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DIRECTORATE-GENERAL
TAXATION AND CUSTOMS UNION
ANALYSES AND TAX POLICIES
Analyses and coordination of tax policies

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

held in Brussels on 16th and 17th March 2005

1. OPENING OF THE MEETING

1. The *Chair* opened the meeting emphasizing that it was essential to reach agreement at the current meeting on the substantive issues of EU transfer pricing documentation requirements. He expressed his hope that the Secretariat's draft report on documentation requirements would, therefore, be adopted by consensus and added that any dissenting views of Members would be recorded in footnotes.

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

2. The proposed agenda was adopted by consensus.

3. ADOPTION OF THE SUMMARY RECORD OF THE JTPF MEETING OF 14TH DECEMBER 2004 (DOC. JTPF/002/2005/EN)

3. The summary record was adopted by consensus.

**4. DISCUSSION AND ADOPTION OF THE DRAFT REPORT ON THE FORUM'S
ACTIVITIES IN THE FIELD OF DOCUMENTATION REQUIREMENTS
(DOC. JTTPF/020/REV2/2004/EN)**

4. The *Chair* thanked the Member from the *UK* tax administration for having withdrawn his reservations on the previous version of the working document. With regard to the written comments by the Observer of the *OECD Secretariat* and the Member from the *Austrian* tax administration, he added that these comments would be incorporated in the draft report, unless Forum Members had substantive problems with these comments.
5. The Member from the *German* tax administration remarked that his comments on the previous draft, including the first part of the draft report, i.e. paras. 1 to 105, that had already been discussed at the meeting of 14 December 2004, were not intended to change the substance of the report. Some *Business* Members replied that the first part of the draft report should not be revisited.
6. One *Business* Member said that the business community was very interested in the work of the Forum and had great expectations in the outcome of the Forum's work. In practice, however, companies were already taking the Forum's preliminary suggestions into consideration when preparing their transfer pricing documentation. He considered it therefore essential for the Forum to reach agreement at the current meeting on a common EU transfer pricing documentation approach.
7. On a *Tax Administration* Member's remark that there were some inconsistencies in the document as regards the wording, the *Chair* underlined the importance of making sure that the Annex fully corresponds with the main part of the report.
8. On chapter 1 ("Summary of Proceedings"), it was agreed to list the different traditional approaches on documentation requirements in para. 5, delete para. 6 and amend the wording of para. 7 accordingly, retaining, however, the word "assessment" in para. 7 (a).
9. On chapter 2 ("Background to Documentation Requirements"), the *Forum* agreed to revert to the previous version of para. 19 and amend paras. 22 and 23 taking account of the written comments by the Observer from the *OECD Secretariat* which were distributed as a room document.
10. The Member from the *German* tax administration explained that his drafting proposals in para. 42 were aimed at reflecting the "proportionality principle". After some discussion, it was agreed by consensus to replace the words "tax at stake" with "amounts at issue" in the first sentence and retain the last part of the second sentence, rephrasing it, however, in a positive sense.
11. The *Forum* agreed to delete para. 45 and amend para. 49 (a) and (c) as proposed by the Observer from the *OECD Secretariat*. It was further agreed by consensus to re-instate the first sentence of para. 50.
12. On chapter 3 ("Possible Approaches of EU-wide Documentation"), *Forum* Members discussed the scope of the common EU transfer pricing documentation

approach with respect to non-EU companies. It was agreed that the common EU approach should also encompass controlled transactions between non-EU companies and associated enterprises resident in the EU. It was, therefore, agreed to amend para. 56 accordingly.

