



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 THIRD MEETING OF THE
EU JOINT TRANSFER PRICING FORUM

held in Brussels on 2nd April 2003

I. ADOPTION OF THE AGENDA (DOC JTPF/001/2003/EN/FR/DE)

1. The proposed agenda was adopted by consensus.

II. ADOPTION OF THE SUMMARY RECORD OF THE JTPF MEETING OF 4TH DECEMBER 2002 (DOC JTPF/002/2003/EN/FR/DE)

2. The Members from the Irish and Greek tax administrations proposed linguistic changes to paras. 12 and 15. The Member from the Italian tax administration stated its country's position with regard to cases where a taxpayer's request to invoke the Arbitration Convention is made after 1 January 2000 needed to be clarified. With these changes 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 *Belgian* tax administration stated that the Prolongation Protocol had recently been approved by Parliament and sealed by the King. It was expected that the Secretariat of the Council would soon be notified.
5. The Member from the *Greek* tax administration informed the FORUM that in his country the Prolongation Protocol and the Accession Convention would be submitted to Parliament in the coming months.

6. The Member from the *Irish* tax administration indicated that the Prolongation Protocol and the Accession Convention were before Parliament and that it was hoped that both instruments would be ratified by the summer 2003 recess.
7. The Member from the *French* tax administration informed the FORUM that France had ratified the Accession Protocol on 6 August 2002 and notified the Secretariat of the Council on 17 December 2002.
8. The *Italian* tax administration Member informed the FORUM that the Prolongation Protocol would probably be introduced to Parliament in about one month.
9. As regards *Portugal* and *Sweden* it was hoped that the Prolongation Protocol would be ratified within the next six months.
10. The *Chair* concluded that encouraging progress on the ratification process had been made and that those countries that had not yet ratified the Prolongation Protocol or the Accession Convention should give a progress report at each meeting of the FORUM.

IV. REPORT OF THE FRENCH TAX AUTHORITIES ON THE MEETING OF THE ADVISORY COMMISSION

11. The Member from the French tax administration gave an oral presentation on the organisational aspects and the practical difficulties in setting up the first advisory commission under the rules of the Arbitration Convention. The first meeting of that commission, which had been set up by the competent authorities of France and Italy, took place in November 2002 and the fourth meeting was scheduled for 26 May 2003.
12. Some of the tax disputes, which led the multinational enterprise to invoke the Arbitration Convention, had been resolved in the mutual agreement procedure, which was initiated in 1997. In 2000 the French competent authority approached the Italian competent authority in order to initiate the arbitration phase. A preparatory meeting with the parties involved was held in March 2001.
13. The document of the Council's financial question group of 6 February 1996, which contains detailed proposals for certain rules of the Arbitration Convention, gave some guidance for the practical issues to be solved. The French and Italian competent authorities decided, inter alia, that the Contracting State that had made the transfer pricing adjustment should arrange for the meetings of the advisory commission, which should all take place in that State.
14. They agreed that the proceedings of the advisory commission should be conducted in the official language of that State with consecutive translation into the other State's official language. All costs in connection with the advisory commission, including the fees and administrative expenses of the independent persons of standing, travel and translation expenses etc., should be shared equally by both Contracting States involved.
15. It had been difficult to find a Chairman for the advisory commission and it had taken about 1 1/2 years to finally set up the commission. One reason was the fact that the

list of independent persons was incomplete and not up to date. The time needed for studying the documents and for the meetings of the advisory commission might have been other reasons why some independent persons of standing had turned down the request to be the Chairman.

