DIRECTORATE FOR FINANCIAL, FISCAL AND ENTERPRISE AFFAIRS
COMMITTEE ON FISCAL AFFAIRS

BOARD ON CO-OPERATION WITH NON OECD ECONOMIES

OBSERVERSHIP IN THE CFA : REVIEW OF APPLICATION OF THE COUNCIL’S CRITERIA FOR
THE PREPARATION OF TECHNICAL OPINIONS

18 - 19 November 2002

This Note 1 is submitted to the Board FOR DISCUSSION AND ENDORSEMENT under session 2 of its agenda.

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Executive Summary - Action required

At present, Argentina, the Russian Federation, the IMF and the World Bank have observer status in the Committee of Fiscal Affairs and its subsidiary bodies.

In 2001 Slovenia and Lithuania requested observer status in the CFA and its subsidiary bodies. The Council has asked the CFA to prepare a technical opinion on these two countries. Further, in 2002 Latvia, Kazakhstan and Chinese Taipei have requested information on procedures for requesting observership, and in October this year Malta announced its intention to request observer status in the CFA. It may be envisaged that most or perhaps even all countries applying for EU membership may consider requesting observer status. This would add three further requests (Estonia, Cyprus and Latvia).

In addition, at its meeting in January 2002 the CFA also approved the recommendation from the BCNOE to contact certain non-Members to establish whether they might be interested in applying for observership. The Board recommended that China and South Africa be approached to commence this informal dialogue. Based on the contacts and meetings so far with the two countries, the Secretariat expects that both countries will submit official requests within the next few months. The Secretariat suggests further that we should propose to the CFA contacting Singapore.

With a view of ensuring a consistent and transparent process for preparing technical opinions on observer requests and further to the discussions at the BCNOE meeting in April 2002, the CFA asked the BCNOE to discuss and recommend possible revisions of the operational guidelines for preparing such technical opinions.

The CFA will be asked, at its January 2003 session, to endorse any revised guidelines and to agree to a schedule for preparing the technical opinions on the pending requests.

In this note a draft update of the CFA guidelines is presented for discussion and endorsement by the Board. For background information the results of a recent CCNM survey on “Participation of non-members in OECD bodies: Implementation of the criteria by various bodies” are provided in document CCN (2002)7. In the background information, too, please find a recent letter from the Secretary General to all Chairs of Committees, requesting Committees to consider issuing operational guidelines on the observer criteria, as set out by Council (Annex 1).
CFA GUIDELINES ON THE IMPLEMENTATION OF
OECD COUNCIL’ CRITERIA ON THE PREPARATION OF TECHNICAL OPINION (DRAFT
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I. Council decisions on the preparation of the technical opinion by subsidiary bodies

1. In Recommendation C(96)64/REV2/FINAL of the Council concerning the participation of non-member economies in the work of the subsidiary bodies of the Organisation, the Council sets out principles for the preparation of technical opinions by subsidiary bodies: “The opinion of the subsidiary body should indicate:

   1. Whether the subsidiary body considers in light of any relevant evidence that the non-member is a major player.

   2. Whether and in what ways association of the non-member with its work would be mutually beneficial.

   3. The consequences that the non-member’s participation might have on the current work programme the subsidiary body concerned as well as on the Secretariat resources devoted to this body; and

   4. As appropriate, the limits and form of the participation of the non-member which appear desirable, bearing in mind the variety of possible programmes and approaches, in order to maximise the benefits and reduce disadvantages.”

2. It is worth stressing that in the Council document it is explicitly stated that granting observer status should be recommended sparingly. This seems to imply a rigorous application of the ‘major player/mutual benefit’ criteria (cumulatively, and not either/or) by the relevant subsidiary body, when considering those options.

3. In addition to the two substantial criteria of 'major player' and 'mutual benefit', the Council Resolution identifies the issues of resources and work planning, and requests that consideration be given to "the consequences that the non-member’s participation might have on the current work programme of the subsidiary body concerned as well as on the Secretariat resources devoted to this body”. The Resolution also asks that alternative ways of strengthening co-operation with the non-Members requesting observer status be borne in mind.

II. CFA Guidelines on the implementation of the guidelines on OECD work on taxation

4. At its meeting in June 1997, the CFA endorsed the operational guidelines for the implementation of the ‘major player’ and ‘mutual benefit’ criteria [DAFFE/CFA(97)21/CONF]. The guidelines were developed within the overall framework set out by the Council. The latest technical opinion from the CFA on Argentina and the Russian Federation were prepared on the basis of these guidelines.

5. The text on guidelines from 1997 are updated in the following sections, with changes and updates marked up:

   Technical guidance

6. The Council Resolution stresses that the subsidiary body’s examination should be from a technical point of view; that is, the “major player” and “mutual benefit” criteria should be considered in the case of the CFA only from a taxation point of view. The CFA is not expected to address broader issues, such as a country’s political or security situation, or the Organisation’s strategic interest in expanding cooperation with different countries. Consideration of these broader issues is the responsibility and
prerogative of the Council. Thus, the possibility exists that a non-Member may be judged by the CFA not to satisfy the “major player/mutual benefit” criteria, but, in light of broader policy or political considerations, still be invited by the Council to participate in the work of the CFA; or, on the contrary, a non-Member might not be invited, even if the CFA’s technical opinion is positive.

