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EU JOINT TRANSFER PRICING FORUM

**Written comments by Tax Administration Members
on the Secretariat draft discussion paper on specific issues
of APAs (Doc. JTPF/016/2005/EN)**

Meeting of 12th and 13th December 2005

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Room Document

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Answers from the Italian Tax Administration Member

Question 1: *Does the Forum accept that APAs should be legally binding for both the tax administration(s) and the taxpayer(s)?*

Yes.

Question 2: *What is the Forum's view on the issue of fees?*

In general, we think that tax administrations should not charge fees for providing APAs. However, we recognize that discussions on this issue shall be conducted, as for example, charging a fee might give positive effects as it might be considered as an “entry test” to verify whether the applicant MNE is really interested in applying the APA. At the same time, if charging fees is the only possibility for a country to provide APAs, we think that this country should be free to charge them (this situation is correctly described in paragraph 11 of the document).

Anyway, charging a fee should not be related to a better service. In this regard, the last sentence of paragraph 10 states that, “in return for his fee, the taxpayer should be entitled to a firm commitment to a time-table for the APA”. Also, paragraph 12 states that “where tax administrations do charge a fee for the APA, it is incumbent on them to ensure that the process runs smoothly and efficiently”. In our opinion tax administrations should run the process efficiently, regardless any internal decision to apply fees or not. Any reference to possible connections between fees and efficiency might generate confusion and justify inefficiencies, due to the absence of fees by tax administrations.

We disagree on paragraph 13 where the charging of fees is linked to certain functions by Tax Administration.

Question 3: *Does the Forum accept that there will sometimes be valid reasons for a taxpayer excluding a particular entity from the APA, for example, when the entity is resident in a country that does not offer APAs?*

Yes.

Question 4: *Should the taxpayer still put in place a coherent transfer pricing policy for all entities which reflects the transfer pricing policy in the APA?*

Yes, provided that the APA is consistent with the arm's length principle. Actually, in undesirable cases where the APA agreed with the tax administrations of two countries

does not follow the arm's length principle, it is likely that the third country not providing APAs can adopt different transfer pricing policies.

Question 5: *Does the Forum accept that while unilateral APAs may have advantages in specific circumstances, they are not a tool for avoiding cross-border disputes?*

The answer is yes.

We would like to make some comments on some paragraphs in this section.

Paragraph 29: strictly speaking, an APA needs to be consistent with the ALP, and then, in compliance with it. In our opinion the choice to apply for a unilateral APA or a bi/multilateral one shall be remitted to the taxpayer, as he should evaluate the advantages and disadvantages of the procedure, based on the specific facts and circumstances. Whether a unilateral APA is applied for, "over compliance" shall be qualified as a wrong application of the ALP. Maybe this concept should be disclosed in the same paragraph. Paragraph 31: the reference to "the potential for unilateral APAs to lead to non AL taxation in other tax administrations" is not entirely clear.

Paragraph 33: the last sentence states that: "this guarantee that the arm's length standard has been applied only results from an agreement between CAs". This might not be entirely true. Even in bilateral APAs it is not ensured that two tax administrations will agree criteria and methodologies in compliance with the ALP. If this is the case the agreement could have a negative impact on a third administration that does not take part in the agreement.

Paragraph 41: the last sentence of the paragraph says that "it is good practice to exchange details of the taxpayer's initial request for a unilateral APA and also of any agreed unilateral APA". As for the taxpayer's initial request, we think that there could be problems in terms of confidentiality. In other words, the taxpayer should be aware that the tax administration is going to inform the tax administration in the other country.

On the other hand, as said before, taxpayers should be entitled to opt for a unilateral/multilateral APA, as there can be circumstances where a unilateral APA could better suits with the needs of the specific facts at issue. In this case, any information furnished to other competent authorities prior to the conclusion of the APA would possibly lead, as a matter of fact, to the non applicability of unilateral APAs as requested by the taxpayers (i.e. unilateral APAs would automatically turn into bilateral ones). The tax administration is in any case free not to carry on the unilateral APA, where it could be argued, in the specific case, that a bilateral or multilateral one would be the only tool to evaluate cross-border transactions (eg. in cases where key information is only available in the other country), or that a unilateral APA will not provide sufficient certainty for the tax administration and will be likely to involve the tax administration in a subsequent MAP.

The situation is clearly different when the APA has already been concluded. Actually, as also stated in that same paragraph, with the “Code of Conduct (Business Taxation) – Transfer Pricing” dated 17th July 2002, Member States have committed themselves to exchange details of concluded unilateral APAs”.

Question 6: *Does the Forum agree that the taxpayer should not be compelled to include all connected transactions in an APA?*

Yes.