16. A member of the tax administration that had made the transfer pricing adjustment formed the secretariat of the advisory commission and was - for reasons of independence and confidentiality - responsible only to the Chairman.
17. Both competent authorities agreed that all their correspondence concerning the case should be made available to the advisory commission. The amount and suitability of documents depended very much on how well the competent authorities had communicated with each other during the competent authority negotiations.
18. They found it helpful to ask the Chairman what documents he considered necessary. He requested, for example, the position of the enterprise on the proposed transfer pricing adjustment, i.e. why it agreed or disagreed with the adjustment. However, comparatively little documentation was available in this particular case.
19. The advisory commission had also asked if the competent authorities had initiated MAPs on the case with competent authorities of other Contracting States and if so whether or not an agreement had been reached. This raised the question of whether the advisory commission should have access to the correspondence with other competent authorities. The Member from the French tax administration argued that for reason of confidentiality the competent authority of another Contracting State should in any case be asked for authorisation to disclose any such information.
20. As it can be very time consuming for the competent authorities to put together all documents considered necessary by the Chairman and for the members of the advisory commission to study these documents, the date on which the matter was referred to the advisory commission according to Article 11.1 of the Convention was construed as meaning the date on which the advisory commission was set up, i.e. the date on which its first meeting took place.
21. The taxpayer was informed of the arbitration procedure and was invited to be present but declined.
22. Members from business and tax administrations appreciated that the Members from the French and Italian tax administration shared their experience with them in identifying difficulties in setting up the advisory commission.
23. The FORUM discussed whether the tax administrations' members of the advisory commission should be from the tax assessment, tax audit or tax policy department or whether it was more appropriate for the individuals who dealt with the case as competent authorities to represent their tax administration in the advisory commission as provided by Article 7.1 of the Convention. The merits of choosing a representative from the competent authority were that this person knew the case and was experienced in transfer pricing, which could help facilitate and expedite the process.
24. The Member from the French tax administration expressed the view that the role of the advisory commission was not to represent the taxpayer or the jurisdictions of the

Contracting States involved and determine the arm's length transfer price. It is rather to deliver a mandatory opinion based on the arguments, methods and the logic presented.

25. The *Chair* concluded that conflict of interest could certainly be an issue and it could be argued that a competent authority should be a separate body structurally independent from the tax inspectorate.
26. A Member from business recommended that witnesses, e.g. the tax auditor and the taxpayer, should be permitted in the arbitration procedure. The *Chair* commented that the Arbitration Convention did not prohibit the admission of witnesses.
27. Another Member from business suggested to consider multilateral MAPs and arbitration procedures in cases where more than two Contracting States were involved in a case.
28. The Members from the French and Italian tax administration agreed to present a written report on their experience in setting up the advisory commission for the next JTPF meeting when the issue would be discussed again.

V. CONTINUATION OF THE DISCUSSION OF THE DRAFT WORKING PROGRAMME 2002-2004 (DOC JTPF/007/2002/REV1/EN/FR/DE; DOC JTPF/007/BACK1/2002/EN; DOC JTPF/008/BACK/2002/REV1/EN)

a) Proceedings during MAP (also including here the first phase of the Arbitration Convention): discussion on the principles of a possible common approach

i) Transparency and taxpayer participation (Questions 12 to 14)

29. The Member from the German tax administration had replied to Question 12 of the document JTPF/007/2002/EN/FR/DE that requests for a mutual agreement procedure had been rejected on grounds of abuse of legal form (so called letter box companies). Members from business were opposed to that position and argued that any taxpayer should have access to the MAP or arbitration.
30. One Member from business commented that according to Article 8.1 of the Arbitration Convention a request could only be rejected when the enterprise was liable to a serious penalty.
31. The discussion showed that except for Germany most competent authorities had not rejected any requests and apparently no tax administration had refused competent authority assistance to a letter box company. Some Members from tax administrations stated that requests had only been rejected because of formal reasons, including insufficient documentation, or because the taxpayer did not fall under the double tax treaty or the Arbitration Convention.
32. The *Chair* concluded that this issue did not seem to be particularly important in practice and, therefore, there was no need for further action.
33. On Question 13 of the document JTPF/007/2002/EN/FR/DE Members from tax administrations expressed differing views on the issue whether taxpayers should

have the right to participate in the mutual agreement process. The vast majority argued that for reason of Member States' sovereignty taxpayers should not have the legal right to participate in the mutual agreement procedure, i.e. in particular to be present during the meetings of the competent authorities. In their view taxpayer participation did not necessarily facilitate or expedite the procedure. However, none of the tax administration Members ruled out that taxpayers might participate in the MAP on a case by case basis, e.g. in presenting the facts and circumstances of the case or attending a meeting, if invited.

