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

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Taxud.E1/JMVL/EM

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## **SUMMARY RECORD OF THE THIRTEEN<sup>TH</sup> MEETING OF THE EU JOINT TRANSFER PRICING FORUM**

**held in Brussels on 20<sup>th</sup> September 2005**

### **1. Adoption of the agenda (doc. JTPF/013/REV1/2005/EN/FR/DE)**

1. The proposed agenda was adopted by consensus.

### **2. Adoption of the summary record of the JTPF meeting of 21<sup>st</sup> June 2005 (doc. JTPF/012/2005/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**

3. The Secretariat reported on the position regarding the Forum's second report and the envisaged Commission Communication: the adoption was expected by the end of October.

### **4. 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/REV1/2005/EN)**

4. The list was updated for Germany. Finland, Spain and Greece will send the information very soon and Ireland will check if its list is still valid. The Chair 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.

5. The period for which people should be appointed was briefly discussed. A consensus was found to make the following recommendation: MS are invited to review the list of independent persons of standing at regular intervals and at least every 5 years. The list should be sent to the Council and to the Commission (TAXUD). The Chair reminded the Forum that the persons on the list could be re-appointed and the purpose of this updating at least five years was to check if the persons were still available to act.

**5. Discussion of the Secretariat draft discussion paper on key points for an efficient APA procedure (doc. JTPF/015/2005/EN)**

6. The secretariat explained that the Secretariat discussion paper on alternative dispute avoidance resolution procedures (doc. [JTPF/003/2005/EN](#)), which had been prepared for the June meeting, had been the tool for the identification of the problems. On this basis two papers were prepared for the September meeting: one covering general aspects of APAs (doc. JTPF/015/2005/EN) and a second (doc. JTPF/020/BACK/2005/EN) on technical issues. These documents must be examined in the light of the various background documents sent to the members and more specifically the results of the answers to the two questionnaires. The aim was to extract best practices out of these documents.
7. MS suggested sending the Business questionnaire to SMEs' representatives in order to know how to make the APA procedure more efficient for them.
8. The advantages of APAs were discussed and it was generally agreed that the insertion of a costs' comparison between a tax examination and an APA was not so relevant. Indeed in the APA it must also be taken into consideration that a renewal and/or a rollback are sometimes possible. In any case, the key words for applying an APA are certainty and avoidance of double taxation. However, it was felt that under many circumstances the costs of an APA for both taxpayers and tax administrations could be less than those incurred in a full tax examination. This would be particularly true if APAs were organised efficiently. Business noted that costs were very important and felt that APAs should be less costly. The Chair said that there was a general agreement that costs should be reduced and that APAs could achieve this.
9. Question 1 on documentation requirements was answered by suggesting that the reference to the EU TPD should probably be sufficient. It was strongly recommended that all Competent Authorities (CAs) should receive the same information throughout the APA. It was felt that tax administrations should look to use what information existed. The Chair concluded that the EUTD would serve as a useful basis where it was used.
10. Question 2 concerned the organization of tax administrations and the need to separate the audit process from the APA one. After a long discussion, it was agreed that to deal with APAs procedures the most important point was to have specialized teams with the adequate technical and negotiation skills. As regard the organization of MS' tax administration it generally seems that a centralized approach is the best

way to guarantee an efficient and consistent treatment of APAs. There was no requirement for a tax administration to be organised in a particular way. The key was to have flexible approach to deal with APAs quickly and efficiently. There was a recognition that the specialist teams needed to carry out two broad roles: firstly, checking and evaluating the APA application, which could be carried out most effectively by auditors with specialist transfer pricing knowledge and, secondly, negotiating the APA with other countries which could be carried out most effectively by the CA. The OECD observer commented that these different roles followed the comments in the OECD Transfer Pricing Guidelines.