13. A *Tax Administration* Member and some *Business* Members expressed the view that additional information requests outside a tax audit should only be made in justified cases. The additional text in para. 66 proposed by a *Business* Member was, therefore, adopted with the term "in justified cases".
14. Paras. 72 to 75 were adopted without the proposed additional text.
15. Several *Tax Administration* Members were opposed to the proposal from the Member of the *German* tax administration to make a reference in para. 79 to the exchange of information. After a controversial discussion, the *Chair* concluded that the last sentence should be replaced with the following: "Centralised documentation could also contribute to more transparency as regards a company's transfer pricing policy."
16. On para. 82, some *Forum* Members pointed out that it was irrelevant where centralised documentation was prepared and kept. It was, therefore, agreed to delete the third sentence of that paragraph.
17. For reason of consistency with para. 79, the *Forum* agreed to delete the last bullet point ("improved exchange of information") in the second column of the table in para. 83.
18. On chapter 4 ("The "EU Transfer Pricing Documentation" (EU TPD) – a new Approach"), the proposal of the *German* Tax Administration Member to delete the last part of the last sentence in para. 88 ("...and should not impose an excessive compliance cost on businesses") was not supported by other *Forum* Members and it was, therefore, agreed by consensus to retain the sentence as previously drafted.
19. On para. 89, the discussion showed that there was common understanding that this paragraph addressed the EU TPD as a whole and that all tax administrations involved would only have access to the same common documentation and information concerning the masterfile element of the EU TPD. It was, therefore, agreed to amend this paragraph accordingly and delete – as proposed by a *Tax Administration* Member – the last part of the first sentence starting with "...as far...".
20. The Member from the *Portuguese* tax administration referred to para. 91 indicating that there were some inconsistencies in the wording of the report and its annex as regards the imposition of documentation related penalties. She added that in practice and under national laws, which had to be complied with, tax administrations used certain principles to evaluate whether or not there was compliance. These principles, however, varied among Member States.
21. The *Chair* responded that the report nevertheless recommended Member States' tax administrations not to impose documentation related penalties on taxpayers

when proper documentation had been submitted. For reason of consistency, the *Chair* proposed to replace in para. 91 the words "should not be liable" by "should not impose" and use this term consistently throughout the document if possible. The Member from the *Portuguese* tax administration agreed with this proposal and withdrew her reservation.

22. The *Forum* agreed by consensus not to adopt the additional text in para. 94 (e) proposed by the *German* Tax Administration Member but to retain the initial wording of para. 96, i.e. keep the last part of the first sentence starting with "...smaller businesses..." and delete the words "...thus providing more transparency" at the end of the paragraph.
23. Considering the drafting amendments and the explanation given by the *Secretariat*, the Members from the *Danish* and *German* tax administration withdrew their reservations in para. 99. The Member from the *German* tax Administration nevertheless expressed his view that the EU TPD should be a Code of Conduct and not a Council Recommendation.
24. Upon a *Business* Member's suggestion it was agreed to change the title of sub-chapter 4.4.5 to "Consequences for Member States having different or no legal documentation requirements".
25. On para. 103, the *Forum* agreed to retain the words "but as limited as possible".
26. Several *Tax Administration* Members stated with respect to para. 109 that it was essential that the content of the EU TPD allowed a tax administration to assess the transfer prices of the inter-company transactions. *Business* Members, on the other hand, argued that taxpayers should not be required to provide a benchmark study and that Member States were expecting too much from the EU TPD. It was finally agreed by consensus to revert to the initial wording.
27. An intensive debate was held on para. 112. Several *Forum* Members and the *Chair* were of the opinion that the EU TPD's purpose as stated in para. 109 was only to provide sufficient information for a tax administration to make a risk assessment for case selection purposes or at the beginning of a tax audit, i.e. make a general assessment of a taxpayer's transfer pricing. The EU TPD was not intended to be a comprehensive document containing all the information and documents necessary for a tax administration to examine a taxpayer's transfer prices in detail during a tax audit or to conclude an APA. Several Tax Administration Members were of the opinion that the contents of the EU TPD should allow the tax administration to assess the transfer prices of the inter-company transactions. The Member from the *German* tax administration expressed his view that the EU TPD would not restrict the information and documents that could be requested from a taxpayer during a tax audit and *Forum* Members confirmed that additional information and documents could be requested during a tax audit.
28. On the issue of "value chain" and "value driver" the Observer from the *OECD Secretariat* stated that from the OECD's perspective these notions had not been defined and were not included in the current OECD Transfer Pricing Guidelines. She supported therefore deleting lit. (f) of para. 112. A *Business* Member

cautioned that there was considerable uncertainty in relation to the term "value drivers". Another *Business* Member added that the amounts of value added by value drivers were not even available in a company's management accounts.