34. Members from business said that taxpayers would like to participate in the mutual agreement procedure at each stage if possible and explain the facts and circumstances of the case to ensure that they are properly understood by all parties. Business Members did, however, not require to be present at competent authority discussions. Considering that regularly one competent authority supports the taxpayer's position whereas the competent authority of the other Contracting State does not, they were of the opinion that taxpayer participation was also in the interests of the competent authorities. They added that Article 10 of the Arbitration Convention provided for taxpayer participation in the arbitration process anyway.
35. For one Member from business the issues addressed in Question 13 needed to be seen in a broader sense. As most taxpayers tried to comply with the arm's length principle, they did not only want to be relieved from double taxation but also wanted their transfer pricing system to be accepted by tax administrations.
36. Another Member from business highlighted that the taxpayer had a key role in the MAP, albeit not necessarily in the competent authority negotiations. That Member made reference to the Administrative Arrangements agreed between the United Kingdom and the United States, which provide for a joint hearing of the taxpayer at the competent authorities' discretion.
37. A Member from a tax administration said that taxpayers were already guaranteed participation in that they had to demonstrate that taxation was not in accordance with the provisions of the bilateral double tax treaty or the Arbitration Convention.
38. It was concluded by consensus that taxpayers should not be granted the right to be present at competent authority discussions. Most FORUM Members agreed, however, that a hearing on request of the competent authority or the taxpayer should be allowed.
39. On Question 14 the *Chair* concluded after short discussion among FORUM Members that there was consensus to keep taxpayers regularly informed of major developments during the MAP.

ii) Other issues (Question 15)

40. The Member from the Danish tax administration mentioned that translation of documents not only delayed the mutual agreement process considerably but was also quite expensive. In order to expedite MAPs he suggested that competent authorities should agree on a common working language in their correspondence. In addition, each letter, or at least each position paper, sent by a competent authority should be accompanied by a courtesy translation.

41. For Members from tax administrations an English courtesy translation, e.g. as a summary, was agreeable. It was noted that the draft paper from tax administrations on indicative time scales, which would be submitted to the FORUM before the 19th June meeting would include recommendations on the optional use of a common language.

b) Proceedings of the second phase of the Arbitration Convention: establishment and functioning of the advisory commission (Questions 16 to 18)

42. FORUM Members expressed differing views on Question 16. Some Members said that the Arbitration Convention was an intergovernmental instrument between Member States and, therefore, a centralised location where the advisory commission should meet seemed not appropriate.

43. Other Members favoured a centralised location, e.g. at the EU Commission or Council in Brussels or the OECD in Paris, whereas one Member from a tax administration preferred the capitals of the Contracting States in turn to be the meeting places. The expertise of a centralised Secretariat's in dealing with many cases and rationalisation especially with respect to smaller Member States, were considered to be the most important benefits of centralisation. One Member from business called upon the EU Commission to deal with arbitration procedures if progress was to be achieved. He added that centralisation could be made optional.

44. Some Members pointed out that a centralised location such as the EU Commission or the OECD would only make sense if these organisations were ready to provide suitable facilities and serve as Secretariat, which would, however, burden them with logistic and administrative problems. According to those Members the rather negative experience of the French and Italian competent authorities had shown that competent authorities should rather try to resolve their cases by speedier mutual agreement procedures and avoid arbitration. A Code of Conduct to improve mutual agreement procedures would be beneficial in that respect.

45. There was consensus that the issue of centralisation should be addressed at a later date when Member States' tax administrations had to deal with a significant number of arbitration cases.

46. With regard to Questions 17 and 18 the *Chair* stated that the Secretariat would draft an amended version of the proposed provisions for the next JTPF meeting and that the following questions also needed to be addressed:

a) the starting point of the six-month period as referred to in Article 11.1 of the Arbitration Convention;

b) taxpayer participation; and

c) participation of witnesses.

47. As one Member from a tax administration remarked that some taxpayers submit their request to both Member States, it was agreed that paras. 56 and 61 a) of the working paper doc. JTPF/007/2002/REV1/EN/FR/DE should be modified in that the

Contracting State that made the transfer pricing adjustment should take the necessary initiative.

