the updating of the list was simpler. The *Forum* agreed to discuss this issue again at the next meeting.

6. DISCUSSION OF THE SECRETARIAT'S DISCUSSION PAPER ON ALTERNATIVE DISPUTE AVOIDANCE AND RESOLUTION PROCEDURES (DOC. JTPF/003/REV1/2005/EN)

6. The *Secretariat* reported that this document had previously been revised and then circulated to take account of some drafting suggestions. The *Secretariat* added that it was a discussion paper which did not require drafting suggestions to be discussed in the meeting. Rather, constructive discussion was invited on points of substance. The *Secretariat* also stated that the paper would be published on the Commission's website without the positions of Forum Members.
7. The *Secretariat* reminded the Forum that the paper was intended to outline procedures to avoid double taxation in the first place. Advance Pricing Agreements (APAs) were undoubtedly a way of achieving this and this was reflected in the comments submitted by Tax Administration Members. To achieve a greater understanding of how successful the APA procedures available in the EU were and to help focus on problem areas, the *Secretariat* said that it would circulate a questionnaire to Tax Administration Members asking for various details about their APA procedures, including the number of APAs entered into and the balance between unilateral and bilateral APAs. It was also suggested to circulate a separate questionnaire to Business Members asking for their experience, e.g. why they did not use APAs more often. A glossary of terms would be included with the questionnaires. The *Forum* agreed to first develop suggestions as to what procedures could be offered for dispute avoidance and resolution, concentrating on the substance, whereas the format of the suggestions, e.g. a Model APA, Code of Best Practice etc., should be decided later. The *Chair* stated that the suggestions

could, for example, take the form of a practical guidebook to APAs. One *Tax Administration Member* said that it would have legislative problems introducing anything more binding.

8. The *Secretariat* then outlined in brief the discussion paper. The paper included these broad areas: APAs, APAs for SMEs, prior consultation (here the Tax Administration Member from the *Netherlands* had submitted an additional suggestion featuring a high level functional analysis), simultaneous tax examination and expert mediation.
9. *Tax Administration Members* responded positively to the idea of examining APAs and possible adaptations for SMEs. *Business Members* commented that they were also in favour of examining APAs and APAs for SMEs. They added that in their view there were similarities between simultaneous tax examinations and prior consultation. Apart from the fear of being subject to numerous audits at the same time, some *Business Members* were in favour of discussing simultaneous tax examinations. Mediation, however, was slightly different because the facts were already known. One *Business Member* wondered whether it was worth the Forum's time discussing this in detail because of the existence of the Arbitration Convention.
10. The issue of documentation in the context of APAs was also discussed. One *Tax Administration Member* reminded the Forum that it had already spent time discussing documentation and that it was preferable now to discuss other issues pertaining to dispute resolution. There was general agreement to this.
11. The *Chair* said that the Forum had to decide what issues to have on the future work list in addition to APAs and APAs for SMEs. Mediation did not have much support whereas prior consultation seemed to be worth more work. The Tax Administration Member from the *Netherlands* who had submitted a paper on prior consultation was invited to explain it.
12. He said that his proposal concerned a high level functional analysis. Competent Authorities (CAs) of Member States should discuss any potential transfer pricing problems outside of a tax audit on the basis of a high level functional analysis of the multinational enterprise and without having to find out the full facts and circumstances of the case to save time and resources. The idea was to avoid years of work in transfer pricing examinations and to reach an agreement between Member States as soon as possible.
13. *Business Members* made several comments. They found the idea to work on an approach to avoid the need for an audit or a Mutual Agreement Procedure (MAP) or an APA very interesting. Basic taxpayer information would already exist in the EU TPD so it might not be necessary to find out the full facts of the case. They considered this approach a pre tax examination stage and, as it was not to do with future facts, not an APA and thought it was a positive proposal to avoid a full tax examination.
14. Some *Tax Administration Members*, however, viewed the proposal sceptically. A Member State with a federal structure would have technical difficulties in reaching an agreement with another Member State in this manner. It was also felt that reaching a decision when the full facts were unknown was presumptive. One *Tax*

Administration Member said that the proposal seemed to be a prior agreement to an APA in which case it would be better to have an actual APA. Another *Tax Administration Member* felt that there would be practical problems in reaching any agreement. He reminded the Forum that according to agreed conventions and as outlined in the OECD Transfer Pricing Guidelines, it was important to keep CAs separate from the audit process. The proposal by the Tax Administration Member of the Netherlands, however, seemed to blur the boundaries between audit and CA to an unacceptable degree. Other *Tax Administration Members* echoed similar concerns and added that it seemed difficult to manage such a process in practice because very clear procedures would in any case be needed about who did what to avoid double tax. In addition, it would be difficult to lay down rules over when an audit was triggered and when another Member State should be contacted. One *Tax Administration Member* pointed out that there were doubts whether double taxation would occur if a transfer pricing adjustment had not yet been agreed or imposed. In any case, it would be difficult to reach an agreement between CAs only on the basis of general information. The precise legal meaning of any agreement would also have to be discussed.

