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**COMMUNICATION FROM THE COMMISSION TO THE COUNCIL, THE  
EUROPEAN PARLIAMENT AND THE EUROPEAN ECONOMIC AND SOCIAL  
COMMITTEE**

**on the work of the EU Joint Transfer Pricing Forum in the period March 2007 to March  
2009 and a related proposal for a revised Code of Conduct for the effective  
implementation of the Arbitration Convention (90/436/EEC of 23 July 1990)**

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## 1. AIM AND CONTEXT

1. Transfer prices are the prices at which an enterprise transfers physical goods and intangible property or provides services to associated enterprises. A fundamental principle, for tax purposes, is that the conditions attached to such transfers should not differ from those which would be established between enterprises that are not associated. This principle is referred to as the ‘arm’s length’ principle and is internationally recognised, although not universally applied. It is enshrined in Article 9 of the OECD Model Tax Convention. The OECD has issued guidelines<sup>1</sup> for the application of the arm’s length principle to evaluate the transfer pricing of associated enterprises.
2. Within the European Union (EU), the arm’s length principle and related OECD guidelines are accepted and applied by all Member States. However, the interpretation and application of the OECD guidelines can vary between countries. Differing interpretations can result in uncertainty for taxpayers and could also affect the proper functioning of the internal market in that the same profits could be taxed twice — double taxation.
3. The quick and effective elimination of any double taxation arising from a transfer pricing adjustment or from differing interpretations of the OECD guidelines is a major issue within the internal market. Consequently, a multilateral convention ‘on the elimination of double taxation in connection with the adjustment of profits of associated enterprises’ (the ‘Arbitration Convention’ or ‘AC<sup>2</sup>’) was adopted in 1990 by all EU Member States.
4. The EU Joint Transfer Pricing Forum (JTPF), an expert group, was set up by the Commission in October 2002, following a Commission Communication issued in 2001<sup>3</sup>. The JTPF’s mandate is to find pragmatic solutions to problems arising from the application of the arm’s length principle and to ensure the elimination of any double taxation that may arise.
5. The Commission has reported on three occasions on the work of the JTPF in three Communications. The first Communication<sup>4</sup> presented a Code of Conduct<sup>5</sup> for the Arbitration Convention, which sought to ensure that the AC would operate more efficiently. The second Communication<sup>6</sup> presented a Code of Conduct<sup>7</sup> concerning documentation requirements for transfer pricing within the EU — the EU Transfer Pricing Documentation (EU TPD). The EU TPD Code of Conduct sought to ensure a consistent approach by setting out the type of documentation that Member States

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<sup>1</sup> ‘Transfer pricing guidelines for multinational enterprises and tax administrations’.

<sup>2</sup> OJ L/1990/225 of 20/08/1990 — Convention 90/436/EEC.

<sup>3</sup> Communication from the Commission to the Council, the European Parliament and the Economic and Social Committee: *‘Towards an internal market without obstacles — A strategy for providing companies with a consolidated corporate tax base for their EU-wide activities’* COM(2001) 582 final, 23.10.2001.

<sup>4</sup> OJ C/2004/122 of 30/04/2004, p. 45.

<sup>5</sup> OJ C/2006/176 of 28/07/2006, p. 8.

<sup>6</sup> OJ C/2006/49 of 28/02/2006, p. 23.

<sup>7</sup> OJ C/2006/176 of 28/07/2006, p. 1.

should request and accept for the purposes of their own transfer pricing rules. The third Communication<sup>8</sup> presented guidelines for Advance Pricing Agreements (APAs) within the EU. APAs are considered to be an efficient tool for dispute avoidance as they provide advance certainty concerning the transfer pricing methodology.

6. This fourth Communication reports on the work of the JTPF over the last two years and presents in annex a revised Code of Conduct for the Arbitration Convention. As a result of a monitoring exercise on the application of the existing Code of Conduct, it was recognised that the three-year target for resolution specified within the Code of Conduct was difficult to achieve and further work was needed to clarify the process to facilitate resolution within the three-year time frame. Consequently, some revisions are proposed to provide the necessary clarification on specific provisions of the Arbitration Convention.

## **2. ACTIVITIES OF THE EU JOINT TRANSFER PRICING FORUM FROM MARCH 2007 TO MARCH 2009**

7. During this period the JTPF adopted two reports: firstly, one on penalties and transfer pricing, unanimously adopted, and, secondly, one on the interpretation of some provisions of the Arbitration Convention with several reservations regarding thin capitalisation. These reports are being issued as staff working documents with this Communication. The JTPF recommendations, included in the JTPF report on the interpretation of some provisions of the AC, have been incorporated in the revised Code of Conduct for the AC, in the Annex to this Communication.

### **2.1. JTPF conclusions on penalties and transfer pricing**

8. The issue of penalties was recognised as an important concern for multinational enterprises in the first JTPF work programme. This topic was addressed on two occasions by the JTPF: when a Forum member, Professor Maisto, conducted a study to better assess how penalties were addressed by EU Member States, and when the JTPF discussed transfer pricing documentation requirements.
9. This work confirmed that EU Member States have rules which aim at enforcing taxpayers' compliance with national tax legislation. These rules can vary widely from one Member State to another. In the area of transfer pricing, penalties are generally applied in the event of non-compliance with transfer pricing documentation requirements, uncooperative behaviour by a taxpayer and understatement of profits.
10. Penalties can take the form of either monetary deterrents, for example a surcharge or additional tax imposed as a consequence of underpayment of tax in addition to the amount of underpayment, or other measures, for example, a reversal of the burden of proof where a taxpayer has not acted in good faith.
11. Penalties must always be distinguished from interest on late payment of tax, which is imposed to recompense the time value of money.