7. The Council Resolution recommends that interpretation of the “major player” and “mutual benefit” criteria should be developed quantified, as appropriate.

The criteria on major player

8. The CFA’s assessment of whether or not a non-Member satisfies this criteria from a tax policy point of view might should be based on the following information:

− the contribution that the non-Member makes (or will make) to implementing the mission statement of the CFA (see Annex II);

− the experience and performance the non-Member has demonstrated in implementing CFA guidelines on international taxation, including policies in the areas of tax treaties, elimination of harmful tax practices, exchange of information and transfer pricing;

− the significance of the tax-treaty network or the willingness of a country to enter into treaties;

− the willingness of the non-Member to use the 1995 Transfer Pricing Guidelines as a benchmark for their national legislation

− the existence of a national institutional structure, supported by an effective tax administration, to ensure that international taxation agreements are implemented;

− the position and leadership adopted by the non-Member in taxation discussions in other international fora;

− any other information and data that could demonstrate that the non-Member is or is not a “major player”.

The criteria on mutual benefit

9. To establish whether a non-Member satisfies the “mutual benefit” criterion in the taxation area, the following information could should be considered:

− the contribution that the non-Member makes (or will make) to implementing the mission statement of the CFA;

− commitments made by the non-Member to disseminate the internationally accepted principles of taxation;

− the overall tax administrative capacity, including level of expertise in operating sophisticated tax systems;

− willingness and ability to provide tax data to OECD in an OECD format;
− willingness and ability to rely on market-based approaches to taxation;
− recognised interest in OECD Council instruments in the field of taxation (notably instruments dealing with tax treaties and transfer pricing;
− any other information that could demonstrate the mutual benefit of the non-Member’s participation in the work of the CFA.

10. In exploring alternative ways of strengthening co-operation, attention should be drawn to the Council Resolution, which stresses that observership is only one of a range of possible forms of participation in the work of subsidiary bodies, and that it should be recommended sparingly.

11. The Appendix to the Council Resolution states: “In considering the establishment of relations with non-Member countries, a subsidiary body should generally not limit its reflection to the specific form requested, but should examine the full range of possible means of co-operation with that non-Member, with a view to finding those best suited to the Organisation and the non-Member in question. These include:

a) participation in one or more workshops, seminars or other ad hoc informal meetings;

b) participation, whether regularly or from time to time, in activities conducted by the Organisation within various frameworks, such as the Development Centre, the General Work Programme of the CCET, the Policy Dialogue with the Dynamic Non-Member Economies, or the Emerging Market Economy Forum;

c) participation directly in the official sessions of the subsidiary body or one or more of its working parties as ad hoc observer, regular observer or full participant;

d) any other form of co-operation that may appear appropriate.”

12. The Council Resolution further suggests that ad hoc invitations to participate in informal meetings should be considered before a non-Member is invited to become an observer. Consideration of whether an invitation should be extended, or transformed into a “regular observership”, should take into account the quality of the non-Member’s participation in ad hoc informal events. This includes the level of participation in discussions, co-operation in the work of the subsidiary body, and the level of information provided. The Council also has the possibility of authorising a subsidiary body to invite non-Members to be represented at a particular meeting.

13. Since the Council issued this general guidance the CFA and the BCNOE have further elaborated the various forms of involving non-Members in the work of the CFA and its subsidiary bodies. In the preparation of the technical opinion the alternative form of participation should be taking into account.

**Overall guidance**

14. The technical opinion shall be prepared by applying the two main criteria on 'major player' and 'mutual benefit' cumulatively, and by considering the overall perspectives of the CFA to strengthen co-operation with the requesting non-Member by form of observership. This would include the evaluation of the two criteria set out above and on examination of the implications for the resources available for the Committee and its subsidiary bodies.
15. The draft technical technical opinion which will be presented to the CFA for approval shall recommend:

- In the case of an agreement to provide observership, whether observer status shall be given in the CFA and all its Level 2 subsidiary bodies or whether any restrictions on admission to subsidiary bodies should be set out

- In the case of a reject of the request, draft proposals for potential ways of strengthening cooperation with the requesting non-Member should be outlined. For example, focus might be on strengthening the bilateral assistance to the non-Member country; encouraging the non-Member to attend and support outreach activities, and proposals on providing ad hoc invitations to the non-Member to attend separate meetings and events, as set up by specific subsidiary bodies.

III. Procedure for preparation of technical opinions on observer requests

16. In the Guidelines as approved by the CFA in 1997, the Committee confirmed its procedures for the preparation of technical opinion, originally set out in 1995 [DAFFE/CFA (95)13/REV1]. In the paragraphs below the relevant parts of the 1995 guidelines are represented brought, with suggested changes and updates marked up in the text.

