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EU JOINT TRANSFER PRICING FORUM

REV Draft Final Report on Improving the Functioning of the Arbitration Convention

Meeting of 12 March 2015

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Note from the Secretariat:

This revised draft includes in the boxes (shaded in grey and starting with "Note from the Secretariat") the comments we received on the previous draft. These comments are compiled in document DOC: JTPF/001/2015/EN.

The discussion at the next JTPF meeting will be limited to those boxes were issues are not yet solved, i.e. boxes where reservations were lifted, will not be discussed.

The Secretariat wants to especially inform you that The Netherlands lifted their reservation on paragraph 1.2 of the Code of Conduct (thin capitalisation) to the AC. Other countries are invited to consider whether they can lift their reservations, too.

Annex 1 of the document includes the new CoC which shows in track changes the JTPF agreed. Sentences shaded in grey will be discussed at the meeting.

Annexes 2 and 3 are currently being updated and will be submitted asap.

I. Introduction

1. The EU Joint Transfer Pricing Forum (JTPF) has carried out a comprehensive monitoring exercise of the practical functioning of Convention 90/436/EEC on the elimination of double taxation in connection with the adjustment of profits of associated enterprises[1] (Arbitration Convention, AC) and the revised Code of Conduct for the effective implementation of the Arbitration Convention (CoC)[2]. In this process the JTPF has drawn on experiences of Member States (MS) and non-government members (NGM) of the Forum, as well as on that of members of advisory commissions under the AC.

2. The monitoring has demonstrated that the AC and its related CoC provide for a well-balanced approach to dispute resolution. Guidance is available on important aspects, while at the same time a certain degree of flexibility is maintained as regards the allocation of powers to parties involved and in view of the administrative burden the procedure creates. This Report addresses relevant issues identified in the monitoring process by way of proposing amendments to the CoC.

II. JTPF analysis and recommendations

Preamble of the Code of Conduct

3. To emphasise the commitment of all parties involved in transfer pricing dispute resolution to the effective application of the Arbitration Convention the preamble of the revised Code of Conduct will be supplemented with a principle on behavioural aspects. The preamble will also emphasize the commitment to the confidentiality of government to government communication.

JTPF recommendation (revised preamble of CoC)
"Without prejudice to the respective spheres of competence of the Member States and the European Union, this revised Code of Conduct concerns the implementation of the Arbitration Convention and certain related issues concerning mutual agreement procedures under double taxation treaties between Member States. The application of the Arbitration Convention is governed by mutual trust, cooperation and transparency between all parties involved as well as by recognising the need to maintain a sustainable and reliable procedure for resolution of disputes in a timely and resource effective manner. However, due respect should be given to the confidentiality of government-to-government communication. All parties are committed to seeking the avoidance of double taxation as defined in Article 4 AC and abide by the letter and the spirit of the AC."
Note from the Secretariat:

[1] OJ L 225, 20.8.1990, p.10.
[2] OJ C 322, 30.12.2009, p.1.

The OECD discussion draft on Action 14 as published in December 2014 includes a commitment for governments to provide sufficient resources to a competent authority. The Secretariat suggests adding the following sentence:

"This includes that Member States of the European Union provide their competent authorities with sufficient resources in terms of personnel, funding, training etc. to carry out their mandate, i.e. resolving cases of double taxation in accordance with the Arbitration Convention."

1. Scope of the Convention (Chapter I, Articles 1 and 2 of the AC)

1.1 Application of the AC in specific cases

4. Article 6 (1) AC, 2nd sentence, provides that a "case must be presented within three years of the first notification of the action which results or is likely to result in double taxation within the meaning of Article 1". The application of the AC in specific situations such as the absence of actual payment of tax after a transfer pricing adjustment and any changes in the status of a taxpayer subject to double taxation which may lead to the disappearance of the actual taxpayer are discussed below.

a) Application of the AC in the absence of an actual payment of tax

5. The question arises whether a case is eligible for a Mutual Agreement Procedure (MAP) under the AC only once an adjustment results in a cash payment. This is pertinent, for example, in cases where the entity subject to the transfer pricing adjustment has losses carried forward against which an upward adjustment could be offset or in cases where because of group relief an actual tax payment is not due. In such situations a case should nevertheless be eligible for MAP under the AC.

JTPF recommendation (new sub point to point 1 in CoC)

"An action which results or is likely to result in double taxation within the meaning of Article 1 of the Arbitration Convention does not require that the transfer pricing adjustment within the meaning of Article 4 of the Convention leads to an actual payment of tax. Therefore cases where the entity subject to the adjustment within the meaning of Article 4 has losses carried forward against which an upward adjustment could be offset or cases where because of group relief no actual tax payment is due and similar situations, are within the scope of the Arbitration Convention."

b) Application of the AC in case of changes in the status of the taxpayer/entity subject to double taxation

6. It is conceivable that the status of an entity subject to a transfer pricing adjustment may change by the time a case can be presented before the Competent Authority of a Member State. Such changes in the status of a taxpayer/entity may involve mergers, restructurings, liquidation or other changes. In such situations a case should nevertheless be eligible for MAP under the AC.

JTPF recommendation (new sub point to point 1 in CoC)

"Cases submitted for resolution under the AC generally regard earlier years. This means that the entities or enterprises involved may have merged, restructured, dissolved or changed otherwise after the years in which double taxation has arisen. This in and of itself should not disallow the case to be handled, as relief of double taxation is generally still important for the parties then involved."

Note from the Secretariat:

Spain lifted its reservation. Poland raised the point that it would not be possible for them to handle a case where an enterprise is dissolved and there is no longer an eligible taxpayer involved.

For the Secretariat it seems indeed worth thinking about how to perform a MAP for an enterprise which is liquidated and has no legal successor.

France stated that the domestic law may limit the possibility of carrying forward losses supported by the entities that has been absorbed and suggests adding to the last sentence "unless the domestic law prevents the elimination of double taxation"

1.2 Application of the AC dependent on a MAP under a DTC

7. The AC applies to issues of double taxation which arise from profit adjustments between associated enterprises in the meaning of Article 1 (1) and (3) and Article 4 (1) AC and from profit adjustments to permanent establishments (PE) in the meaning of Article 1 (2) and (3) and Article 4 (2) AC. The JTPF discussed cases where the application of the AC itself and the way it is applied depends on issues not covered by the AC. For example: MS have different views on whether a PE in the meaning of Article 5 of the OECD Model Tax Convention (OECD MTC) exists and, if so, how much profit should be allocated to it by virtue of Article 7 OECD MTC.