29. The *Forum* finally agreed by consensus to adopt lit. (a), (c) and (g) to (j) of para. 112 as drafted and delete lit. (f) as proposed. It was further agreed to add the words "a general description of..." at the beginning of lit. (b), delete the words "cross-border" in lit. (d) and add "a general description of..." in lit. (d) (i) to (iii). The *Forum* also agreed to adopt the proposal of the Observer from the *OECD Secretariat* as regards lit. (d) (i) and delete the words "a general description of value drivers" in lit. (e).
30. As regards the example in para. 113, *Business* Members cautioned that the figures might lead to incorrect conclusions and some *Forum* Members suggested deleting the example. After some discussion, the *Chair* concluded to simplify and generalize the example and take out the figures. The *Forum* also agreed to delete para. 113 a).
31. On para. 114, a *Tax Administration* Member requested reinstating lit. (c) because it was essential for tax administrations to receive a comparability analysis. A detailed business analysis was, however, not necessary.
32. The Observer from the *OECD Secretariat* commented that a comparability analysis, which was a technical term defined in the OECD Transfer Pricing Guidelines, was important when assessing the arm's length character of controlled transactions.
33. *Business* Members expressed serious concerns with respect to the inclusion of benchmark studies and external comparables in lit. (e) of para. 114. They claimed that requiring taxpayers to provide these information, which were difficult to obtain, in particular for SMEs, was too high a burden to impose on businesses on a regular basis. One *Business* Member remarked that information on comparables should, if at all, only be requested during a tax audit. When submitting its EU TPD, a company should, however, only be obliged to inform the tax administration if information on internal or external comparables were available to it.
34. The Observer from the *OECD Secretariat* commented that the OECD Transfer Pricing Guidelines did not require information on external comparables at the initial stage of providing documentation.
35. A *Tax Administration* Member noted that lit. (e) of para. 114 as drafted presupposed that comparable uncontrolled transactions existed, whereas practice showed that this was often not the case.
36. In conclusion, there was agreement to retain the wording of lit. (a) and (d), delete lit. (b) (iv), reinstate lit. (c) but without the words "detailed business", amend lit. (e) to "relevant information on internal and/or external comparables, if available", and replace the word "system" with "policy" in lit. (f).

37. On para. 115, the *Chair* mentioned that conforming amendments would have to be made in the table.
38. Many *Forum* Members considered the issue of a commonly understood language addressed in para. 117 politically sensitive. The Member from the *Spanish* tax administration suggested redrafting the first sentence of this paragraph after the words "compliance burden" as follows: "...tax administrations should be prepared to accept the masterfile in a commonly understood language for the Member States concerned." This proposal was accepted by all *Forum* Members.
39. The Member from the *UK* tax administration referred to para. 118 and his written comments on the issue of "evidence" and "documentation" pointing out that the evidence for arm's length pricing might not be available at the time the transaction takes place or at the time the transaction is recorded in the business's accounting system. As the evidence had to exist only when the tax return was filed, he suggested deleting the first sentence of para. 118.
40. Not all *Forum* Members initially agreed to that proposal arguing that their legislation required contemporaneous documentation. The Observer from the *OECD Secretariat* referred to paras. 20 to 23 of the document and confirmed that some OECD Member States did not require a taxpayer to transact at arm's length but required, only for tax purposes, year-end adjustments or adjustments in the tax return based, for example, on a comparability analysis. The OECD Transfer Pricing Guidelines were, therefore, somewhat vague on this issue as they were a compromise between Member States' different legislation.
41. A *Business* Member added that in a certain number of groups the associated enterprises in practice did not normally set their inter-company prices according to the arm's length principle, because companies were organised as strategic business units. In order to comply with the arm's length principle, companies made adjustments in their tax returns.
42. It was finally agreed by consensus to delete the first sentence and the words "if appropriate" at the end of para. 118.
43. On paras. 119 and 120, *Tax Administration* Members suggested deleting all references to specific time limits in the main part of the report and in the Annex and leave this matter to Member States' national legislation. *Business* Members disagreed with this proposal as it would create uncertainty. After a controversial discussion, the *Chair* concluded that any reference to time limits in the document should be deleted.
44. Taking para. 123 as an example, the *Chair* clarified that it was up to the Member States to provide for any time limits in their national legislation when the report did not make a specific recommendation. In other words, it would be left up to the company when to inform the tax administration, unless domestic legislation provided differently.
45. On para. 125, a *Business* Member suggested deleting the words "with genuine commercial circumstances" in the last sentence. The Member from the *German* tax administration pointed to an inconsistency between para. 125 and the last

sentence of para. 32 of the Annex that provides for a transitional period for companies recently acquired. To eliminate this inconsistency, the *Forum* agreed by consensus to delete the last sentence of para. 32 of the Annex reasoning that such a case was covered by the notion of "well justified cases".