48. A Member from a tax administration suggested that the competent authorities dealing with a case should reach agreement on the date when the two-year period had elapsed and the case was to be submitted to an advisory commission. He added clarification was also necessary on the start of the two-year period and on the suspension of the two-year period in case of non-cooperation of the taxpayer.
49. One Member from business said the fees for the independent persons of standing and the maximum fee per opinion were too low.

c) Interaction of the mutual agreement and arbitration procedure with administrative and judicial appeals (Question 19)

50. The Chair pointed out that it was difficult to force a taxpayer to choose between a mutual agreement and an appeals procedure. Moreover, in most Member States a suspension of tax collection was only available in appeals.
51. Several Members from business commented that taxpayers should be entitled to appeal even when requesting a MAP in order for the additional taxes to be minimized or dropped. One Member from business pointed to the fact that according to Articles 7.3 and 7.1 of the Arbitration Convention the issue of waiving or withdrawing an appeal was only relevant when the advisory commission was to be set up. Also, there would be less appeals once suspension of tax collection was available to enterprises during a MAP.
52. One Member from a tax administration cautioned that this issue was very complex, not least because it was difficult to implement solutions found in domestic legislation, and the issue should, therefore, only be examined if it had high priority.
53. The Member from the German tax administration stated that the interaction between internal judicial proceedings and mutual agreement procedures was also an issue of safeguarding a level playing field between Member States. He explained that in Germany a taxpayer could appeal and request competent authority assistance at the same time, and the German competent authority could also derogate from the decisions of the German judicial bodies. This rather generous approach could, however, lead to an erosion of tax revenue.
54. The Member from the Belgian tax administration said she understood the concern expressed by the Member from the German tax administration, but for Belgium, for example, it was impossible to change its legal system and, in addition, examining that issue would exceed the remit of the FORUM.
55. The *Chair* replied that only France and the United Kingdom had made a declaration that Article 7.3 applied in their countries. He added this matter was in any case of concern to business and that there was a link between this issue and the suspension of tax collection. As business Members proposed to prepare a paper on the interaction between judicial proceedings and the procedure under the Arbitration Convention, it was agreed to continue the discussion when the paper from business on this issue was available.

VI. DISCUSSION OF THE WORKING PAPER ON CONCLUSIONS OF THE MEETINGS SO FAR (DOC JTPF/003/2003/EN)

56. The *Chair* underlined the importance to have a complete and updated list of independent persons of standing, because the Chairman of the advisory commission should be appointed from the whole list.
57. A Member from a tax administration suggested that the FORUM should submit a first report to the ECOFIN as soon as consensus on the issues of mutual agreement procedures and arbitration had been reached. The *Chair* commented that this should be decided at the September 2003 meeting in the light of the progress made by then.
58. The Member from the Danish tax administration asked to have the wording in para. 5 from sentence 2 onwards changed as follows: “*Denmark*, however, continues MAP procedures under the pertinent double tax treaty. Two other Member States also consider that the procedures under the Arbitration Convention are suspended while the Convention is not in force but have no cases that were submitted before 1 January 2000. »
59. As regards Annex II the Member from the Greek tax administration indicated that his country would accept a taxpayer’s request and continue the mutual agreement procedure under the Arbitration Convention if the other Member State agrees. The Member from the Italian tax administration stated that her country’s position needed to be clarified.
60. With these changes the document and its annexes were approved by consensus. The *Chair* asked Members from tax administrations to submit written comments as regards para. 8 of the Conclusion Paper and to confirm by e-mail whether the date when the tax assessment notice or equivalent was sent or received was deemed to constitute the starting point of the three-year period.

VII. PRESENTATION OF THE PROPOSAL FROM TAX ADMINISTRATION MEMBERS ON “TARGET TIME SCALES FOR MAPS”

61. The Forum took note that Members from tax administrations would prepare a draft discussion paper for the next JTPF meeting.

VIII. ANY OTHER BUSINESS (DOC JTPF/005/2003/EN)

62. The *Chair* asked Members from tax administrations and Observers from EU Candidate Countries to submit written comments on the Enlargement Note (doc. JTPF/005/2003/EN).
63. Members from tax administrations informed the FORUM that they had set up a drafting sub-group on documentation requirements. It was suggested that business should prepare a first draft on documentation requirements by 30 April 2003, which tax administration Members should use as starting point for their own draft that should be submitted to the Secretariat by 30 June.

64. It was agreed by consensus that the next JTPF meeting should take place on 19 June 2003.