8. The issue of whether a PE exists (Article 5 OECD MTC) is indeed not covered by the AC. Disputes on this issue may therefore only be solved by other means, e.g. MAP under an applicable Double Taxation Convention (DTC). However, once the existence of a PE is established, the AC should be applicable to solve an eventual dispute on the amount of profit attributable to this PE.

JTPF recommendation (new point 2 in CoC):

"If access to the Arbitration Convention or the treatment of cases under the Arbitration Convention depends directly on the result of a mutual agreement procedure under an applicable Double Taxation Convention, care should be taken to ensure that the deadline under Article 6(1) of the Arbitration Convention does not expire. The enterprise should file separate requests for a mutual agreement procedure under the Arbitration Convention and a mutual agreement procedure available under the applicable Double Taxation Convention. The requests may be combined in one letter. The two-year period referred to in Article 7 (1) AC will not start before the issue addressed under the Double Taxation Convention is solved.

1.3 Access to the AC and remedies against denial of access

9. A Member State will not grant access to the AC if the case presented by the enterprise is not covered by the scope of the AC or excluded from the AC under Article 8 AC. The AC itself does not provide remedies against denial of access. However, some MS already have domestic legal remedies for determining whether a denial of access to the AC by their administrative bodies is justified[3]. For reasons of transparency and fairness, a competent authority should inform the other competent authority(ies) when access to the Arbitration Convention is denied and provide them with the reasons for the denial. The competent authorities involved should exchange their views so as to try, where possible, to reach a common position on whether the denial of access to the Arbitration Convention is justified.

JTPF recommendation (new point 5 in CoC)

"Member States should consider providing domestic legal remedies for determining whether the denial of access to the Arbitration Convention by their administrative bodies is justified."

Note from the Secretariat:

Italy, Poland and Sweden confirmed their wish to reserve their position against this recommendation.

For the Secretariat the recommendation is already formulated very carefully and thought could be given on whether it would be appropriate to really reserve against even considering something.

10. When an enterprise considers that the principles of Article 4 AC are not observed it can request access to the Arbitration Convention. The request can be made by either one of the two enterprises specified in Article 1 AC, but has to be presented to the competent authority of the Contracting State of which it is an enterprise or in which its permanent establishment is situated. Point 7.3 (h) CoC indicates that the competent authority receiving the request decides first about whether minimum information in the meaning of point 7.6 (a) CoC (with or without an additional request (point 7.6 (a) (viii) CoC) is submitted and the claim is well founded. However, it would be difficult to solve a case by mutual agreement when one competent authority considers that the minimum information has not been submitted. This may have direct consequences on the length of time to obtain relief and whether such relief can ultimately be provided.

JTPF recommendation (addition to point 7.3 e) CoC

[3] See Member States' Transfer Pricing Profiles at:
http://ec.europa.eu/taxation_customs/taxation/company_tax/transfer_pricing/forum/index_en.htm

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 authority(ies) of the other Member State(s) involved in the case attaching a copy of the taxpayer's request. The competent authorities should reach a mutual understanding on whether they consider the minimum information as submitted. A competent authority should inform the other competent authority(ies) when access to the Arbitration Convention is denied and provide them with the reasons for the denial. The competent authorities involved should exchange their views so as to try, where possible, to reach a common position on whether the denial of access to the Arbitration Convention is justified.

Note from the Secretariat:

Spain, Germany and Italy lifted their scrutiny reservations.

2. General provisions (Chapter II, Articles 3 to 14 AC)

2.1. Informing enterprises of their rights under the AC

11. Drawing on Best Practice No. 9 of the OECD Manual on Effective Mutual Agreement Procedures (OECD MEMAP) the JTPF recommends informing concerned enterprises of their rights under the AC in case of an adjustment. Such written notice or advice could be issued at the time a proposed adjustment is formally notified to the enterprise and could include general guidance on the availability of a MAP and how to go about protecting access to this mechanism. Some tax administrations have implemented the practice of advising enterprises of both their domestic and AC rights and obligations at the time of the proposed adjustment, with successful results and positive feedback.

JTPF recommendation (new point 7.1 a) in CoC)

"A tax administration making an adjustment is encouraged to inform the enterprise in a timely manner of its rights under the Arbitration Convention, including about any time limits in the Convention for initiating a mutual agreement procedure. The onus for making a timely request in order to preserve access to the mutual agreement procedure rests with the enterprise and enterprises should take all reasonable steps to ensure that time limits do not expire."

2.2. Independence of CA from audit

12. In line with Best Practice No. 23 of the OECD MEMAP the JTPF recommends that in order to enhance the independence of a subsequent review of a case by a competent authority (CA), CAs maintain a level of autonomy from the audit function of a tax administration.

JTPF recommendation (new point 7.1 c) in CoC)

"Although competent authorities and audit (function) may belong to the same tax administration, competent authorities should maintain a degree of autonomy from the audit function of the tax administration in order to ensure the independence of any subsequent review of a case by the competent authority. The guiding principle should be that the competent authority's function is to ensure a fair and appropriate application of the Arbitration Convention, not to seek to uphold all adjustments proposed by the tax authorities of its Member State."

Note from the Secretariat:

Italy lifted its reservation.

2.3. No waiver of rights for audit settlements or blocking MAP access through unilateral APAs

13. Drawing on Best Practice No. 19 of the OECD MEMAP the JTPF recommends that blocking MAP access via audit settlements or unilateral Advance Pricing Agreements (APAs) should be avoided.

JTPF recommendation (new point 7.1 d) in CoC)

"Enterprises and tax administrations should not include waiver of access to a mutual agreement procedure in audit settlements and unilateral APAs, as it would be inappropriate for two parties (the enterprise and one tax administration) to exclude a third party (the other tax administration) from the final resolution of a file in which they had an interest."

Note from the Secretariat:

Germany lifted its reservation.

2.4. Implication of the new Article 7 OECD MTC (2010)

14. In 2008 the OECD concluded its work on the attribution of profits to permanent establishments with publishing the report "Attribution of Profits to Permanent Establishments". The report represents the outcome of the work on how the "separate arm's length enterprise" provision of Article 7 should be applied. The conclusions of the Report were implemented in the OECD MTC in two stages.

15. The first stage was the revision of the Commentary on Article 7 OECD MTC as Article 7 read before 22 July 2010. This stage was completed in the 2008 update of the OECD MTC. It was aimed at implementing the conclusions of the report that do not conflict with the interpretation previously provided in the OECD commentary on Article 7 OECD MTC. The second stage was the finalization of a completely new Article 7 OECD MTC with related commentary changes in the 2010 update of the OECD MTC.

