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Transfer pricing – Transparency and exchange of information  
Report from the Commission Services to the Code of Conduct Group  
summarising the discussions in subgroup A.

**Introduction**

1 The issue of transparency and exchange of information in the transfer pricing area was discussed at meetings of subgroup A (hereinafter referred to as “the group”), on 19 March and 1 April 2001. The documents 7142/01 FISC 46 and 7552/01 FISC 54 (hereinafter referred to as FISC 54) prepared by the chair of the group served as a basis for the discussions.

2 Both working papers from the chair of the group were based on paragraph 17 of Annex I to the report 13563/00 FISC 193, which makes a distinction between exchange of information on a yearly basis and exchange of information in individual cases.

3 The purpose of this paper is to report to the Code of Conduct Group the outcome of the discussions in the group.

4 The subject of transparency and exchange of information in the transfer pricing area raises a number of complex and technical problems. Despite the helpful papers from the chair of the group, the group was, due to the relatively short time available not able to reach any final conclusions. The discussions were however very useful and established a good basis for further work.

5 The clear majority of Members of the group indicated that they support the idea of improving transparency through exchange of information in the transfer pricing area, although a number of specific issues and details require further clarification. It was suggested that a questionnaire be used to obtain more factual information on problem areas and to get precise information on what type of information Member States would find useful to exchange.

6 The following paragraphs outline in more detail the discussions in the group.

### **Exchange of information on a yearly basis**

7 Most Members of the group (hereinafter referred to as “Members”) were in favour of an exchange of information on a yearly basis. Transfer pricing is a major factor in the context of tax competition. Lack of transparency may for instance operate so as to create harmful tax measures. It is therefore necessary to improve transparency through annual exchange of information. Some Members, however, expressed some doubts about the usefulness of exchanging publicly available information on a yearly basis.

8 There was a broad consensus that it might not be possible to obtain a perfect result in the first instance but that it nevertheless was important to start the process, and that both the types of information being exchanged and the relevant procedures could be revised once some experience has been gained. Similarly, there was agreement that the exercise should not impose an undue burden on tax administrations while still preserving the benefits to be derived from transparency and increased exchange of information.

9 The degree of usefulness of a yearly exchange of information depends on which information should be the basis for such information. It was generally agreed that it should be possible to include not only public information of a general nature but also more specific information, as long as it is possible to secure anonymity in individual cases. Information concerning individual taxpayers that is confidential, protected by law or regulations, would not fall within the scope.

10 The question of exchange of information concerning Advance Pricing Arrangements (APAs) or other advance agreements on transfer pricing involving third country companies were discussed. Some Members of the group found that such information would not be useful and also expressed concern related to confidentiality. Another view expressed was that such information would in principle be very useful

but that the modalities had to be discussed. (On the aspect of third country companies, see also paragraphs 18 and 19 below).

11 The group agreed that all Member States should fully participate in the information exchange. Some Member States stressed, however, that they have no or little experience on transfer pricing or on APAs. Although this situation would not prevent such Member States from exchanging information on a reciprocal manner it would of course have an impact on the amount of information that, on their part, could be exchanged. This should not be seen as a violation of the principle of reciprocity.

12 FISC 54 lists some specific items of information concerning the use of transfer pricing guidelines in practice, the number and kind of APAs and the procedures for APAs, that could be exchanged on a yearly basis:

*a) Use of transfer pricing guidelines in practice;*

No Member said that they would not be able to exchange the items of information listed under this heading.

*b) Number and kind of APAs;*

The vast majority of Members expressed the view that this information would be useful but that it was necessary to establish the appropriate level of aggregation in order to protect confidentiality of individual taxpayers.

*c) Procedures for APAs;*

No Member said that they would not be able to exchange the items of information listed under this heading.

A few Members referred to difficulties of a practical nature resulting from the different administrative burden, because of the sizes of the tax administrations, between the smallest and the biggest Member States.

13 Introducing a yearly exchange of information raises questions on the procedures for such an exchange. A possible solution would be that Member States

submit the information to the Commission, who would co-ordinate the procedure. The Commission services said that they would be prepared to undertake this role. The Commission services expressed the view that some kind of standardised reporting format could usefully be developed.

### **Exchange of information in individual cases**

14 Most Members of the group were in favour of more exchange of information in individual cases as compared to the current standard practices.

15 The relationship to the ad hoc Working Party on Tax Fraud raised by FISC 54 were discussed by the group. It was generally considered that the work already done by this Working Party could be taken into account and that maybe the same procedure, i.e. a questionnaire, could be followed.

*a) Notification of APAs, rulings or any other advance agreements concerning transfer pricing*

16 It was generally recognised that unilateral APAs or other advance agreements on transfer pricing is an area where there is particular interest in improving the exchange of information. Several Members indicated that they do not conclude unilateral APAs etc.

17 The OECD Transfer Pricing Guidelines (hereinafter referred to as the “Guidelines”) discourages the use of unilateral APAs. In the light of this FISC 54 raises the issue of whether it would be useful if Member States were not to enter into unilateral APAs etc. before having invited other states affected to conclude a bilateral or multilateral APA, or if it would be sufficient if the other state was immediately notified of such a unilateral agreement. Those Members that expressed a view considered that Member States should not enter into unilateral APAs etc. covering transfer pricing with companies of other Member States or with third country companies. No Member objected to informing other Member States concerned either before or immediately after concluding a unilateral APA etc.

18 Members of the group consider that exchange of information of APAs with third country companies would be relevant. However, with respect to such exchange of information some Members expressed concern that there would be no legal basis for exchanging such information. A number of Members considered one should seek to provide for the right legal base.

19 It was mentioned that it is usual practice for third country companies – in advance of deciding on the location of business - to approach several Member States’ tax authorities individually to obtain the best possible conditions.

20 A number of Members considered the reference to Member States concerned in paragraph 17 of Annex I to doc. 13563/00 FISC 193 must be understood as having a broad scope.

21 It was only briefly discussed how the expression necessary information in the said paragraph 17 should be interpreted. In FISC 54 it is suggested that information should be exchanged to the extent that it enables other Member States to apply the arms length principle according to the Guidelines.

*b) Notification of MNEs use of a transfer pricing method outside the OECD Transfer Pricing Guidelines*

22 This item was only subject to very limited discussion.