1997 Procedures with suggested modifications highlighted

Suggested Procedural Steps:

17. The Committee should have a first round of discussions once the Council has agreed that a request should be considered by the Organisation.

18. It is at this stage that the Committee should set the timetable for the review, whether and if so which subsidiary bodies should Working Parties will be involved (normally WP1, 6 and 8) and what issues should be examined, although it is not always possible at this stage to identify all of the issues. The Committee would also instruct the Board on how detailed any review should be, including any need for setting up a Review Panel. The timetable would have to be consistent with the overall timetable set by the Council and to take due account of the applicant country’s wishes and degree of preparedness.

19. Each Working Party would then be asked to carry out a review of the requesting country’s practices within its area of competence and report back to the Committee as to whether the country is able and willing to follow the guidelines established by OECD instruments monitored by that Working Party. This will require examining tax treaty policy and implementation, as well as relevant domestic legislation and administrative practices.

20. The Board will continue the review process, act as a contact point with the subsidiary bodies, engage in a first dialogue with the requesting non-Member and be responsible for preparing the consolidated technical opinion on which the CFA would take its decision.

21. The requesting non-Member will be asked to prepare a report, based on a standard questionnaire as prepared by the Secretariat. The Board will invite the relevant subsidiary bodies to provide a technical opinion for the areas within their competencies. The Chair of each subsidiary body can decide how he or she wants to prepare the opinion from his group: the Bureau, the full group, oral discussion at a meeting or by means of a written communication.
22. On the basis of these contributions the Secretariat will prepare an overall evaluation for the Board, which, once agreed, will be forwarded to the full CFA, for endorsement.

23. The procedure to be followed by each Working Party is that the Secretariat should send out a letter to Delegates indicating when a review will take place and asking each Delegate to identify any issues within the competence of that Working Party which should be raised during the review. Delegates should be encouraged to contact their enterprises and taxpayers which are undertaking activities in that country.

24. On the basis of country replies, the Secretariat will prepare a brief list of issues to be discussed and the country under review should prepare a note setting out its position on the relevant issues covered by the Working Party. In the case of WP1 this would include an overview of its tax treaty policy and network, the relationship between treaties and domestic law, an explanation of where its policies deviate from the OECD Model and a listing of the reservations and observations that it would wish to make. For WP6 the main focus would be on how far it follows the OECD Transfer Pricing Guidelines and what experience it has in auditing MNE. The note for WP8 would focus on Exchange of Information, mutual agreement procedures, taxpayers rights and obligations, penalty policies and other administrative practices which may be of interest to the international community. Both the Secretariat note and the country note should be available 3 weeks prior to the meeting.

25. The Board will remain free to organise further aspects of the review process, including suggesting whether meetings between the requesting non-Member and the Board and, if needed, with the full CFA, would be useful.
Dear Chair,

Participation of non-Members in OECD subsidiary bodies

I am writing to seek your Committee’s contribution to the discussions on a longer-term strategy for the participation of non-Members in OECD subsidiary bodies and to an improved application of the Resolution C(96)64/REV2/FINAL.

The Resolution governs the participation of non-Member economies in OECD instruments and subsidiary bodies. In particular, the Resolution provides broad guidelines on the application of the two criteria – "major player"/"mutual benefit" – used to assess a request for observer status. However, specific interpretation on the application of these criteria is left to the subsidiary bodies in light of the broad scope of the OECD’s substantive work and the diversity of Committee working methods.

At the initiative of its Chair, Ambassador Olivieri, the Committee on Co-operation with Non-Members has launched a reflection on how Committees across the Organisation manage the responsibilities conferred on them by the Resolution, in particular how they interpret and apply the criteria set by the Resolution in the formulation of their technical opinions. The discussion was based on a paper prepared by the Secretariat [CCN(2002)7]. The CCN noted that some Committees have taken the initiative to develop their own guidelines for the application of the Council Resolution. The CCN welcomed this as a useful means of ensuring a more consistent approach by Committees in the formulation of their technical advice, while at the same time providing the CCN itself with a better understanding of the technical arguments on which the Committees’ advice are based.

... / ...
To: All Committee Chairs

In light of these discussions, I would like to encourage your Committee to develop, if it has not already done so, guidelines for the application of the observership criteria taking into account the field of competence of your Committee. These guidelines would then be used explicitly and consistently to frame your Committee’s technical opinions for specific requests. I believe that this step can make a useful contribution to improving the Organisation’s decision-making process on observership requests, by facilitating the work of the Committee in formulating its opinion while providing the CCN and the Council with a clearer understanding of the Committee’s argumentation. I look forward to your support in this undertaking.

I thank you in advance for sharing with me the outcome of your Committee deliberations. Should you have any questions, comments or concerns concerning this matter, please do not hesitate to contact Mr. Eric Burgeat, Director of the CCNM, or his colleague Ms. Lynn Robertson.

Yours sincerely,

Donald J. Johnston