16. The JTPF discussed the implications of these developments on the interpretation of Article 4 (2) AC.

JTPF recommendation (new point 6 b) in CoC)

"Article 4(2) of the Arbitration Convention should be interpreted in conjunction with the most recent version of Article 7 OECD Model Tax Convention and the relevant Commentary. This will not apply in cases where a MS made a reservation in the OECD MTC against implementing the new version of Article 7 OECD MTC and in cases where the bilateral Double Taxation Convention between the Member States involved has a different wording. In cases where Member States have concluded bilateral Double Taxation Conventions, Article 4(2) should have the same meaning as the relevant Article on attributing profits to permanent establishments in the applicable Double Taxation Conventions, taking into account the OECD commentary on the provisions included in the concerned Double Taxation Convention. "

Note from the Secretariat:

Spain and Italy indicated concerns regarding the guidance for situations where there is no treaty. France suggested softening the language of the first sentence by adding "as far as possible" and "in the spirit of ". Sweden expressed its willingness to work towards a consensus wording.

The Secretariat questions, whether the suggestion made by France to include "as far as possible" is necessary as the exemptions from the general rule are explicitly described in the following sentences.

As regards to the concerns expressed by Italy and Spain on the non-treaty situation and if an agreement based on the existing language cannot be reached, the Secretariat suggests a recommendation saying that deviating from the general spirit of the new Article 7 MTC is possible

- (i) in case a bilateral treaty has a different wording is different,
- (ii) and in cases when competent authorities agree on a common approach in the first phase of the Mutual Agreement Procedure under the AC.

Drafting proposal:

"Article 4(2) of the Arbitration Convention should be interpreted in the spirit of the most recent version of Article 7 OECD Model Tax Convention and the relevant Commentary. This will not apply (i) in cases where the bilateral Double Taxation Convention between the Member States involved has a different wording and in (ii) cases where the Competent Authorities involved agree on a common approach in the first phase of the Mutual Agreement Procedure under the AC. In cases where Member States have concluded bilateral Double Taxation Conventions, Article 4(2) should have the same meaning as the relevant Article on attributing profits to permanent establishments in the applicable Double Taxation Conventions, taking into account the OECD commentary on the provisions included in the concerned Double Taxation Convention."

2.5. Disputes likely to arise

17. The AC foresees that for cases where double taxation is likely to arise, MAP requests under the AC may already be submitted in advance. This possibility may, on the one hand, be seen as providing the advantage to address disputes at an early point in time. At the same time, however, an early submission of a MAP request may be seen as impeding efforts to solve the issue before MAP. An additional consideration is that the workload for CAs in dealing with cases where double taxation did actually arise is usually rather high.

18. Certain tools are already available for dealing with disputes likely to arise:

    a) For situations where certainty is sought for **future transactions** taxpayers may have recourse to an APA procedure[4].

    b) For situations where following a transaction an enterprise identifies a **risk that a dispute may raise,** the JTPF report on transfer pricing risk management[5] recommends that the enterprise should have the possibility to communicate with the tax administration at an early point in time (R4) and tax administrations may consider joint action (R5 and R9).

    c) For situations where a Contracting State **intends** to make an adjustment, the procedure in Article 5 AC is available. This procedure foresees that the enterprises in both States liaise between the two (or more) tax administrations involved.

    d) For situations where the action of a Contracting State is **likely to result in double taxation** the taxpayer may file for MAP under the AC (Article 6 (1) AC).

2.6. MAP request and informing the other CA involved

19. The JTPF considered that it would be helpful if both CAs involved were informed by the enterprise about a MAP request under the AC.

JTPF recommendation (new point 7.3 d) in CoC)
"Enterprises should submit a copy of their request for a mutual agreement procedure under the Arbitration Convention to the other competent authority involved at the same time and with the same set of information as to the competent authority to which the request is addressed in accordance with Article 6 (1) of the Arbitration Convention. Where appropriate and allowed, this might be done through electronic means. In cases where the request is not made in a common working language, the enterprise should provide a translation of the request into a common working language. The fact that a copy of the request was submitted by the enterprise does not replace the obligation of the competent authority to inform the other competent authority about receiving the request under point 7.3 (e) nor should it be understood as limiting a competent authority's efforts to come to a satisfactory solution itself within the meaning of Article 6 (2) of the Arbitration Convention."

4 Guidelines for Advance Pricing Agreements in the EU, COM(2007) 71 final

5 Commission Communication on the work of the EU Joint Transfer Pricing Forum in the period July 2012 to January 2014, COM(2014) 315.

2.7. Guidance on Multilateral MAP

20. The OECD is currently working on multilateral approaches in the context of MAP. This OECD project builds on earlier work of the JTPF on triangular cases. At its meeting in March 2014 the JTPF agreed that further work on this issue by the JTPF would be postponed until the first results of the OECD project become known. It would then be decided whether and how this item should be taken forward by the JTPF, i.e. in this project or in the context of monitoring the guidance on non-triangular cases.

Note from the Secretariat:

Given that in short term additional guidance on multilateral MAP cannot be expected from the OECD, the Secretariat suggests removing the paragraph and adding a placeholder for further work as follows:

"The JTPF recognises the increasing importance of multilateral MAP, intra EU and between EU and non EU States. The JTPFs former work on EU triangular cases[6] and the report on Non EU triangular cases form the basis for multilateral approaches. It is suggested that the JTPF takes up further work in the future."

2.8. Informing the enterprise during MAP

21. The CoC already contains provisions (point 6.3 (b), (f) and (g)) that enterprises will be kept informed about: "all significant developments"; whether the case is considered as being well founded; the initiation of a MAP; whether the request is made within the time limits foreseen under the AC; and, about the starting point of the 2-year period.

2.9. Implications of MAP results for other years

22. The procedure for MAP requests which are linked to a former MAP can usefully be streamlined to the benefit of both taxpayers and tax administrations.

JTPF recommendation (new point 7.3 i) in CoC)

"Where a new request by an enterprise for a mutual agreement procedure is linked to issues which are already covered by an ongoing mutual agreement procedure with the same enterprise, competent authorities should, where appropriate, consider treating the new request together with the ongoing mutual agreement procedure. Where a request for a mutual agreement procedure is linked to issues which have already been covered in another mutual agreement procedure regarding the same enterprise, competent authorities should typically consider applying the outcome in the earlier mutual agreement procedure to the new request and where appropriate, to apply that outcome."