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<sup>8</sup> COM(2007) 71 final of 28/2/2007.

12. As regards penalties linked to transfer pricing documentation, the JTPF felt the issue was already addressed in the Code of Conduct on transfer pricing documentation, where the following recommendations are made:

‘Member States should not impose a documentation-related penalty where taxpayers comply in good faith, in a reasonable manner and within a reasonable time with standardised and consistent documentation as described in the Annex or with a Member State’s domestic documentation requirements, and apply their documentation properly to determine their arm’s length transfer prices.

...

Taxpayers avoid cooperation-related penalties where they have agreed to adopt the EU TPD approach and provide, upon specific request or during a tax audit, in a reasonable manner and within a reasonable time, additional information and documents going beyond the EU TPD referred to in paragraph 18.’

13. Considering that penalty regimes are a matter of domestic law and recognising that, generally, EU Member States do not apply separate penalty regimes to transfer pricing adjustments, the JTPF observed that the interaction of transfer pricing and penalties was a matter to be addressed by existing EU Member States penalty regimes.

14. However, the JTPF agreed on three further conclusions:

- (a) On penalties related to transfer pricing adjustments, the JTPF recognised that transfer pricing is not an exact science; there will usually be a range of possibilities for arriving at the arm’s length price. Therefore, it is inappropriate for tax administrations to impose a penalty automatically, without considering the facts of the case, merely due to what turns out to be incorrect transfer pricing.
- (b) On the cancellation or mitigation of penalties where the case has been subject to a Mutual Agreement Procedure (MAP) under a double tax convention or a procedure under the Arbitration Convention: in practice, penalties are generally reduced or waived following the downward revision of a settlement originally made between the taxpayer and the tax administration or following an agreement between the tax administrations involved in the MAP or AC procedure to reduce the transfer pricing adjustment. The JTPF considered it appropriate to reiterate that the penalty should be reduced commensurately with a downward revision. This would bring the penalty into line with the final, agreed transfer pricing. This, however, would not necessarily be the case for criminal penalties or penalties considered as serious under the Arbitration Convention.
- (c) Finally, the JTPF concluded that as regards the Arbitration Convention and the possibility to deny access to it in the case of a serious penalty, the topic should be addressed in the report on the Arbitration Convention (see under point 2.2, paragraph 17).

## **2.2. JTPF conclusions on the interpretation of some provisions of the Arbitration Convention**

15. The objective of the first Code of Conduct was to ensure a more effective and uniform application by all EU Member States of the Arbitration Convention and to establish procedures to enable smooth and timely progression through the various stages of the Arbitration Convention. The Code of Conduct also contained a recommendation to EU Member States on the suspension of tax collection during cross-border dispute resolution procedures.
16. Based on the practical experience gained since this first Code of Conduct was adopted in 2004, the JTPF members were of the opinion that a common view of the interpretation of some provisions could usefully be addressed. The topics specifically identified were: serious penalties, the scope of the AC (triangular transfer pricing and thin capitalisation cases), interest charged/credited by tax administrations when a case is dealt with under the AC, the functioning of the AC (rules on the deadline for setting up the advisory commission, criteria for establishing the independence of independent persons of standing), the date from which a case is admissible under the AC, and the interaction between the AC and domestic litigation.
17. The topic of serious penalties (Article 8(1) of the AC), whereby access to the AC may be denied where the taxpayer is liable to a serious penalty, was also discussed by the JTPF. This article is supplemented by unilateral declarations made by Member States to explain what they consider to be a serious penalty. Some Member States now acknowledge that their unilateral declarations do not describe penalties that should be considered serious. Moreover, since 1995, tax administrations have gained more experience with transfer pricing disputes and in practice access to the AC has been denied in very few cases. Consequently, the JTPF concluded that serious penalties should only be applied in exceptional cases like fraud and invited Member States to better reflect this conclusion in their unilateral declarations.
18. The JTPF examined to what extent ‘thin capitalisation’ cases are covered by the scope of the AC. It was unanimously recognised that adjustments to the rate of interest on loans between associated enterprises fall within the scope. However, differing views were expressed by the tax administration members on the specific issue of whether adjustments to the amount of a loan are also covered, and this in turn leads to wider issues concerning general borrowing capacity. This is particularly sensitive if the adjustment of profits related to thin capitalisation are deemed to be derived from the application of EU Member States’ anti-abuse rules (AAR) rather than from their general arm’s length rules, as evidenced by the number of reservations, referring to AAR, expressed on the JTPF recommendation.
19. A large majority of Member States concluded that the AC covers thin capitalisation cases as it makes clear reference to ‘conditions ... made or imposed between the two enterprises in their commercial or financial relations’. Consequently, adjustments related to conditions made or imposed in relation to interest rates, the amount of the loan and borrowing capacity are all covered by the AC. A significant minority did not agree with this conclusion, reasoning that AAR and the application of the arm’s length principle to a financial transaction are different concepts and that adjustments related to the amount of a loan and borrowing capacity were therefore not within the scope of the AC.