15. Other *Tax Administration Members* viewed the proposal more positively stating that it was not too different from a bilateral APA. Any problems would be easy to solve if Tax Administration Members started to talk to each other early enough. There were undoubtedly practical problems but the idea was attractive and should be looked at in greater depth, even if a closer look found more problems. One *Tax Administration Member* wondered if there was not scope for a pre-APA consultation between CAs or if the ability to consult in this fashion existed already in the idea of simultaneous tax examinations.
16. The *Chair* summed up this discussion and it was held that the idea of a prior consultation would be considered in greater depth with a view to discovering and overcoming any problems that might exist. The Tax Administration Member from the *Netherlands* agreed to revise its original paper on high level functional analysis and re-submit it to the Forum.
17. The *Forum* then moved on to discuss in more detail the statements raised in the Secretariat's discussion paper. All the Tax Administration Members who had provided information on the availability of APAs indicated that either in domestic law or in any case under a tax treaty APAs could be provided for.
18. One *Tax Administration Member* pointed out that France and the UK had already published guidelines concerning their own practices for APAs and it might be useful for the Forum to consider this guidance together with Business experience. The *Chair* suggested that Airbus Industries (which had negotiated a multilateral APA with France, Spain, Germany and the UK) could be asked to present their experiences to the Forum. A *Business Member* said that he had worked on this APA and that the company would probably be prepared to discuss in the Forum how tax administrations and taxpayers should work together on APAs. The Tax Administration Member from *France* said that he had worked on the Airbus APA which had been signed on 1st April 2004 to apply from 1st January 2004. The *Chair* said that Michelin too had signed a multilateral APA and might wish to talk about their experience. It was agreed that Airbus Industries would be approached by the Business Member who had participated in the APA negotiation.

19. *Business Members* highlighted issues that they considered important. The timing of an APA was vital and it would be interesting to assess the number of cases where an APA request was withdrawn and to examine the reasons why. A *Tax Administration Member* pointed out that there would be different categories for "failure": sometimes the MNE would withdraw the application for its own reasons, sometimes no agreement would be reached between tax administration and taxpayer, sometimes no agreement would be reached between CAs etc.
20. There was a discussion whether information gained in the APA process should be used by tax administrations for other purposes. *Business Members* felt that information provided as part of an APA should only be used in that APA. The Observer from the *OECD* said that according to para. 4.157 of the OECD Transfer Pricing Guidelines, if a taxpayer withdraws from the APA process than any non-factual information provided should not be used by the tax administration in a subsequent tax examination. A *Tax Administration Member* queried the definition of non-factual: this could be many things and if it was proper to use the information then it should be used. *Tax Administration Members* reported that they were unable to ignore information they had gained. It was hence impossible to "misuse" information. Tax Administration Members were obliged to use all known facts. It was a question of their domestic laws. One *Tax Administration Member* however stated that the APA procedures in its country were completely separate from the tax examination programme: any information received at the pre-filing stage was returned to the taxpayer if the APA failed and therefore could not be used again.
21. *Business Members* reminded the Forum that the purpose of discussing APAs was to encourage their use. The Forum's final report should state how any information was to be used. *Business Members* feared that any APA information might be used improperly: for example, for earlier tax periods when the information was irrelevant or wrong. They appreciated that it might be a matter of internal law but it might be possible to distinguish between information the tax administration would have obtained in the normal course of business and information obtained only because of the APA. It was generally agreed that there should be a subsequent discussion on this topic.
22. The *Chair* asked *Business Members* why they were reluctant to use APAs. They replied that it sometimes took a long time to negotiate an APA. One *Business Member* detailed his failed APA experience: after four years of ultimately fruitless negotiations with more than one tax administration, one particular tax administration tried to "rollback" the information gained in the APA procedure to prior periods. Other *Business Members* mentioned the operational burden imposed upon a business from having an inflexible APA. Apart from the length of time required to negotiate an APA, uncertainties about the length of time that an APA could remain in existence were a common *Business* concern. *Business Members* stated that the quantity of information required was a disincentive to apply in the first instance and also the need to disclose global operations. A *Tax Administration Member* interjected to point out that it was up to the taxpayer not a tax administration to decide which transactions should and should not be included in an APA. *Business Members* added that there were sometimes also problems with the interaction between EU and non-EU countries at the APA level.