46. With respect to chapter 5 ("The Use of Database Searches for Comparables") *Business* Members highlighted that this chapter was very important because one of the key objectives of the Forum's mandate was to decrease companies' compliance burden. For *Business* Members the key issues was whether or not the EU could be considered as one single market, as underpinned by several studies, and whether one pan-European database was sufficient for the search of comparables instead of possibly 25 country databases. *Business* Members were concerned that the conclusions already reached were watered down by the comments made by *Tax Administration* Members.
47. The *UK* Tax Administration Member commented that the main conclusion reached, at least from the perspective of Member States, was that comparables were valuable if they actually were comparables. He added that chapter 5 was not critical to the Forum's work on documentation and could, therefore, be deleted.
48. The *Chair* responded that the wording of chapter 5 reflected a delicate balance between the position of Member States and Business and the discussion should therefore not be re-opened.
49. The Member from the *German* tax administration withdrew his drafting proposal in para. 128 stressing, however, that the decisive issue was comparability and not the source of the data, i.e. whether they come from a database (pan-European or country-specific) or not.
50. It was finally agreed by consensus to adopt the drafting proposals made by the Observer from the *OECD Secretariat* on paras. 127 to 130 and replace the word "many" with "some" in the first sentence of para. 130.
51. The *Forum* also agreed to add the following sentence, which was proposed by *Tax Administration* Members, at the end of para. 131: "The position of Member States is consequently, that for example, comparables found in pan-European databases, should not be rejected automatically".
52. On paras. 132 and 133, the discussion showed that the *Business* point of view should be reflected as indicated by the headline of this sub-chapter. It was, therefore, agreed to revert to the initial wording of these paragraphs and add another sentence at the end of para. 132 as proposed by a *Business* Member.
53. The *Forum* further agreed to add "Member States' point of view" in the headline of sub-chapter 5.3. and reverse the order of sub-chapters 5.2 .and 5.3.
54. A room document containing proposals by the *Tax Administration* Members was the basis for the discussion of chapter 6 ("General Issues Related to Transfer Pricing Documentation in the EU"). *Tax Administration* Members suggested incorporating chapter 6 in chapter 2 of the report, because both chapters contained general documentation issues, in particular concerning timing.

55. The proposal of the Member from the *Italian* tax administration to delete para. 139, reasoning that the reference to evidence was deleted in para. 118, was not supported by the *Forum*.
56. The Members from the *German* and *Danish* tax administration suggested adding the first sentence of para. 5.3 of the OECD Transfer Pricing Guidelines at the beginning of para. 118. Several *Forum* Members were, however, opposed to this proposal.
57. The *Forum* finally agreed by consensus to add in chapter 4.2 a sentence stating that the EU TPD should follow the OECD Transfer Pricing Guidelines as described in chapter 2.1.2. and in particular paragraphs 22 and 23 of the report.
58. The *Forum* also agreed to the proposed new structure of the report as regards chapters 2 and 6, to the deletion of para. 138 and to the new para. 139 a) as suggested by *Tax Administration* Members.
59. The Glossary was approved with the following drafting amendments: The words "and consistent" were deleted in the definition of "standardized documentation" and the words "or by a designated service company" were deleted in the definition of "centralised (integrated global) documentation".
60. Before discussing the Annex, the *Chair* drew *Forum* Members' attention to the room documents provided by *Tax Administration* Members, the Observer from the *OECD Secretariat* and the Member of the *Austrian* tax administration.
61. The *Chair* clarified that sub-chapter 1.1 referred not only to the EU TPD. Therefore, it was agreed to amend the headline of chapter 1 to "Transfer Pricing Documentation in the EU" and avoid as far as possible any reference in that chapter to the EU TPD.
62. Upon the request of the Observer from the *OECD Secretariat*, the *Forum* agreed to add the following text in para. 1: "Transfer pricing documentation in the EU must be viewed in the framework of the OECD Transfer Pricing Guidelines."
63. *Tax Administration* Members requested to replace the word "recommends" in para. 2 with "recognizes" and in paras. 4, 5 and 6 with "concludes".
64. The *Tax Administration* Member from the *Netherlands* pointed out that para. 2 should be made consistent with para. 99 as regards the interpretation of the terms of the EU TPD.
65. The Member from the *German* tax administration suggested adding new text at the beginning of para. 3. After a controversial discussion, the *Forum* agreed by consensus to add the following text: "Since the EU TPD is a basic set of information for the assessment of the group's transfer prices, the *Forum* recognizes that, in its domestic law, a Member State would be entitled to request more and different information...".
66. In order to remove redundancies and clarify the meaning of para. 7, it was agreed to delete para. 5 and amend the wording of para. 7.