Question 7: *Does the Forum accept that complexity thresholds can be appropriate in an APA procedure?*

Yes.

Question 8: *Does the Forum agree that the volume of connected transactions is not an infallible guide to transfer pricing risk?*

Yes.

Question 9: *Does the Forum think that it is a good idea that where a critical assumption is not met, then the taxpayer and tax administration should have the opportunity to discuss how the APA could continue and not be cancelled automatically?*

Yes.

Question 10: *Does the Forum agree that there will be advantages to allowing retrospection/rollback in an APA?*

An APA should be valid only for the future. By definition, an APA is an arrangement that determines, in advance of controlled transactions, an appropriate set of criteria for the determination of the transfer pricing for those transactions over a fixed period of time. However, there could be advantages to allow retrospection/rollback, as a side effect of the agreement.

As a matter of fact Italian legislation on APAs does not specifically provide for retrospection/rollback. We think that great care should be taken with the rollback of an APA, as stated in sub paragraph 83.

Nonetheless, some countries provide for the rollback of APAs. According to what already stated in the OECD guidelines, we think that this application would require the agreement of the tax administration, the taxpayer, and, where appropriate, of the treaty partner.

Question 11: *Does the Forum think that a modified APA procedure should exist for SMEs?*

At present, the Italian APA practice as well as the provisions generally regarding the controls on transfer pricing make reference mostly to large-sized taxpayers. Nevertheless, it has to be recognized that also medium enterprises may be interested to enter into an agreement with the tax administration in order to assess the correctness of their transfer pricing policies. Most of the times, however, they are unable to produce exhaustive TP analysis and support documentation. As it would be unfair denying such enterprises to have access to the APA procedure, the idea of some simplified procedure could be accepted in theory, once it has been agreed on the fact that a less complete analysis produced by the taxpayer cannot correspond to a more burdensome commitment for the tax administration.

Anyway, we would prefer the Forum not to deal with this point. Actually, Forum business members did not show a great interest on SMEs. In our opinion, SMEs themselves do not seem to be interested in APAs.

Question 12: *Should a MNE be able to gain access to a modified APA procedure under some circumstances*

Generally speaking, we think that all taxpayers should be treated the same way. Nonetheless, in order to answer correctly to the question, we should know the circumstances and the modified APA procedure referred to in the question.

Question 13: *Do Forum Members think that this paper sufficiently covers the issues to be addressed or are there any other issues the Forum wishes to discuss*

Yes, we do.

Answers from the UK Tax Administration Member

Question 1: *Does the Forum accept that APAs should be legally binding for both the tax administration(s) and the taxpayer(s)?*

Yes.

Question 2: *What is the Forum's view on the issue of fees?*

The UK does not charge fees for APAs.

Question 3: *Does the Forum accept that there will sometimes be valid reasons for a taxpayer excluding a particular entity from the APA, for example, when the entity is resident in a country that does not offer APAs?*

Yes.

Question 4: *Should the taxpayer still put in place a coherent transfer pricing policy for all entities which reflects the transfer pricing policy in the APA?*

Yes.

Question 5: *Does the Forum accept that while unilateral APAs may have advantages in specific circumstances, they are not a tool for avoiding cross-border disputes?*

Yes.

Question 6: *Does the Forum agree that the taxpayer should not be compelled to include all connected transactions in an APA?*

Yes.

Question 7: *Does the Forum accept that complexity thresholds can be appropriate in an APA procedure?*

Yes.

Question 8: *Does the Forum agree that the volume of connected transactions is not an infallible guide to transfer pricing risk?*

Yes.

Question 9: *Does the Forum think that it is a good idea that where a critical assumption is not met, then the taxpayer and tax administration should have the opportunity to discuss how the APA could continue and not be cancelled automatically?*

Yes. The taxpayer should draw attention to the fact that a critical assumption has not been met and there should then be discussion involving all interested parties, including the taxpayer, to agree on appropriate action.

Question 10: *Does the Forum agree that there will be advantages to allowing retrospection/rollback in an APA?*

Yes, but this should only be an incidental part of an agreement.

Question 11: *Does the Forum think that a modified APA procedure should exist for SMEs?*

The UK thinks that the Forum might want to explore what demand there is from SMEs themselves for APAs and whether any demand could appropriately be satisfied by a modified procedure.

Question 12: *Should a MNE be able to gain access to a modified APA procedure under some circumstances*

No. An APA is not an alternative procedure for achieving a ruling.

Question 13: *Do Forum Members think that this paper sufficiently covers the issues to be addressed or are there any other issues the Forum wishes to discuss*

The UK is looking forward to the debate and to considering points raised by other Forum members.