[6] See point 3 CoC and point 7.5 CoC

2.10. The three-year period

23. According to Article 6 (1) of the AC, a case under the AC must be presented before the relevant competent authority within three years of the first notification of the action which results, or is likely to result, in double taxation within the meaning of Article 1 AC. The term first notification as the starting point of the three-year period under Article 6 (1) AC is determined differently by MS. Possible discrepancies may create insecurity for enterprises as regards time limits. For the determination of the starting point, the understanding of the term first notification by the MS whose action resulted in double taxation should be decisive. *Annex 2* contains information on the starting point of the three-year period for each Member State.

24. To ensure that a case which is presented within three years of the first notification of the action under Article 6(1) cannot be rejected as out of time where additional information requested by the concerned State is received after the three-year time limit, a distinction is made between "presentation" of a case in the meaning of Article 6 (1) AC and "submission" of a case for the purpose of Article 7 (1) AC, as elaborated in new point 7.6 (a) CoC. However, if the undertaking of the taxpayer to present the additional information requested is not adhered to, the two competent authorities can decide to cancel the procedure and to revoke any suspension of tax collection.

JTPF recommendation (addition to amended point 7.2 in CoC)

"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 of the Arbitration Convention, e.g. due to a transfer pricing adjustment'[7], is considered as the starting point for the three-year period. A request is considered as presented in the meaning of Article 6 (1) AC when it contains the information listed in (point 7.6 (a) (i) – (vii) CoC. 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 taxation treaties between Member States."

Note from the Secretariat

Finland lifted its reservation and Germany suggested clarifying the drafting of the second sentence as follows:

"A request is considered as presented for the purposes of the 3 year period under the second sentence of Article 6 (1) AC when it contains the information listed in (point 7.6 (a) (i) – (vii) CoC."

The Secretariat would not have a problem with the wording suggested by Germany.

Denmark is not prepared to give up the scrutiny reservation as they regard the change as deterioration for MS.

[7] Reservation by Italy to be inserted.

2.11. Guidance on position papers

25. The existing guidance on position papers contained in point 6.4 CoC can benefit from further clarification.

JTPF recommendation (amended point 7.4 in CoC)

Exchange of position papers

(a) Member 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 authority(ies) of the other Member State(s) involved in the case. The position paper will contain the information relevant for understanding the case under consideration. Depending on the facts and circumstances of the case the position paper may set out e.g.:

(i) General information:

- legal name, address and taxpayer identification number of the person requesting assistance, its related persons in the other country, if applicable, and the basis for determining the association;
- the contact details of the competent authority official in charge of the case
- broad overview of the issue, transactions, business, and basis for the adjustment
- the tax years affected
- amount of income and tax adjusted in each tax year, if applicable
- summary of relevant information from the original tax return

(ii) the case made by the person making the request;

- description of the exact nature of the issue or adjustment
- if relevant, calculations with supporting data (these may include financial and economic data and reports relied upon, explanatory narratives as well as taxpayer documents and records where relevant and appropriate).

(iii) the competent authority's view of the merits of the case, e.g. why it believes that double taxation has occurred or is likely to occur;

(iv) how the competent authority suggests that 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, e.g.

- outline of comparable transactions and comparability adjustments;

- description of the methodology employed for the adjustment; and
- an explanation of the appropriateness of the transfer pricing methodology employed for the adjustment (i.e. an explanation why it believes the adjustment achieves an arm's length outcome; identification of tested party, if applicable; industry and functional analysis, if a relevant study is not already included elsewhere in the taxpayer's submission).

(c) The position paper will be sent to the competent authority(ies) of the other Member State(s) 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 7.6(a).

(d) Member 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. To enable the competent authorities to identify the areas of disagreement and to understand the position of the responding competent authority, a rebuttal or response paper could include e.g.:

- indication of the areas or issues where the competent authorities are in agreement or disagreement;
- requests for additional information and explanations necessary to clarify particular issues;
- presentation of other or additional information considered pertinent to the case, but not raised in the initial position paper; and
- submission of proposals or views to resolve the issue.

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 7.6(a).

(f) Member States will further undertake any appropriate steps to speed up all procedures wherever possible. In this respect, Member 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)."

Note from the Secretariat:

France suggested not introducing rigid rules for position papers.
For the Secretariat the message that the list is not binding but rather a proposal is already given in the last sentence of section (a).

2.12. MAP outcome and domestic remedies

26. CAs have a legitimate concern that - in case of domestic court or administrative proceedings carried out in parallel to a MAP - an agreement reached in MAP may be in contradiction with a relevant court decision (or the outcome of other available domestic remedies). Possible risks of abuse also represent a valid concern.

JTPF recommendation (new point 7.7 in CoC)

"If the terms and conditions of an agreement reached in a mutual agreement procedure are not satisfactory to the enterprise, the enterprise may withdraw its request for a mutual agreement procedure under the Arbitration Convention.
When at the time an agreement is reached under the procedure of Article 6(2) of the Arbitration Convention, domestic remedies are still pending, the implementation of this agreement should be subject to its acceptance by the enterprise and the enterprise's withdrawal from domestic remedies such as appeals concerning the issues settled in a mutual agreement procedure under the Arbitration Convention."

27. Member States' practices in this respect are indicated in the Member States Transfer Pricing profiles[8] published on the JTPF website.

[8] See http://ec.europa.eu/taxation_customs/taxation/company_tax/transfer_pricing/forum/index_en.htm#membership

2.13. Serious penalties

28. Dispute resolution under the AC does not need to be initiated and may be suspended if one of the enterprises involved is subject to a "serious penalty" for the transactions giving rise to the profit adjustment (Article 8). MS have made unilateral declarations to the AC on what they consider a serious penalty in the meaning of Article 8 (1) AC.

29. The CoC makes it clear that the application of the AC is not automatically excluded in case of a serious penalty. Access to the AC should only be denied when a serious penalty is imposed in exceptional cases like fraud and similar situations. It is, therefore, not the penalty imposed as such which bars access to the AC, but the actual type of underlying behavior of the taxpayer which led to the penalty.

JTPF recommendation (amended point 8 in CoC)

"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 should deny access to the Arbitration Convention when serious penalties are applied only in exceptional cases like fraud. Exceptional cases like fraud include tax fraud, wilful default and gross negligence.