67. The Member from the *Portuguese* tax administration remarked that paras. 8 to 10 concerned not only tax administrations but also businesses. These three paragraphs should, therefore, be placed in a separate sub-chapter 1.2.5 "Other conclusions".
68. The Tax Administration Member from the *Netherlands* withdrew his proposal concerning para. 16.
69. Contrasted views were expressed as regards the wording proposed by *Tax Administration* Members and the Observer from the *OECD Secretariat* for para. 18. *Business* Members were of the opinion that the proposed additional text at the end of the first sentence of that paragraph would lead to misunderstandings.
70. The *Forum* finally agreed by consensus on the following wording: "Tax administrations should evaluate domestic or non-domestic comparables with respect to the specific facts and circumstances of the case. For example, comparables found in pan-European databases should not be rejected automatically".
71. The Tax Administration Member from *Denmark* mentioned that his country was of the opinion that the country-specific documentation may include financial information about the companies involved in the controlled transactions.
72. On para. 36, the *Forum* agreed to delete in the last sentence the word "legal". The *Chair* clarified that any country-specific documentation would only have to be made available to the respective country.
73. The *Chair* concluded that the substantive issues of the report had been approved and that the report would subsequently have to be checked for consistency before it would be sent to all Forum Members for approval under the written procedure.

5. DISCUSSION AND ADOPTION OF THE DRAFT REPORT ON THE FOLLOW-UP OF THE RE-ENTRY INTO FORCE OF THE ARBITRATION CONVENTION (DOC. JTPF/019/REV2/2004/EN)

74. The *Chair* explained that this document reflected the answers to the questionnaire that had been distributed in December 2004 to all Member States that were parties to the Arbitration Convention. He thanked all Members from those tax administrations for having replied so quickly. He added that this document was very useful as it gave a clear picture of the situation in Member States as regards pending cases and Member States' position.
75. The Member from the *Danish* tax administration requested modifications to be made in para. 11 and the first column (question 1) of Annex II in that Denmark's answer should be "yes".
76. On para. 13, the Tax Administration Member from the *Netherlands* suggested adding a reference to Article 7 (4) of the Arbitration Convention.
77. The Tax Administration Members from *Denmark, Finland, Italy* and *Sweden* pointed out that they had answered in the negative to the question in the second

column of Annex II. Consequently, their answers in the third column (question 3) of Annex II should be changed to "not applicable" and para. 19 should be amended accordingly.

78. The Tax Administration Member from *Finland* stated that his answer to question 1 of Annex II was "yes" and the Tax Administration Member from *Italy* said she would soon reply to question 1.
79. For reason of consistency, those Tax Administration Members who had answered the second question positively agreed on the answer "not applicable" as regards the third question in Annex II.
80. The *Chair* drew Tax Administration Members' attention to the fact that at the end of 2004 there were still 29 pending cases where taxpayers filed a request for a mutual agreement procedure under the Arbitration Convention before 1st January 2000. He urged those Member States that were concerned with those cases to set up advisory committees as soon as possible. He also asked the Members from those tax administrations that had not yet nominated their independent persons of standing, eligible to become a Member of the advisory commission as referred to in Article 7 (1) of the Convention, to do so as quickly as possible.
81. After the *Secretariat* had provided an explanation for the discrepancies in table 1 of Annex III as regards the number of pending cases reported by Member States, the *Chair* asked Tax Administration Members to solve any discrepancies so that the document could be put on the Commission website by mid April 2005.

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

82. The *Chair* regretted that due to time constraints it was not possible to discuss this document. He asked all Forum Members to submit their replies to the questions in that paper and any comments by end of April 2005 so as to enable the Secretariat to revise that document for the next JTPF meeting.

7. OTHER BUSINESS

83. It was agreed that the next meetings of the Forum would take place on 21st June, 20th September and 13th December 2005. The Forum also agreed to discuss alternative dispute avoidance and resolution procedures and the issues of "interest" and "penalties" at the next meeting.