20. The Commission's opinion, based on the text of the AC, is that Article 4(1) is sufficiently broad to cover all aspects of thin capitalisation rules, whether they concern the interest rate or the amount of the loan, as these aspects ultimately all affect the profits of the associated enterprises.
21. It may be noted that the European Court of Justice (ECJ), in applying the arm's length principle, also refers to these different aspects of thin capitalisation rules<sup>9</sup>. On the specific aspect of adjustments derived in whole or in part from the application of domestic anti-abuse rules (AAR) in cross-border situations only, the Commission concludes, based on recent ECJ case law and as already partly developed in its Communication on anti-abuse measures<sup>10</sup>, that such adjustments should be restricted to transactions which, in whole or in part, represent a purely artificial arrangement. In addition, the rule should only aim to set the right price of the transaction.
22. Since the AC addresses adjustments related to the application of the arm's length principle, there should not be any reason to prevent the application of the AC in the above circumstances. Therefore the Commission encourages all tax administrations to accept this interpretation in order to give the widest possible access to the benefits of the AC process.
23. The Forum reviewed the application of the existing Arbitration Convention and related Code of Conduct to double taxation cases that resulted from the involvement of more than two European parties to a transaction. In examining the issue, an agreed definition of the type of case involved was required and the following was agreed: *a triangular case is a case where two Member States in a MAP cannot fully resolve any double taxation arising in a transfer pricing case when applying the arm's length principle because an associated enterprise — as defined in the Arbitration Convention — situated in a third Member State and identified by both EU competent authorities (evidence based on a comparability analysis including a functional analysis and other related factual elements) had a significant influence in contributing to a non-arm's length result in a chain of relevant transactions or commercial/financial relations and is recognised as such by the taxpayer suffering the double taxation and requesting the MAP.*
24. The JTPF agreed that transfer pricing disputes in triangular cases involving only EU competent authorities were covered by the scope of the Arbitration Convention. The Forum also examined what practical guidance could be given to facilitate the resolution of such cases.
25. Considering the recommendation in the first Code of Conduct to suspend tax collection during the Mutual Agreement Procedure, the JTPF examined the possibility to suspend interest charges during the procedure. All tax administrations could agree that a taxpayer should not be adversely affected by the existence of different approaches to interest charges and refunds during the time it takes to complete the MAP process. The JTPF therefore recommended that Member States should apply one of the following approaches: 1) tax to be released for collection and repaid without attracting any interest; 2) tax to be released for collection and repaid

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<sup>9</sup> See in particular para. 81 of *Thin Cap GL case C-524/04 of 13/03/2007*.

<sup>10</sup> OJ C/2008/106 of 26/04/2008, p.13.

with interest; 3) each case to be dealt with on its merits in terms of charging or repaying interest (possibly during the MAP process). The competent authorities, by discussing and adopting the most appropriate approach based on the three options, have an opportunity to prevent the taxpayer being adversely affected by differing approaches to interest charges during the MAP negotiations. The Commission encourages the adoption of the above process.

26. The Arbitration Convention was designed to facilitate the resolution of disputes within a three-year timeframe. From the statistical data<sup>11</sup> it was obvious that it takes longer than three years for too many cases to be resolved. The absence of a clear deadline for setting up the advisory commission in Article 7(1) was identified as a major drawback of the Arbitration Convention process. To overcome this problem, the JTPF has agreed that an advisory commission should be set up no later than six months following expiry of the initial stage of the AC process as defined in Article 7 of the AC.
27. A further difficulty that leads to delays is reaching agreement on whether an independent person of standing, designated to become a member of an advisory commission, is indeed independent. The JTPF agreed that the use of a standardised declaration would be beneficial. The notice will require independent persons of standing selected for the panel to sign a declaration accepting nomination and a statement of independence for the particular case under consideration. Furthermore, the JTPF also agreed that independent persons of standing do not have to be nationals of or resident in the nominating state, but do have to be nationals of a Contracting State to the AC and resident within the territory to which the AC applies, as defined in Article 16 of the AC.
28. The JTPF also clarified the date from which a case is admissible under the AC, once a country joins the AC. The JTPF concluded that a case is covered by the AC when the request is presented within the time period referred to in Article 6 of the AC but after the date of entry into force of accession by new Member States to the AC, even if the adjustment applies to earlier fiscal years.
29. The JTPF also provided some clarifications on Article 7 of the AC and the interaction between Mutual Agreement Procedures and judicial appeals. Each Member State has provided information to clarify the situation prevailing in its case. Further information is available in Annex VIII of the JTPF report on the interpretation of some provisions of the AC.

### **3. THE ARBITRATION CONVENTION AND RELATED ISSUES**

30. With regard to the state of play concerning ratification of the Convention on the accession of new Member States to the Arbitration Convention<sup>12</sup>, the ratification process has been finalised in 2009.

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<sup>11</sup> See Staff Working Document.

<sup>12</sup> OJ C/2005/160 of 30/06/2005, p. 1-22.



31. On 23 June 2008 the Council adopted a Decision<sup>13</sup> extending the scope of the Arbitration Convention to Bulgaria and Romania. The Decision entered into force on 1 July 2008.
32. Taxpayers in nearly all Member States are now covered by the Arbitration Convention for future transactions. Further information is available on the Council website<sup>14</sup>.
33. Member States have also reported on the implementation of the recommendation on the suspension of tax collection included in the Code of Conduct adopted in 2004. By the end of March 2009, all Member States had confirmed that suspension is possible or will become available. Further information is available in Annex IX of the JTPF report on the interpretation of some provisions of the AC. This issue will need further monitoring in the future to examine how it is applied in practice.
34. The annual monitoring exercise carried out to examine the number of pending cases under the EU Arbitration Convention revealed that the number of long-outstanding transfer pricing double tax cases has decreased. The Commission considers this trend to be a good step forward.
35. It can also be seen from the table, however, that the number of new transfer pricing cases is still increasing, so the elimination of double taxation in these cases continues to require increased resources.