Note from the Secretariat:

Spain and Germany did withdraw their scrutiny reservation. Italy suggested eliminate the last sentence and especially the reference to "gross negligence" as this would increase the number of cases for which access can be denied. France would not agree with a recommendation not recognising the right of a MS to deny access to the AC in the case of opposition to tax inspection, secret payments or distribution, or for abuse of rights.

The Secretariat supports the recommendation as currently drafted and supported at the last meeting, i.e. sticking to cases with intentional misconduct (wilful default) and gross negligence. In order to meet the concern of Italy it is suggested to monitor whether there is indeed an increase the number of cases for which access is denied. As regards the suggestion from France the Secretariat would be reluctant to list specific items when access to the AC can be denied.

2.14. Improving the "second phase" of the Arbitration Convention

a) Composition and functioning of advisory commissions

30. The composition of advisory commissions is governed by Article 9(1) of the AC. Article 11 (2) AC provides that "The advisory commission shall adopt its opinion by a simple majority of its members".

31. The presence of competent authorities on the panel and especially their right to vote on the opinion of the advisory commission was criticised by 3 of the 4 chairmen of advisory commissions from whom the JTPF sought feedback[9] in 2013 on the functioning of the "second phase" of the Arbitration Convention. They pointed out that although it is of great value to have CAs on the commission in order to give independent members full information on all aspects of the case including their own position and the reasons for it, their status as full members of the advisory commission with voting power seems to be an obstacle to the efficient functioning of the commission. In particular, chairmen of advisory commissions pointed out that:
    - the principles of arbitration suggest that interested parties do not sit on an arbitration panel;
    - representatives of CAs can delay the proceedings of the advisory commission, as they take much of the meeting time by continuing exchanges of view;
    - presence of CAs' representatives may inhibit necessary discussion on the issues among the independent members;
    - representatives of CAs do not want usually to prejudice their jobs by agreeing with the other side's view; a compromise is therefore unlikely and this means in practice that the decision of the commission is generally taken by the (three) independent members only, unless they agree to fully support the view of one of the Member States. If CAs are not present in the advisory commission, the independent persons of standing and the Chair could decide on an opinion in a more expedite and efficient manner.

32. From a Member State's point of view it is important that representatives of CAs are full members of the advisory commission, so as to ensure that their case is presented well. CAs' representatives on the panel are normally two and MS consider that this is adequate, as it allows them to send to the advisory commission two professionals with different profiles (e.g., a lawyer and an economist). The possibility to appoint only one representative per CA is already foreseen in Article 9(1).

33. Revising the voting powers within the advisory commission and giving independent persons of standing the formal possibility to hold separate deliberations was considered to require changes to the AC.

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9 See document JTPF/010/2013/EN

Note from the Secretariat:

For Germany the word "formal" in paragraph 33 suggests that the AC "informally" provides the possibility for separate deliberations. As this is in their view not the case, Germany suggests removing the word "formal".

The Secretariat has no objection.

b) Opening statement by the enterprise and auditor(s)

34. The chairmen of advisory commissions surveyed by the JTPF in 2013 argued that hearing enterprises and auditors at the outset of the arbitration procedure can usefully inform and facilitate the deliberations of advisory commissions. In the case of hearings of enterprises, this involves interviewing not only tax experts, but also persons occupying high operational and management positions in the enterprise - familiar with the business strategy, international market conditions and the reasons behind the enterprise's transfer pricing strategy.

35. The AC and CoC already envisage the possibility that auditors and enterprises may appear before the advisory commission (Article 10 AC and point 7.3 (d) CoC). It was considered that it would nevertheless be useful to explicitly inform enterprises of the possibility to state their case before the advisory commission.

JTPF recommendation (amended point 9.3 (d) in CoC)

"(d) Whilst respecting Article 10 of the Arbitration Convention, the advisory commission may request Member States and in particular the Member 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 of the Arbitration Convention, to appear before the advisory commission. At the outset of the arbitration procedure each of the enterprises involved should be informed by their respective competent authorities of their right to make a statement before the advisory commission."

Note from the Secretariat:

Finland lifted its scrutiny reservation. France stated that the first recommendations, i.e. requesting a MS to appear before the advisory commission seems a bit odd as the MS is already represented in the advisory commission.

The Secretariat understands the concerns of France as regards the first sentence. By way of explanation, this sentence was already adopted in the 2006 CoC. Its context to Article 10 indicates that it seems to be intended to clarify that the advisory commission may request the respective service in charge for the assessment to appear before the advisory commission rather than a MS's representative. The Secretariat suggests a clarification along the following lines may be added:

"[…] the advisory commission may request Member States and in particular the Member State that issued the first tax assessment notice […] to allow a representative of the respective service in charge for the issue under consideration to appear before the advisory commission."

c) Preparation of the arbitration procedure

36. The 6-month period envisaged under the AC for an advisory commission to deliver an opinion can be considered generally appropriate. However, at the beginning of this period sufficient information should already be available to the commission, so that it can deliver its opinion in a timely and efficient manner. The time until an advisory commission is established should be used by the competent authorities to compile all relevant information, so that it is already available at the beginning of the procedure.

JTPF recommendation (amended point 9.2 (f) in CoC)

"(f) Member 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. To assist the advisory commission in completing its work in a timely and efficient manner, the competent authorities will use the time period needed to establish the advisory commission to collect and prepare all necessary information, so that it is already available at the outset of the procedure."

d) Remuneration of chairmen and independent members of advisory commissions

37. Point 7.3 (f) (ii) CoC provides for a remuneration in the amount of 1000 EUR per meeting date per person. Although it is recognised that members of advisory commissions do substantial work outside official meetings of the advisory commission (reading written material, exchanging emails, making conference calls, agreeing the wording of the opinion, travelling) the CoC maintains that remuneration should be made on the basis of meeting days and not by reference to actual time spent on the case due to the objectivity of this criterion.

e) Follow-up to advisory commissions' opinions

38. According to Article 12 AC the competent authorities concerned are expected to take a decision which eliminates the double taxation within 6 months of the delivery of the advisory commission's opinion (their decision may actually deviate from the advisory commission's opinion). Acceptance by the enterprise of this decision is not formally required under the AC and the decision may therefore be implemented without the enterprise's agreement. However, it can be expected that an enterprise would generally be satisfied when double taxation is removed.

Note from the Secretariat:

Poland suggests clarifying the first sentence as follows:

"According to Article 12 AC the competent authorities concerned are expected to take a decision which eliminates the double taxation within 6 months of the delivery of the advisory commission's opinion. Their decision may actually deviate from the advisory commission's opinion, but if they fail to reach an agreement, they are obliged to act in accordance with the advisory commission's opinion."