11. Question 3 in the paper outlined a possible reason for the small numbers of APAs in existence: taxpayers' fears that an APA application would result in a full audit or transfer pricing examination. If this was the case, then Business could see no reason to apply for an APA. In particular, there was a Business fear that a suggested methodology in an APA would be forced on the taxpayer inappropriately for previous years.
12. Tax Administration Members acknowledged that merely because a new methodology was suggested by a taxpayer, this did not mean that a different methodology used in the past was incorrect. It was noted that in the constructive ambience of an APA past problems might be easier to clear up.
13. Tax Administration Members also stated that there was no confidentiality of information within a tax administration. There was no possibility that information provided in an APA could be somehow returned to the taxpayer and not used for other purposes by the tax administration. Information learnt in an APA would be treated in exactly the same way as information gained in any other way.
14. Business Members explained their more general fears. In an APA the relationship between the taxpayer and tax administration should be a co-operative one. This environment of trust is unusual. The APA should be a forum for an open discussion. Both taxpayer and tax administration should benefit from this. If the APA comes to resemble an audit then these benefits will not arise. An APA must not be a recipe for being audited twice: once in arrears and once in advance.
15. Tax Administration Members felt that they must be able to adequately check an APA application and that this might be a lengthy process in complicated cases. However, the key was to ensure that the APA application was subjected to an appropriate level of scrutiny.
16. The Forum also drew a distinction between checking an APA application and monitoring the APA agreement. It was important that tax administrations were able to perform both tasks.
17. The Chair summed up saying that the level of scrutiny of the APA might be different because of the co-operative nature of the process. Where possible, the scrutiny of an APA should be a checking process not a full audit process. But the co-operation needs to be successful. The APA is not to be used to avoid an audit and in exceptional circumstances a tax administration still has the power to carry out an audit. An APA request should not automatically be subject to an audit level of scrutiny but this does not mean that a taxpayer can avoid all audits by submitting an APA request.

18. When it comes to considering the past, there were many possible scenarios. If the past was wrong then a reassessment could not be avoided. But often the co-operative nature of the APA could lead to increased understanding and an easier resolution of problems.
19. On questions 5 and 6. on the added value of a pre-filing stage and information to be provided at this stage, the Forum indicated its approval of the proposed four stage APA process. The Chair had to clarify that unilateral APAs were not covered by the key points document, which was made clear in paragraph 3 of the document. Unilateral APAs were discussed in the specific issues document.
20. Everybody agreed on the importance of the pre-filing stage. It was vital that any exchange of views between tax administration and taxpayer took place as early as possible. A proper pre-filing stage helped to launch the APA on a solid basis.
21. Some Members suggested that companies should have the opportunity to apply anonymously at this stage (this is already possible in France and UK). With reservations from Denmark and The Netherlands, all Members recognised that this kind of un-named application might be accepted even if applicants should not expect too much from such a meeting. There was no question that any binding agreements could be entered into on an anonymous basis but sometimes an anonymous initial approach might be useful.
22. The Forum then discussed what information should be included in an initial application: On question 7 concerning the content of appendices A and B (necessary information and functional analysis), it was agreed that it was important that all relevant information be provided as early as possible in the process: there was no point in providing information later on when it could be provided sooner. Everybody agreed that the pre-filing stage was the moment where it must be discussed and agreed what should be the content of the formal application.
23. The Tax Administration Member from Spain suggested that most of the details under point 6 of appendix A should be included in point 5 (rollback). In appendix B an economic analysis should be included. Several Business Members did not agree with the list of information recommended to be provided. One Business Member requested a revision of point 8(c). Some Tax administration Members highlighted the importance of point 8 (c). Several Members suggested that the request only to refer to the EU TPD requirements. The Chair agreed that even if the list in appendix A was indicative, it could be revised by tax administrations at their next pre-meeting. However, it was important that any list remain illustrative but also give an idea of the type of information that was likely to be necessary. What was necessary in a particular case would depend on the facts of the particular case. But it would be helpful if taxpayers were given an idea of the type of information they should compile for an application.
24. Question 8 concerned the need to keep delays to a minimum in any APA negotiation. The Forum also discussed the time frame for concluding an APA and the illustrative time frame contained in appendix E of the document. Several Tax Administrations Members found Appendix E unrealistic. A Business Member underlined that several issues could be agreed in a second stage (content of the annual report, critical assumptions and renewal conditions). However a consensus was found on the necessity of such time frame but which should only be indicative.

According to the questionnaires and to Forum Members' experience, a range of 18 to 24 months was a typical time frame at the moment. But Business Members took the view that existing times were too long. The Tax Administration Member from The Netherlands was strongly in favour of improving the existing time frames and felt that Appendix E, suitably revised, would be useful for taxpayers. The Tax Administration Member from Spain agreed that it was important to have a target time frame. The Tax Administration Member from Germany cautioned against unrealistic timeframes. Tax Administration Members agreed that the Forum's aim should be to improve existing timeframes.