23. The *Chair* asked Tax Administration Members whether they should offer more APAs to taxpayers. One *Tax Administration Member* felt that the question was premature because all the issues had not been examined yet: this was what the Forum was to study. Another *Tax Administration Member* mentioned problems with APA implementation because of his country's federal structure. Nevertheless, there was clear agreement amongst Tax Administration Members that APAs should be available to taxpayers. The Forum should examine how APA procedures could work more efficiently.
24. In the subsequent discussion the following potential subjects emerged as worthwhile of future discussion: procedural guidelines for APAs, the importance of the pre-filing stage, documentation, interaction with non EU countries, unilateral versus bilateral APAs, the various types of rollback, timetables, milestones. The *Chair* pointed out that this was not an exhaustive list and should in any case be viewed in conjunction with the suggestions in the Secretariat's discussion paper. The idea was to agree on guidelines to prevent problems arising.
25. *Business Members* emphasised that excessive documentation requirements were a major disincentive to applying for an APA. *Tax Administration* and *Business Members* alike emphasized that they wanted to avoid a new lengthy debate on documentation given the work done on the EU TPD but nevertheless this topic had to be considered. *Tax Administration Members* said that where the EU TPD was used, this could be the requirement for consideration of an APA application. Even though use of the EU TPD (which was optional) was not a pre-requisite for an APA, sensible documentation was needed. *Business Members* requested to avoid a long list of documents being required upon receipt of an APA application.
26. The *Chair* noted that there were harmful tax competition issues surrounding unilateral APAs. Bilateral APAs were better since they covered both parties and definitely eliminated double taxation. However, it was noted that a taxpayer could not be obliged to apply for a bilateral APA and in many instances a unilateral APA would be better for a taxpayer and a tax administration than no agreement at all.
27. The Tax Administration Member from *France* stated that as of 1st January 2005 his country permitted unilateral APAs. However, bilateral APAs were preferred where possible. In some circumstances however unilateral APAs might be inherently more suitable, for SMEs for example. It was noted that under the code of conduct on harmful tax competition, tax administrations were required to exchange information on unilateral APAs. One *Tax Administration Member* cautioned that unilateral APAs might lead to over-allocation of income and other tax administrations might disagree.
28. The *Forum* moved on to discuss the advisability of special APA procedures for SMEs. The *Chair* said that there was a feeling that the nature of the APA process acted as a disincentive for SMEs who had limited resources available. He questioned whether it was possible to work on different guidelines for SMEs to lighten the administrative burden and cost. Unilateral APAs, for instance, might require fewer resources.
29. One *Tax Administration Member* said that his country did have a different approach for SMEs. The tax administration would help an SME to work out the arm's length transfer price. The taxpayer must provide factual information but the tax

administration would perform any comparability search. The Tax Administration Member from *France* said that his country was going to publish a document entitled "Transfer pricing and you" to help SMEs. France had a lighter version of the APA procedure and would perform some part of the comparability study on the taxpayer's behalf. This, after all, would be done anyway during an audit so it involved no extra cost for the administration. The objective was a neutral and objective comparability study. One *Tax Administration Member* said that his tax administration was not allowed to help taxpayers in this way. Another *Tax Administration Member*, whilst acknowledging that SMEs should be encouraged to apply for APAs, was uneasy about helping the taxpayer to perform activities such as comparable searches which he should do himself. One *Tax Administration Member* felt that it was premature to discuss what guidelines should exist for SMEs before any guidelines were established for larger taxpayers.

30. Another *Tax Administration Member* cautioned that merely because one enterprise was smaller than others did not mean that it should necessarily be treated more leniently, for instance in terms of requiring less documentation. The complexity of the transactions under review should also be kept in mind. *Business Members* commented that safe harbours for SMEs had been mooted at a previous meeting but rejected. Furthermore, binding rulings (as in the Hungarian and Polish systems) might function as APAs. The *Chair* commented that anything which safeguarded the price of a transaction could be considered an APA. One *Tax Administration Member* said that his country did not have a law on APAs as such but it did have a law on binding rulings. However, these were not available for future transactions
31. On the issue of simultaneous tax examinations, one *Business Member* observed that these could be considered in conjunction with prior consultation since they both involved a search for the arm's length transfer price after events had occurred. A *Tax Administration Member* commented that they were different instruments and should be considered separately: tax audits should be kept separate to CA work. Simultaneous tax examinations were problematic because they required two tax administrations to be at the same audit stage. Another *Tax Administration Member* agreed that simultaneous tax examinations and prior consultation should be kept apart as they were separate instruments, different in nature and intent. Another *Tax Administration Member* said simultaneous tax examinations were designed to obtain information for a specific purpose, they were often cumbersome and not routine and they were not an instrument to avoid double taxation. Another *Tax Administration Member* argued that simultaneous tax examinations should not be pursued because they were not intended to eliminate double taxation.
32. A *Tax Administration Member* remarked that the Nordic countries had a protocol on simultaneous tax examinations to encourage their use. However, in practice there were often conflicts of interest between countries. Simultaneous tax examinations tended to work best when there were affiliates in each Nordic country but the parent company was outside the area. The protocol had in practice been a way of finding disputes, not resolving them. Another *Tax Administration Member*, whose country was party to this protocol, said that simultaneous tax examinations were not for avoiding double taxation. Another *Tax Administration Member* whose country was party to this agreement said that simultaneous tax examinations were not for dispute avoidance and were carried out by local tax inspectors not the CA.