#### **4. CURRENT AND FUTURE WORK PROGRAMME OF THE JTPF**

36. The work programme agreed in 2007 contains the following topics: intra-group services, small and medium-sized enterprises, cost contribution arrangements, and monitoring of adopted instruments. In 2008 the JTPF started to examine the issue of intra-group services.
37. In future, the Forum will continue the monitoring process by examining the implementation of the Code of Conduct on transfer pricing documentation and the Guidelines on APAs. The intention is that Member States and business members will report on the implementation of the different instruments and on practical problems arising from their implementation. The next monitoring exercise will look at the Code of Conduct on transfer pricing documentation and work will start in 2009.
38. As regards the Arbitration Convention, the Commission notes that the following issues need further discussion: the possibility of setting up a permanent and independent secretariat and the interaction between the Arbitration Convention and Article 25.5 of the OECD Model Tax Convention.

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<sup>13</sup> OJ L/2008/174 of 03/07/2008, p. 1-5.

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[http://www.consilium.europa.eu/cms3\\_Applications/applications/Accords/details.asp?cmsid=297&id=2004119&lang=en&doclang=en](http://www.consilium.europa.eu/cms3_Applications/applications/Accords/details.asp?cmsid=297&id=2004119&lang=en&doclang=en).

## 5. COMMISSION CONCLUSIONS

39. Regarding the work of the JTPF in the period from March 2007 to March 2009, the Commission expresses its thanks to the JTPF members for their constructive contributions to pragmatic recommendations in reaching solutions to the issues identified.
40. In reporting on penalties and the Arbitration Convention, the JTPF fulfils one of the main objectives of its mandate by facilitating better implementation of the Arbitration Convention. The Commission also notes the importance of the annexes included in these JTPF reports, which provide useful background information.
41. The Commission fully supports the conclusions and suggestions of the JTPF in its reports on penalties and transfer pricing and on the interpretation of some provisions of the AC. On the basis of this work, the Commission has drawn up the attached proposal for a revised Code of Conduct for the Arbitration Convention.
42. The Commission considers that, once adopted by Member States, the recommendations included in the proposal for a revised Code of Conduct will improve the efficiency of the instrument and should lead to quicker resolution of transfer pricing disputes.
43. The Commission therefore invites the Council to endorse the proposal for a revised Code of Conduct for the Arbitration Convention and invites Member States to rapidly implement the new recommendations in their national legislation or administrative rules. Furthermore, Member States are invited to allocate sufficient resources to the resolution of transfer pricing disputes so that they can be settled quickly.
44. The Commission notes that the Code of Conduct for the AC includes a monitoring procedure, which has led to recommendations to improve the AC process. It considers that the increase in the number of new cases submitted under the AC process contributes to reducing double taxation within the internal market, and indicates increased confidence by taxpayers in the efficiency of the AC process.
45. Nevertheless, the Commission recognises that future revisions and updates of the Code may be required in the light of future experience, and will continue to monitor the functioning of the AC with a view to proposing any necessary improvements, looking in particular at the trend in the resolution of cases and international developments in dispute resolution through arbitration.
46. On thin capitalisation disputes, the Commission is of the opinion that as the AC refers to profits arising from commercial and financial relations without seeking to differentiate between different types of profit, all aspects of thin capitalisation adjustments are covered by the AC. Whilst the Commission recognises the value of the agreement that interest rates are covered by the AC, different interpretations on whether — or not — loan amounts come under the AC leads to uncertainty, increased compliance burden and potential double taxation. Member States are therefore invited to consider permitting access to the Arbitration Convention on the above aspects of thin capitalisation disputes with a view to the elimination of double taxation.

47. Member States are also invited to amend their unilateral declarations on the definition of the term ‘serious penalty’ to narrow the scope and better reflect the recommendation of the Forum that a serious penalty should only be applied in exceptional cases like fraud.
48. Member States are invited to report every two years to the Commission on measures they have taken to implement this revised Code of Conduct and its practical functioning. On the basis of these reports, the Commission will periodically review the Code of Conduct.

## ANNEX

### **DRAFT REVISED CODE OF CONDUCT FOR THE EFFECTIVE IMPLEMENTATION OF THE CONVENTION ON THE ELIMINATION OF DOUBLE TAXATION IN CONNECTION WITH THE ADJUSTMENT OF PROFITS OF ASSOCIATED ENTREPRISES**

THE COUNCIL OF THE EUROPEAN UNION AND THE REPRESENTATIVES OF THE GOVERNMENTS OF THE MEMBER STATES, MEETING WITHIN THE COUNCIL,

HAVING REGARD TO the Convention of 23 July 1990 on the elimination of double taxation in connection with the adjustment of profits of associated enterprises (the 'Arbitration Convention'),

ACKNOWLEDGING the need both for Member States and for taxpayers to have more detailed rules to implement efficiently the aforementioned Convention,