The Secretariat has no objection

39. Nevertheless, the relation between the AC and domestic remedies needs to be considered in this context. Article 7(1) AC blocks the expiration of the 2-year period when domestic remedies have been initiated by the enterprise, Article 7 (2) AC allows Member State to initiate or continue judicial proceedings and Article 7 (3) AC provides - for cases where the domestic law does not allow the competent authority to derogate from the decision of their juridical bodies - that an advisory commission shall not be set up before the time provided for an appeal has expired or the right for an appeal has been withdrawn.

Note from the Secretariat:

For Germany the paragraph does not correctly reflect Article 7 AC. For the UK the paragraph does not add much clarification on the relation between the AC and judicial proceedings. As the confusion mainly results from the unclear drafting of Article 7 AC itself the UK suggests spending more time on this.

To address the point raised by Germany, the language could be aligned to the language of the CoC:

"Nevertheless, the relation between the AC and domestic remedies needs to be considered in this context. Article 7(1) AC provides that where a case has been submitted to a court or a tribunal, the 2-year period shall be computed from the date on which the judgement of the final court of appeal was given. , Article 7 (2) AC allows Member State to initiate or continue judicial proceedings and Article 7 (3) AC provides - for cases where the domestic law does not allow the competent authority to derogate from the decision of their juridical bodies - that an advisory commission shall not be set up before the time provided for an appeal has expired or the right for an appeal has been withdrawn."

However, the paragraph would then simply repeat the AC and may therefore be deleted as not adding value as the key messages are made in paragraphs 38 (no agreement needed for implementing the advisory commission's decision) and 40 (MS should take action to avoid inconsistencies. For the interaction between MAP and judicial appeals it is referred to section 2.12 above.

For the UK more work should be into this area and try to clarify the language of the AC. However, for the Secretariat the debate should not risk the finalisation of the work at the March meeting. The Secretariat would like to refer to the attempts made by the Forum in this and the previous mandate. As also stated by the UK, the reason for the confusion seems to be the unclear wording of the AC.

The Secretariat suggests adding this issue to the issues warranting further consideration in the concluding remarks below. For reason of transparency, MSs positions as indicated in annex 4.8 of the 2009 Report of the EU Joint Transfer Pricing Forum on the Interpretation of some Provisions of the Arbitration Convention (COM(2009)472 final) would be put to the country profiles on the JTPF website

40. Where the rules on specific domestic remedies and appeals in a MS create the possibility for inconsistencies, the MS concerned may need to take the necessary action to prevent this, e.g. by requiring the enterprise to withdraw from the domestic remedies and appeals which concern the issues to be settled under the AC before entering the "second phase".

Note from the Secretariat:

For the UK, the drafting of paragraph 40 may be read as implying that it would be MS domestic law creating inconsistencies and confusion rather than the unclear wording of Article 7 AC. Furthermore the UK suggests a commitment of the taxpayer not to pursue domestic appeals following the elimination of double taxation relating to the same issue.

The Secretariat suggests a more neutral drafting:

"Where there is a risk for inconsistencies between the outcome of the procedure under the AC and domestic remedies, the MS concerned may need to take the necessary action to prevent this, e.g. by requiring the enterprise to withdraw from the domestic remedies and appeals which concern the issues to be settled under the AC before entering the "second phase"."

2.15. Tax collection and interest charges

41. It is recognised that tax collection should be suspended during dispute resolution procedures under the AC and that Member States' different approaches to interest charges and refunds during that procedure do not adversely affect enterprises. Point 8 CoC provides for measures aimed to ensure that the same conditions as those available for domestic appeals or litigation procedures are available in case of filing for a MAP procedure under the AC. The CoC leaves MS a choice between three different approaches to interest charges and refunds. When MS involved in a case choose each a different approach to interest charges and refunds it is appropriate that they should attempt to eliminate any resulting asymmetry.

JTPF recommendation (improved language of point 10 in CoC)

(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 or 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 taxation treaties between Member States.

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(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:

(i) tax to be released for collection and repaid without attracting any interest; or

(ii) tax to be released for collection and repaid with interest; or

(iii) each case to be dealt with on its merits in terms of charging or repaying interest (possibly during the mutual agreement procedure),

When, nevertheless, asymmetry results, MS should seek to eliminate any resulting asymmetry in the MAP process where possible."

Note from the Secretariat:

Germany and Spain lifted their scrutiny reservation. For Italy the content of the recommendation is already addressed in the third alternative and requests deletion of the additional sentence. The Secretariat also went back to the wording of the recommendation as used in the existing CoC.

For the Secretariat the first part of No. 10 CoC recommends MS to apply one of the 3 different approaches (including No (iii), i.e. deal with each case on its own merits), but the new sentence goes beyond this by recommending that both MS should seek to eliminate any asymmetry in MAP if it nevertheless arises, (e.g. if a MS does not follow the recommendation or other aspects of the respective approaches are different) The Secretariat supports keeping this recommendation.

42. Annex 3 contains information on the state of play in MS as regards suspension of tax collection and on interest charges.

2.16. Other issues (numbering and headline to be changed)

[*New report item to be inserted after report item 2.3 in the final report*] **Requesting and providing information**

43. (*numbering to be changed*) The JTPF recognises that tax administrations and taxpayers benefit from a cooperative and fully transparent mutual agreement procedure. Therefore all necessary information available at the time of the request to initiate the mutual agreement procedure should be provided by the enterprise to the tax administration(s).

Note from the Secretariat:

Germany suggests clarifying that due regard should be given to confidentiality of government to government communication and suggests drafting the paragraph as follows:

"The JTPF recognises that tax administrations and taxpayers benefit from a cooperative and fully transparent mutual agreement procedure while giving due respect to the confidentiality of government-to-government communication. Therefore all necessary information available at the time of the request to initiate the mutual agreement procedure should be provided by the enterprise to the tax administration(s)."

As this wording is in line with the text used in the preamble, the Secretariat has no objection.

JTPF recommendation (new point 7.1 (h) CoC

"h) The enterprise should provide all necessary information available at the time of the request to initiate the mutual agreement procedure. Requests for additional information and responses to those requests should be complete, well-targeted and submitted without unnecessary delay. In the case of subsequent material changes in the information or documentation previously submitted as part of, or in connection with, a request to initiate a mutual agreement procedure, the enterprise should inform the competent authority(ies) thereof and submit the new information or documentation relevant to the issues under consideration. Failure to co-operate during any part of the procedure of the Arbitration Convention may have direct consequences on the length of time needed to obtain relief and whether such relief can ultimately be provided."