33. *Business Members* commented that simultaneous tax examinations could nonetheless be a preventive measure if tax administrations consulted each other. Language could however be a problem. But what was desired was the elimination of double taxation. A *Tax Administration Member* reminded the Forum that transfer pricing was only one tax issue included in simultaneous tax examinations. In his experience of simultaneous examinations with the US, Canada and Australia, the process did little to ensure even singular taxation and did nothing to avoid double taxation. Another *Tax Administration Member* said that simultaneous tax examinations could lead to a breach of tax secrecy. One *Tax Administration Member* added that not all tax audits were conducted in the same way at the same time. Another *Tax Administration Member* said that double tax problems could be avoided through a simultaneous examination if combined with early consultation between CAs.
34. The Observer from the *OECD* stated that the OECD Transfer Pricing Guidelines clearly stated that the purpose of a simultaneous examination was to assess the tax of a company and it was not a substitute for MAP. After further consideration, the *Forum* decided to drop this issue from its subsequent discussions.
35. The *Forum* then considered prior consultation in more detail. A *Tax Administration Member* said that it would be necessary to consider whether prior consultation should be mandatory or voluntary and whether a Member State should be obliged to consult with another before issuing a re-assessment. Another *Tax Administration Member* said that there was no legal basis for mandatory consultation. Furthermore, the process would slow down matters considerably. Another *Tax Administration Member* saw only limited application for prior consultation.
36. *Business Members* however argued that double taxation needed only to be likely to occur for a taxpayer to invoke a MAP. It was up to the taxpayer to initiate this. If Member States were compelled to come to an agreement before imposing an adjustment then there would be no double taxation in the first place. It was a good idea to encourage Member States to talk to one another before making an adjustment.
37. The *Chair* said that it was a proposal to alter the usual order of an adjustment, a netting off operation to decide which Member State the income belonged to. It would avoid the need for dispute resolution in the first place. It would, however, be possible to replicate the effect of this idea by suspending the collection of tax and the charging of interest. A *Tax Administration Member* said that of course liquidity problems should be addressed but a situation could not be imposed where one Member State's right to tax was controlled by another Member State. Another *Tax Administration Member* said that he had no support for prior consultation whatsoever. Another *Tax Administration Member* said that the contents of a prior consultation could be considered.
38. The *Chair* acknowledged that a Member State could not be put in a situation where its right to assess taxes was dependent on another Member State. The reference to mandatory consultation should therefore be dropped. However, voluntary prior consultation could still be considered. *Business Members* accepted that Member States' rights could not be so limited but wanted to be in the position where

companies did not have to pay tax and interest twice on the same income for three or four years while a MAP was carried out.

39. The Secretariat said that the questionnaire on APAs referred to would be issued by the end of the month and answers would be requested by the end of August 2005.

7. ANY OTHER BUSINESS

7.1 Discussion of the future organisation of the Forum's meetings

40. For reason of time constraints, this issue could not be discussed.

7.2 Future work on the issues of interest and penalties (doc. JTPF/011/BACK/2005/EN)

41. The *Chair* invited Professor Maisto to introduce his paper. Some countries had not yet validated the factual information in the report. If they could do so then the report could be published on the Commission's website. The *Chair* made it clear that it would be labelled as a paper produced by Business.
42. A *Tax Administration Member* objected strongly to the information in the report. The domestic law which the report had labelled as a penalty was in fact not a penalty but an interest charge for late payment of tax. It was a feature of the tax system of his country. Hence the report was misleading and should not be published. The *Chair* replied that the document should be published with all technical issues corrected. It was a business paper and the position of Professor Maisto himself. Another *Tax Administration Member*, referring to a different section of the report, said that there was a distinction between criminal and civil penalties and that the definition might differ between Member States.
43. The *Chair* said that the report was the initiative of the private sector. It did not commit Member States. However, Member States should check the information in the report which was to help taxpayers. The paper, suitably checked, would be placed on the Commission's website after the September meeting.

7.3 Next meetings of the Forum

44. It was agreed that the next meetings of the Forum would take place on 20th September and 13th December 2005.