NOTING the Commission Communication of XXX on the work of the EU Joint Transfer Pricing Forum in the period March 2007 to March 2009, based on the reports of the JTPF on penalties and transfer pricing, and on the interpretation of some provisions of the Arbitration Convention,

EMPHASISING that the Code of Conduct is a political commitment and does not affect the Member States' rights and obligations or the respective spheres of competence of the Member States and the Community resulting from the Treaty,

ACKNOWLEDGING that the implementation of this Code of Conduct should not hamper solutions at a more global level,

ENDORISING the conclusions of the JTPF report on penalties,

HEREBY ADOPT THE FOLLOWING REVISED CODE OF CONDUCT:

**Without prejudice to the respective spheres of competence of the Member States and the Community, this revised Code of Conduct concerns the implementation of the Arbitration Convention and certain related issues concerning mutual agreement procedures under double tax treaties between Member States.**

#### **1. Scope of the Arbitration Convention**

##### **1.1 EU triangular transfer pricing cases**

a) For the purpose of this Code, a EU triangular case is a case where, in the first stage of the Arbitration Convention procedure, two EU Competent Authorities cannot fully resolve any double taxation arising in a transfer pricing case when applying the arm's length principle because an associated enterprise situated in (an) other Member State(s) and identified by both EU Competent Authorities (evidence based on a comparability analysis including a functional analysis and other related factual elements) had a significant influence in contributing to a non-arm's length result in a chain of relevant transactions or commercial/financial relations and

is recognised as such by the taxpayer suffering the double taxation and having requested the application of the provisions of the Arbitration Convention.

b) The scope of the Arbitration Convention includes all EU transactions involved in triangular cases among Member States.

## **1.2 Thin capitalisation**

The Arbitration Convention makes clear reference to profits arising from commercial and financial relations but does not seek to differentiate between these specific profit types. Therefore, profit adjustments arising from financial relations, including a loan and its terms, and based on the arm's length principle are to be considered within the scope of the Arbitration Convention.

## **2. Admissibility of a case**

On the basis of Article 18 of the Arbitration Convention, Member States are recommended to consider that a case is covered by the Arbitration Convention when the request is presented in due time after the date of entry into force of accession by new Member States to the Arbitration Convention, even if the adjustment applies to earlier fiscal years.

## **3. Serious penalties**

As Article 8(1) provides for flexibility in refusing to give access to the Arbitration Convention due to the imposition of a serious penalty, and considering the practical experience acquired since 1995, Member States are recommended to clarify or revise their unilateral declarations in the Annex to the Arbitration Convention in order to better reflect that a serious penalty should only be applied in exceptional cases like fraud.

## **4. The starting point of the three-year period (deadline for submitting the request according to Article 6(1) of the Arbitration Convention)**

The date of the 'first tax assessment notice or equivalent which results or is likely to result in double taxation within the meaning of Article 1, e.g. due to a transfer pricing adjustment', is considered as the starting point for the three-year period.

As far as transfer pricing cases are concerned, Member States are recommended to apply this definition also to the determination of the three-year period as provided for in Article 25.1 of the OECD Model Tax Convention on Income and on Capital and implemented in the double tax treaties between EU Member States.

## **5. The starting point of the two-year period (Article 7(1) of the Arbitration Convention)**

- (i) For the purpose of Article 7(1) of the Arbitration Convention, a case will be regarded as having been submitted according to Article 6(1) when the taxpayer provides the following:

- a) identification (such as name, address, tax identification number) of the enterprise of the Contracting State that presents its request and of the other parties to the relevant transactions;
  - b) details of the relevant facts and circumstances of the case (including details of the relations between the enterprise and the other parties to the relevant transactions);
  - c) identification of the tax periods concerned;
  - d) copies of the tax assessment notices, tax audit report or equivalent leading to the alleged double taxation;
  - e) details of any appeals and litigation procedures initiated by the enterprise or the other parties to the relevant transactions and any court decisions concerning the case;
  - f) an explanation by the enterprise of why it thinks that the principles set out in Article 4 of the Arbitration Convention have not been observed;
  - g) an undertaking that the enterprise shall respond as completely and quickly as possible to all reasonable and appropriate requests made by a Competent Authority and have documentation at the disposal of the Competent Authorities; and
  - h) any specific additional information requested by the Competent Authority within two months upon receipt of the taxpayer's request.
- (ii) The two-year period starts on the latest of the following dates:
- a) the date of the tax assessment notice, i.e. a final decision of the tax administration on the additional income, or equivalent;
  - b) the date on which the Competent Authority receives the request and the minimum information as stated under point 5(i).

## **6. Mutual agreement procedures under the Arbitration Convention**

### **6.1 General provisions**

- a) The arm's length principle will be applied, as advocated by the OECD, without regard to the immediate tax consequences for any particular Contracting State.
- b) Cases will be resolved as quickly as possible having regard to the complexity of the issues in the particular case in question.
- c) Any appropriate means for reaching a mutual agreement as expeditiously as possible, including face-to-face meetings, will be considered; where appropriate, the enterprise will be invited to make a presentation to its Competent Authority.

- d) Taking into account the provisions of this Code, a mutual agreement should be reached within two years of the date on which the case was first submitted to one of the Competent Authorities in accordance with point 5(ii) of this Code. However, it is recognised that in some situations (e.g. imminent resolution of the case or particularly complex transactions, or triangular cases), it may be appropriate to apply Article 7(4) (providing for time limits to be extended) to agree a short extension.
- e) The mutual agreement procedure should not impose any inappropriate or excessive compliance costs on the person requesting it, or on any other person involved in the case.