Note from the Secretariat:

Finland suggests drafting the third sentence as follows:

The enterprise may provide the competent authority with additional information and the enterprise should inform the competent authority(ies) thereof and submit the new information or documentation relevant to the issues under consideration. Failure to co-operate.

[*New report item to be inserted after report item 2.11*] **Information required for the start of the two-year period (Article 7 (1) AC)**

44. (*numbering to be amended*) Point 7.6 (a) (vii) CoC provides that for the purpose of Article 7 (1) AC, a case will be regarded as having been submitted when the enterprise provides any specific additional information requested by the competent authority within 2 months of the receipt of the enterprise's request. Instances were reported where the information requested was not provided in a sufficient and timely manner or was considered as overly burdensome and comprehensive by the taxpayer. The JTPF is of the view that the case-specific nature of transfer pricing sets limits to providing prescriptive guidance on the specific kind of information or certain time limits. Implementing specific procedures for determining whether information requested is necessary or provided in a sufficient manner is regarded as disproportionate. Instead the common interest in solving cases of double taxation in a timely and efficient manner and the principles of well-targeted and appropriate action are being recalled. For reasons of transparency, it is recommended that competent authorities inform the other competent authorities about the additional information requested.

45. (*numbering to be amended*) Nevertheless, as already provided in the CoC, the enterprise should undertake to 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 as referred to in point 7.6 (a) (vii). In case the enterprise does not respect this undertaking the competent authorities could jointly agree to cancel the procedure under the AC.

JTPF recommendation (addition to point 7.6 (a) (vii) CoC new)

"(vii) 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 ; in case the enterprise does not respect this undertaking the competent authorities could jointly agree to cancel the procedure under the AC, and"

Note from the Secretariat:

Denmark thinks that the MS will have opposing interest and therefore it would in practice not be likely that they agree on cancelling the procedure. For Germany the new recommendations should be deleted and the discussion postponed. Especially a possibility to cancel the procedure raises the question what the legal basis for this cancellation would be and how it would relate to procedures under domestic law.

JTPF recommendation (addition to point 7.6 (a) (viii) CoC new)

"(viii) any specific additional information requested by the competent authority within two months upon receipt of the taxpayer's request. Requests for additional information should be well-targeted and responses to those requests should be complete and submitted without unnecessary delay. A competent authority should inform the other competent authority(ies) about additional information requested."

Note from the Secretariat

For France the CoC should not introduce rigid rules for the exchange of information;

The Secretariat considers such a recommendation as an expression of the general principle of transparency and cooperation established by the Preamble and prefers keeping it.

III. Concluding remarks

46. All parties involved in dispute resolution under the AC have an interest that double taxation is removed in a timely and resource effective manner. This Draft Report proposes amendments to the CoC to this effect. New guidance respects the fact that resolving transfer pricing disputes often requires case-specific approaches. It also rests on the principle that the application of the AC is governed by mutual trust between all parties involved and the recognition of the need to maintain this sustainable and reliable procedure for resolution of disputes.

47. Beyond the amendments to the Code of Conduct proposed in this Revised Draft Report the JTPF notes that based on the findings of the AC and CoC monitoring process carried out, amendments to the AC itself may be discussed in the future. Possible issues for consideration include:
    - Composition of advisory commissions (Article 9 AC), voting rights, possibility for independent persons of standing to hold separate deliberations
    - Alternative approaches to arbitration (e.g. last best offer approach, also called "baseball arbitration") compared to the independent opinion approach currently provided under the AC (Article 11)
    - Possibility for CAs to mutually cancel the procedure under the AC in certain cases
    - Application of the AC to establish the existence of a permanent establishment (Article 5 OECD MTC).

Note from the Secretariat:

Spain and Italy are of the opinion that applying the AC to disputes arising on the existence of a permanent establishment should not be considered. For Sweden, introducing a substantive rule in the AC to establish whether a permanent establishment exists could come into conflict with a corresponding provision of a tax treaty leading to "double non taxation" for a country applying the exemption method. France thinks it is premature to list the possible changes of the AC and would suggest postponing the discussion.

For the Secretariat it would be important to keep the message that more issues and ideas than those appearing in the new CoC have been discussed by the JTPF but that the further discussion of these issues was limited by the text of the Arbitration Convention itself. The Secretariat would not have an objection against removing the last bullet point and would support adding a point on further elaborating on suspension of tax collection, interests and penalties as well as on the interaction between judicial appeals and the AC.

ANNEX 1

Revised Code of Conduct
for the effective implementation of the Arbitration Convention

[Recitals]

Without prejudice to the respective spheres of competence of the Member States and the European Union, this revised Code of Conduct concerns the implementation of the Arbitration Convention and certain related issues concerning mutual agreement procedures under double taxation treaties between Member States. The application of the Arbitration Convention is governed by mutual trust, cooperation and transparency between all parties involved as well as by recognising the need to maintain a sustainable and reliable procedure for resolution of disputes in a timely and resource effective manner. However, due respect should be given to the confidentiality of government to government communication. All parties are committed to seeking the avoidance of double taxation as defined in Article 4 AC and abide by the letter and the spirit of the AC. This includes that Member States of the European Union provide their competent authorities with sufficient resources in terms of personnel, funding, training etc. to carry out their mandate, i.e. resolving cases of double taxation in accordance with the Arbitration Convention.

SCOPE OF THE ARBITRATION CONVENTION (Chapter I, Articles 1 and 2 AC)

1. Cases covered *[addition, report item 1.1]*

(a) An action which results or is likely to result in double taxation within the meaning of Article 1 of the Arbitration Convention does not require that the transfer pricing adjustment within the meaning of Article 4 of the Convention leads to an actual payment of tax. Therefore cases where the entity subject to the adjustment within the meaning of Article 4 has losses carried forward against which an upward adjustment could be offset or cases where because of group relief no actual tax payment is due and similar situations, are within the scope of the Arbitration Convention.

(b) Cases submitted for resolution under the AC generally regard earlier years. This means that the entities or enterprises involved may have merged, restructured[dissolved] or changed otherwise after the years in which double taxation has arisen. This in and of itself should not disallow the case to be handled, as relief of double taxation is generally still important for the parties then involved.