Comments from the Danish Tax Administration Member

In paragraph 41 there is an expressly reference to the agreement between Member States - Code of Conduct (Business Taxation) - Transfer pricing - approved by the ECOFIN Council - in which Member States have committed themselves to exchange details on concluded unilateral APAs.

From the danish point of view we consider this to be an important agreement and we take it for granted that all member states acts in accordance with the agreement.

It is therefore more than good practice to exchange details of any agreed unilateral APA - it is a commitment for the Member States.

The wording of paragraph 41 is a bit ambiguous on this part - and that is unfortunate.

Comments from the Irish Tax Administration Member

Q.1: *Does the Forum accept that APAs should be legally binding for both the tax administration(s) and the taxpayer(s)?*

A 1: An APA should provide certainty going forward. As envisaged in the OECD Guidelines this should involve a tax administration concerned undertaking not to make transfer pricing adjustments to issues covered by the APA as long as the taxpayer follows the terms of the agreement. The taxpayer will then have certainty but only so far as he follows the terms of the agreement. There does not appear to be any need to go beyond this.

Q 2: *What is the Forum's view on the issue of fees?*

A 2: The question of whether or not fees are charged by a tax administration for an APA should be left to the tax administration. In the case of a small tax administration, the issue may not be whether fees should be charged; rather the concern is likely to be the diversion of resources from other compliance work in order to undertake APA work.

Q 3: *Does the Forum accept that there will sometimes be valid reasons for a taxpayer excluding a particular entity from the APA, for example, when the entity is resident in a country that does not offer APAs?*

Q 4: *Should the taxpayer still put in place a coherent transfer pricing policy for all entities which reflects the transfer pricing policy I the APA?*

A3&4: It will be for a taxpayer to decide what should be covered by an APA. An APA will provide certainty for a taxpayer. The more comprehensive the coverage is, the more certainty the taxpayer will have. A taxpayer will want to balance its need for certainty against the costs involved in obtaining it. It is, therefore, possible to envisage circumstances in which a taxpayer will not want to include a particular entity. However, the transfer pricing policy for any company that is not covered by an APA should be consistent with the transfer pricing policy in the APA.

Q 5: *Does that Forum accept that while unilateral APAs may have advantages in specific circumstances, they are not a tool for avoiding cross-border disputes?*

A 5: A unilateral APA that provides for appropriate arm's length pricing can help avoid cross-border disputes. However, unilateral APA's do not have the same focus on avoiding cross-border disputes as bilateral or multilateral APA's.

Q 6: *Does the Forum agree that the taxpayer should not be compelled to include all connected transactions in the APA?*

A6: It will be for taxpayers to decide what should be covered by an APA as they initiate the process. Taxpayers will be motivated by balancing the advantage of getting certainty with the costs involved. For this reason they may seek certainty only in certain areas. If a tax administration considers that the taxpayer's approach is inappropriate and the taxpayer is unwilling to change position, the tax administration can refuse to enter into an APA. Equally, if the taxpayer considers the tax administration's approach to be unreasonable, it can withdraw its request for an APA. Consequently a taxpayer cannot be compelled to include all connected transactions in an APA.

Q 7: *Does the Forum accept that complexity thresholds can be appropriate in an APA procedure?*

A 7: In general, one would expect that a taxpayer would only seek certainty where there is a degree of complexity. However, the question as to whether a complexity threshold should apply in a Member State should be left to the tax administration of the Member State.

Q 8: *Does the Forum agree that the volume of connected transactions is not an infallible guide to transfer pricing risk?*

A 8: Yes.

Q 9: *Does the Forum think that it is a good idea where a critical assumption is not met, then the taxpayer and tax administration should have the opportunity to discuss how the APA could continue and not be cancelled automatically?*

A 9: Yes.

Q 10: *Does the Forum agree that there will be advantages to allowing retrospection/rollback in an APA?*

A 10: Retrospection/ rollback is likely to be useful in the context of unresolved issues for earlier years where the circumstances are similar to those covered by the APA. However, the focus of an APA should be on the future.

Q 11: Does the Forum think that a modified APA procedure should exist for SMEs?

Q 12: Should a MNE be able to gain access to a modified APA procedure under some circumstances?

A11/12:It may be useful to examine a modified APA procedure that could apply in certain circumstances. If a modified procedure were to be considered for SME's it would be important to involve SME interests so that any new procedures would meet their needs.

Q 13: Do Forum Members think that this paper sufficiently covers the issues to be addressed or are there any other issues the Forum wishes to discuss?

A 13: This paper seems to cover the main areas.