## **6.2 EU triangular transfer pricing cases**

- a) As soon as the Competent Authorities of the Contracting States have agreed that the case under discussion is to be considered a EU triangular case they should immediately invite the other EU Competent Authority(ies) to take part in the proceedings and discussions as (an) observer(s) or as (an) active stakeholder(s) and decide together which is their favoured approach. Accordingly, all information should be shared with the other EU Competent Authority(ies) through for example exchanges of information. The other Competent Authority(ies) should be invited to acknowledge the actual or possible involvement of ‘their’ taxpayer.
- b) One of the following approaches may be adopted by the Competent Authorities involved to resolve double taxation arising from EU triangular cases under the Arbitration Convention.
  1. The Competent Authorities can decide to take a multilateral approach (immediate and full participation of all the Competent Authorities concerned); or
  2. The Competent Authorities can decide to start a bilateral procedure, whereby the two parties to the bilateral procedure are the Competent Authorities that identified (based on a comparability analysis including a functional analysis and other related factual elements) the associated enterprise situated in another Member State that had a significant influence in contributing to a non-arm’s length result in the chain of relevant transactions or commercial/financial relations, and should invite the other EU Competent Authority(ies) to participate as (an) observer(s) in the Mutual Agreement Procedure discussions; or
  3. The Competent Authorities can decide to start more than one bilateral procedure in parallel and should invite the other EU Competent Authority(ies) to participate as (an) observer(s) in the respective Mutual Agreement Procedure discussions.

Member States are recommended to apply a multilateral procedure to resolve such double taxation cases. However this should always be agreed by all the Competent Authorities, based on the specific facts and circumstances of the case. If a multilateral approach is not possible and a two (or more) parallel

bilateral procedures are started, all relevant Competent Authorities should be involved in the first stage of the Arbitration Convention procedure either as Contracting States in the initial Arbitration Convention application or as observers.

- c) The status of observer may change to that of stakeholder depending on the development of the discussions and evidence presented. If the other Competent Authority(ies) want(s) to participate in the second stage (arbitration), it (they) has (have) to become (a) stakeholder(s).

If the other EU Competent Authority(ies) remain(s) throughout as (a) party(ies) to the discussions as (an) observer(s) only, that has no consequences for the application of the provisions of the Arbitration Convention (e.g. timing issues and procedural issues).

Participation as an observer does not bind the other Competent Authority(ies) to the final outcome of the Arbitration Convention procedure.

In the procedure, any exchange of information must comply with the normal legal and administrative requirements and procedures.

- d) The taxpayer(s) should, as soon as possible, inform the tax administration(s) involved that (an)other party(ies), in (an)other Member State(s), could be involved in the case. That notification should be followed in a timely manner by the presentation of all relevant facts and supporting documentation. Such an approach will not only lead to quicker resolution but also guard against the failure to resolve double taxation issues due to differing procedural deadlines in the Member States.

### **6.3 Practical functioning and transparency**

- a) In order to minimise costs and delays caused by translation, the mutual agreement procedure, in particular the exchange of position papers, should be conducted in a common working language, or in a manner having the same effect, if the Competent Authorities can reach agreement on a bilateral (or multilateral) basis.
- b) The enterprise requesting the mutual agreement procedure will be kept informed by the Competent Authority to which it made the request of all significant developments that affect it during the course of the procedure.
- c) The confidentiality of information relating to any person that is protected under a bilateral tax convention or under the law of a Contracting State will be ensured.
- d) The Competent Authority will acknowledge receipt of a taxpayer's request to initiate a mutual agreement procedure within one month from the receipt of the request and at the same time inform the Competent Authorities of the other Contracting States involved in the case attaching a copy of the taxpayer's request.



- e) If the Competent Authority believes that the enterprise has not submitted the minimum information necessary for the initiation of a mutual agreement procedure as stated under point 5(i), it will invite the enterprise, within two months upon receipt of the request, to provide it with the specific additional information it needs.
- f) Contracting States undertake that the Competent Authority will respond to the enterprise making the request in one of the following forms:
  - (i) if the Competent Authority does not believe that profits of the enterprise are included, or are likely to be included, in the profits of an enterprise of another Contracting State, it will inform the enterprise of its doubts and invite it to make any further comments;
  - (ii) if the request appears to the Competent Authority to be well-founded and it can itself arrive at a satisfactory solution, it will inform the enterprise accordingly and make as quickly as possible such adjustments or allow such reliefs as are justified;
  - (iii) if the request appears to the Competent Authority to be well-founded but it is not itself able to arrive at a satisfactory solution, it will inform the enterprise that it will endeavour to resolve the case by mutual agreement with the Competent Authority of any other Contracting State concerned.
- g) If a Competent Authority considers a case to be well founded, it should initiate a mutual agreement procedure by informing the Competent Authority of the other Contracting State(s) of its decision and attach a copy of the information as specified under point 5(i) of this Code. At the same time it will inform the person invoking the Arbitration Convention that it has initiated the mutual agreement procedure. The Competent Authority initiating the mutual agreement procedure will also inform - on the basis of information available to it - the Competent Authority of the other Contracting State(s) and the person making the request whether the case was presented within the time limits provided for in Article 6 (1) of the Arbitration Convention and of the starting point for the two-year period of Article 7 (1) of the Arbitration Convention.