25. Business Members welcomed the idea of target time frames and felt that the evaluation stage of an APA in particular was vulnerable to delay. Agreeing a time table at the start of the APA would limit the opportunity for delay.
26. The Chair summed up by saying that it was good practice to have the four basic phases as mentioned in the paper and that it was healthy to have a structured timetable. This was best practice. It was useful to have the document contain an illustrative time frame. In practice, the time table for each APA should be agreed between the parties to the APA: in particular the CAs should seek to establish this early on in the process. It would be necessary for all parties to co-operate fully to keep to the timetable.
27. Question 9 on the division of roles between CA and tax auditor was already discussed under question 2 and further discussions took place. However a consensus was reached to recognise that the roles are different. Business Members said that there were two parts in the process of agreeing an APA: evaluating the application (which was appropriate for the auditor) and negotiating with the treaty partner (which was appropriate for the CA.) The problem was that it takes too long to move from the evaluation to the negotiation stage. Tax Administration Members felt that it was important that the people in the administration who had the most appropriate skills formed part of the team dealing with the APA.
28. The Chair summed up by saying that there was a distinction between carrying out a full audit and agreeing an APA. In an APA a tax administration had to possess skills in two areas – the technical knowledge to check the APA and the CA skills to negotiate with another tax administration.
29. On question 10 concerning Appendix C (contents of the CA position paper), the Chair noted that at some stage in every APA the CAs had to exchange position papers. It was how business was done. It was important that this was done as early as possible to remove delays from the process. There was general agreement that Appendix C formed a useful indication of some of the items that might be necessary in the CA position paper. It was agreed that it was a good idea that any position paper and any subsequent APA agreement should contain details of how the APA should be monitored. A long discussion took place on what these details should amount to. Several Members wanted to develop guidelines on the content of this report and other Members argued in favour of a practical approach limiting the exercise to a confirmation that the terms of the APA have been respected. The Chair summed up by saying that it was important that every APA contained details of how it should be monitored but that this would vary on a case by case basis. The tax administration would of course retain the right to check to see if the terms of the APA had been upheld.

30. Question 11 and Appendix D concerned the details necessary in an APA agreement. It was agreed that the appendix should include several points of Appendix A (entities and transactions covered by the APA, etc.) and conditions for a possible renewal. It would again be useful to have an illustrative list of the details necessary. It was agreed that it was good practice for an APA agreement to stipulate how any differences of interpretation should be resolved. There was a broad agreement that it would be correct in many cases for the CAs to resolve these problems.
31. The Forum recognised that the APA would be given effect by a series of agreements. An agreement between CAs would form the master agreement but there would also be further agreements between each tax administration and each taxpayer in many cases.
32. After a long discussion, the Chair stated that he wanted to avoid any discussion on how the agreement between CAs would be made binding on the taxpayer and the tax administration in national laws since every national situation is too specific to provide any recommendation on this issue. What was important was that the taxpayer and tax administration was given legal certainty. Appendix D would be changed to reflect this discussion.
33. A Business Member asked the Secretariat to integrate in the second paper some considerations on what information could be published yearly on APAs (e.g. statistics and more general information). The Secretariat agreed to add suggestions for discussion to the second APA paper.
34. The Forum agreed that the key points APA paper did cover the main areas where work should be done to develop best practice. Two new suggestions were made regarding APA meetings. Some Members were in favour of taxpayer attendance at meetings between tax administrations to enable factual matters to be addressed efficiently. Members also felt that it might be good practice for CAs to arrange regular meetings between themselves to discuss all outstanding APAs.

**6. Discussion of the Secretariat draft discussion paper on specific issues of APAs (doc. JTPF/016/2005/EN)**

35. It was agreed that written comments should be sent to the Secretariat by October 18th. This paper would now be discussed at the next Forum meeting.

**7. Discussion of the Secretariat draft discussion paper on early notification (doc. JTPF/014/2005/EN)**

36. The Secretariat gave a brief explanation on this paper and clarified that this paper is distinct from the issue on prior consultation for which the Dutch delegate did not send a revised paper of his proposal. Early notification would now be discussed at the next Forum meeting. This does not mean that the issue of prior consultation will not be discussed at a later stage.

**8. Discussion of the Secretariat draft discussion paper on penalties  
(doc. JTPF/017/2005/EN)**

37. This document could not be discussed for reasons of time constraints. As for Prof. Maisto's paper, the Chair explained that a majority of MS validated the content of the tables but to give the opportunity to all MS to agree on the tables a new document will be put in circulation and MS are invited to send their last comments by 18th October. After this deadline, the document will be published on the Commission website.

**9. Any other business**

38. The Chair pointed out that MS which would not have answered the questionnaire on APAS are invited to send it to the Secretariat as soon as possible.

39. It was agreed that the next meeting should be a 1.5 days' meeting starting the 12th December and ending the 13th December.

40. In 2006, the two next meetings are planned for the 21st March and 20th June.