#### **6.4 Exchange of position papers**

- a) Contracting States undertake that when a mutual agreement procedure has been initiated, the Competent Authority of the country in which a tax assessment, i.e. a final decision of the tax administration on the income, or equivalent has been made, or is intended to be made, which contains an adjustment that results, or is likely to result, in double taxation within the meaning of Article 1 of the Arbitration Convention, will send a position paper to the Competent Authorities of the other Contracting States involved in the case setting out:
  - (i) the case made by the person making the request;
  - (ii) its view of the merits of the case, e.g. why it believes that double taxation has occurred or is likely to occur;

- (iii) how the case might be resolved with a view to the elimination of double taxation together with a full explanation of the proposal.
- b) The position paper will contain a full justification of the assessment or adjustment and will be accompanied by basic documentation supporting the Competent Authority's position and a list of all other documents used for the adjustment.
- c) The position paper will be sent to the Competent Authorities of the other Contracting States involved in the case as quickly as possible taking account of the complexity of the particular case and no later than four months from the latest of the following dates:
  - i) the date of the tax assessment notice, i.e. final decision of the tax administration on the additional income, or equivalent;
  - ii) the date on which the Competent Authority receives the request and the minimum information as stated under point 5(i).
- d) Contracting States undertake that, where a Competent Authority of a country in which no tax assessment or equivalent has been made, or is not intended to be made, which results, or is likely to result, in double taxation within the meaning of Article 1 of the Arbitration Convention, e.g. due to a transfer pricing adjustment, receives a position paper from another Competent Authority, it will respond as quickly as possible taking account of the complexity of the particular case and no later than six months after receipt of the position paper.
- e) The response should take one of the following two forms:
  - (i) if the Competent Authority believes that double taxation has occurred, or is likely to occur, and agrees with the remedy proposed in the position paper, it will inform the other Competent Authority(ies) accordingly and make such adjustments or allow such relief as quickly as possible;
  - (ii) if the Competent Authority does not believe that double taxation has occurred, or is likely to occur, or does not agree with the remedy proposed in the position paper, it will send a responding position paper to the other Competent Authority(ies) setting out its reasons and proposing an indicative time scale for dealing with the case taking into account its complexity. The proposal will include, whenever appropriate, a date for a face-to-face meeting, which should take place no later than 18 months from the latest of the following dates:
    - aa) the date of the tax assessment notice, i.e. final decision of the tax administration on the additional income, or equivalent;
    - bb) the date on which the Competent Authority receives the request and the minimum information as stated under point 5(i).
- f) Contracting States will further undertake any appropriate steps to speed up all procedures wherever possible. In this respect, Contracting States should

envisage to organise regularly, and at least once a year, face-to-face-meetings between their Competent Authorities to discuss pending mutual agreement procedures (provided that the number of cases justifies such regular meetings).

## **6.5 Double tax treaties between Member States**

As far as transfer pricing cases are concerned, Member States are recommended to apply the provisions of points 1 to 3 also to mutual agreement procedures initiated in accordance with Article 25 (1) of the OECD Model Convention on Income and on Capital, implemented in the double tax treaties between Member States.

## **7. Proceedings during the second phase of the Arbitration Convention**

### **7.1 List of independent persons**

- a) Contracting States commit themselves to inform without any further delay the Secretary General of the Council of the European Union of the names of the five independent persons of standing, eligible to become a member of the advisory commission as referred to in Article 7 (1) of the Arbitration Convention and inform, under the same conditions, of any alteration of the list.
- b) When transmitting the names of their independent persons of standing to the Secretary General of the Council of the European Union, Contracting States will join a curriculum vitae of those persons, which should, among other things, describe their legal, tax and especially transfer pricing experience.
- c) Contracting States may also indicate on their list those independent persons of standing who fulfil the requirements to be elected as Chairman.
- d) The Secretary General of the Council will address every year a request to Contracting States to confirm the names of their independent persons of standing and/or give the names of their replacements.
- e) The aggregate list of all independent persons of standing will be published on the Council's web-site.
- f) Independent persons of standing do not have to be nationals of or resident in the nominating state, but do have to be nationals of a Contracting State and resident within the territory to which the Arbitration Convention applies.
- g) Competent authorities are recommended to draw up an agreed declaration of acceptance and a statement of independence for the particular case, to be signed by the selected independent persons of standing.

### **7.2 Establishment of the advisory commission**

- a) Unless otherwise agreed between the Contracting States concerned, the Contracting State that issued the first tax assessment notice, i.e. final decision of the tax administration on the additional income, or equivalent which results, or is likely to result, in double taxation within the meaning of Article 1 of the Arbitration Convention, takes the initiative for the establishment of the advisory

commission and arranges for its meetings, in agreement with the other Contracting State(s).

- b) Competent Authorities should establish the advisory commission no later than 6 months following expiry of the period referred to in Article 7 of the Arbitration Convention. Where one Competent Authority does not do this, another Competent Authority involved is entitled to take the initiative.
- c) The advisory commission will normally consist of two independent persons of standing in addition to its Chairman and the representatives of the Competent Authorities. For triangular cases, where an advisory commission is to be set up under the multilateral approach, the Contracting States will have regard to the requirements of Article 11(2) of the Arbitration Convention, introducing as necessary additional rules of procedure, to ensure that the advisory commission, including its Chairman, is able to adopt its opinion by a simple majority of its members.
- d) The advisory commission will be assisted by a secretariat for which the facilities will be provided by the Contracting State that initiated the establishment of the advisory commission unless otherwise agreed by the Contracting States concerned. For reasons of independence, this secretariat will function under the supervision of the Chairman of the advisory commission. Members of the secretariat will be bound by the secrecy provisions as stated in Article 9 (6) of the Arbitration Convention.
- e) The place where the advisory commission meets and the place where its opinion is to be delivered may be determined in advance by the Competent Authorities of the Contracting States concerned.
- f) Contracting States will provide the advisory commission before its first meeting, with all relevant documentation and information and in particular all documents, reports, correspondence and conclusions used during the mutual agreement procedure.

### **7.3 Functioning of the advisory commission**

- a) A case is considered to be referred to the advisory commission on the date when the Chairman confirms that its members have received all relevant documentation and information as specified under point 7.2(f).
- b) The proceedings of the advisory commission will be conducted in the official language or languages of the Contracting States involved, unless the Competent Authorities decide otherwise by mutual agreement, taking into account the wishes of the advisory commission.
- c) The advisory commission may request from the party from which a statement or document emanates to arrange for a translation into the language or languages in which the proceedings are conducted.
- d) Whilst respecting the provisions of Article 10 of the Arbitration Convention, the advisory commission may request the Contracting States and in particular the Contracting State that issued the first tax assessment notice, i.e. final decision of

the tax administration on the additional income, or equivalent which resulted or may result in double taxation within the meaning of Article 1, to appear before the advisory commission.

- e) The costs of the advisory commission procedure, which will be shared equally by the Contracting States concerned, will be the administrative costs of the advisory commission and the fees and expenses of the independent persons of standing.
- f) Unless the Competent Authorities of the Contracting States concerned agree otherwise:
  - i) the reimbursement of the expenses of the independent persons of standing will be limited to the reimbursement usual for high ranking civil servants of the Contracting State which has taken the initiative to establish the advisory commission;
  - ii) the fees of the independent persons of standing will be fixed at Euro 1000 per person per meeting day of the advisory commission, and the Chairman will receive a 10% higher fee than the other independent persons of standing.
- g) Actual payment of the costs of the advisory commission procedure will be made by the Contracting State which has taken the initiative to establish the advisory commission, unless the Competent Authorities of the Contracting States concerned decide otherwise.

#### **7.4 Opinion of the advisory commission**

Contracting States would expect the opinion to contain:

- a) the names of the members of the advisory commission;
- b) the request; the request contains:
  - the names and addresses of the enterprises involved;
  - the Competent Authorities involved;
  - a description of the facts and circumstances of the dispute;
  - a clear statement of what is claimed;
- c) a short summary of the proceedings;
- d) the arguments and methods on which the decision in the opinion is based;
- e) the opinion;
- f) the place where the opinion is delivered;
- g) the date on which the opinion is delivered;

- h) the signatures of the members of the advisory commission.

The decision of the Competent Authorities and the opinion of the advisory commission will be communicated as follows:

- i) Once the decision has been taken, the Competent Authority to whom the case was presented will send a copy of the decision of the Competent Authorities and the opinion of the advisory commission to each of the enterprises involved.
- ii) The Competent Authorities of the Contracting States can agree that the decision and the opinion may be published in full, they can also agree to publish the decision and the opinion without mentioning the names of the enterprises involved and with deletion of any further details that might disclose the identity of the enterprises involved. In both cases, the enterprises' consent is required and prior to any publication the enterprises involved must have communicated in writing to the Competent Authority to whom the case was presented that they do not have objections to publication of the decision and the opinion.
- iii) The opinion of the advisory commission will be drafted in three (or more in the case of triangular cases) original copies, one to be sent to each Competent Authority of the Contracting States involved and one to be transmitted to the Secretariat General of the Council for archiving. If there is agreement on the publication of the opinion, the latter will be rendered public in the original language(s) on the website of the Commission.

#### **8. Tax collection and interest charges during cross-border dispute resolution procedures**

- a) Member States are recommended to take all necessary measures to ensure that the suspension of tax collection during cross-border dispute resolution procedures under the Arbitration Convention can be obtained by enterprises engaged in such procedures, under the same conditions as those engaged in a domestic appeals/litigation procedure although these measures may imply legislative changes in some Member States. It would be appropriate for Member States to extend these measures to the cross-border dispute resolution procedures under double tax treaties between Member States.
- b) Considering that during Mutual Agreement Procedure negotiations, a taxpayer should not be adversely affected by the existence of different approaches to interest charges and refunds during the time it takes to complete the Mutual Agreement Procedure, Member States are recommended to apply one of the following approaches:
  - tax to be released for collection and repaid without attracting any interest, or
  - tax to be released for collection and repaid with interest, or
  - each case to be dealt with on its merits in terms of charging or repaying interest (possibly during the Mutual Agreement Procedure process).

#### **9. Accession of new EU Member States to the Arbitration Convention**

Member States will endeavour to sign and ratify the Accession Convention of new EU Member States to the Arbitration Convention, as soon as possible and in any event no later than two years after their accession to the EU.

## **10. Final provisions**

In order to ensure the even and effective application of the Code, Member States are invited to report to the Commission on its practical functioning every two years. On the basis of these reports, the Commission intends to report to the Council and may propose a review of the provisions of the Code.