2. Application of the AC dependent on the outcome of a mutual agreement procedure under a DTC *[addition, report item 1.2]*

If access to the Arbitration Convention or the treatment of cases under the Arbitration Convention depends directly on the result of a mutual agreement procedure under an applicable Double Taxation Convention, care should be taken to ensure that the deadline under Article 6(1) of the Arbitration Convention does not expire. The enterprise should file separate requests for a mutual agreement procedure under the Arbitration Convention and a mutual agreement procedure available under the applicable Double Taxation Convention. The requests may be combined in one letter.

The two-year period referred to in Article 7 (1) AC will not start before the issue addressed under the Double Taxation Convention is solved.

3. EU triangular transfer pricing cases *[former point 1.1 CoC]*

(a) For the purpose of this Code of Conduct, 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.

4. Thin capitalisation[10] *[former point 1.2. CoC]*

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.

5. Denial of access *[addition, report item 1.3]*

Member States should consider providing domestic legal remedies for determining whether the denial of access to the Arbitration Convention by their administrative bodies is justified.

DISPUTE RESOLUTION PROCEDURE (Chapter II, Articles 3 to 14 AC)

6. Principles applied (Article 4 AC)

(a) The arm's length principle will be applied, as advocated by the OECD, without regard to the immediate tax consequences for any particular Member State. *[former point 6.1. (a) CoC]*

(b) Article 4(2) of the Arbitration Convention should be interpreted in conjunction with the most recent version of Article 7 OECD Model Tax Convention and the relevant Commentary. This will not apply in cases where a MS made a reservation in the

[10] Reservations by certain MS to be inserted in the final version.

OECD MTC against implementing the new version of Article 7 OECD MTC and in cases where the bilateral Double Taxation Convention between the Member States involved has a different wording. In cases where Member States have concluded bilateral Double Taxation Conventions, Article 4(2) should have the same meaning as the relevant Article on attributing profits to permanent establishments in the applicable Double Taxation Conventions, taking into account the OECD commentary on the provisions included in the concerned Double Taxation Convention. *[addition, report item 2.4]*

7. Mutual Agreement Procedures under the Arbitration Convention (Articles 6 and 7 AC) *[former point 6 CoC]*

7.1 General Provisions [former point 6.1 CoC]

(a) A tax administration making an adjustment is encouraged to inform the enterprise in a timely manner of its rights under the Arbitration Convention, including about any time limits in the Convention for initiating a mutual agreement procedure. The onus for making a timely request in order to preserve access to the mutual agreement procedure rests with the enterprise and enterprises should take all reasonable steps to ensure that time limits do not expire. *[addition, report item 2.1]*

(b) Cases will be resolved as quickly as possible having regard to the complexity of the issues in question.

(c) Although competent authorities and audit (function) may belong to the same tax administration, competent authorities should maintain a degree of autonomy from the audit function of the tax administration in order to ensure the independence of any subsequent review of a case by the competent authority. The guiding principle should be that the competent authority's function is to ensure a fair and appropriate application of the Arbitration Convention, not to seek to uphold all adjustments proposed by the tax authorities of its Member State. *[addition, report item 2.2]*

(d) Enterprises and tax administrations should not include waiver of access to a mutual agreement procedure in audit settlements and unilateral APAs, as it would be inappropriate for two parties (the enterprise and one tax administration) to exclude a third party (the other tax administration) from the final resolution of a file in which they had an interest. *[addition, report item 2.3]*

(e) 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.

(f) Taking into account the provisions of this Code of Conduct, 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 7.6(b) of this Code of Conduct. 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) of the Arbitration Convention (providing for time limits to be extended) to agree a short extension.

(g) 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.

h) The enterprise should provide all necessary information available at the time of the request to initiate the mutual agreement procedure. Requests for additional information and responses to those requests should be complete, well-targeted and submitted without unnecessary delay. In the case of subsequent material changes in the information or documentation previously submitted as part of, or in connection with, a request to initiate a mutual agreement procedure, the enterprise should inform the competent authority(ies) thereof and submit the new information or documentation relevant to the issues under consideration. Failure to co-operate during any part of the procedure of the Arbitration Convention may have direct consequences on the length of time needed to obtain relief and whether such relief can ultimately be provided. *[addition, report item 2.16]*

7.2 The starting point of the three-year period (deadline for submitting the request according to Article 6(1) of the Arbitration Convention) *[former point 4 CoC]*

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 of the Arbitration Convention, e.g. due to a transfer pricing adjustment'[11], is considered as the starting point for the three-year period. A request is considered as presented for the purposes of the 3 year period under the second sentence of Article 6 (1) AC when it contains the information listed in (point 7.6 (a) (i) – (vii) CoC.

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 taxation treaties between Member States.

7.3 Practical functioning and transparency *[former point 6.3. CoC]*

(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 Member State will be ensured.

(d) Enterprises should submit a copy of their request for a mutual agreement procedure

[11] Reservation by Italy to be inserted.

under the Arbitration Convention to the other competent authority involved at the same time and with the same set of information as to the competent authority to which the request is addressed in accordance with Article 6 (1) of the Arbitration Convention. Where appropriate and allowed, this might be done through electronic means. In cases where the request is not made in a common working language, the enterprise should provide a translation of the request into a common working language. The fact that a copy of the request was submitted by the enterprise does not replace the obligation of the competent authority to inform the other competent authority about receiving the request under point 7.3 (e) nor should it be understood as limiting a competent authority's efforts to come to a satisfactory solution itself within the meaning of Article 6 (2) of the Arbitration Convention. *[addition, report item 2.6]*

(e) 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 authority(ies) of the other Member State(s) involved in the case attaching a copy of the taxpayer's request. The competent authorities should reach a mutual understanding on whether they consider the minimum information as submitted. A competent authority should inform the other competent authority(ies) when access to the Arbitration Convention is denied and provide them with the reasons for the denial. The competent authorities involved should [exchange their views] so as to try, where possible, to reach a common position on whether the denial of access to the Arbitration Convention is justified. *[addition report item 1.3]*

(f) 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 7.6(a), it will invite the enterprise, within two months upon receipt of the request, to provide it with the specific additional information it needs.

(g) Member 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 Member 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 Member State concerned.

(h) If a competent authority considers a case to be well-founded, it should initiate a mutual agreement procedure by informing the competent authority(ies) of the other Member State(s) of its decision and attach a copy of the information as specified under point 7.6(a) of this Code of Conduct. 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(ies) of the other Member 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.

(i) Where a new request by an enterprise for a mutual agreement procedure is linked to issues which are already covered by an ongoing mutual agreement procedure with the same enterprise, competent authorities should, where appropriate, consider treating the new request together with the ongoing mutual agreement procedure. Where a request for a mutual agreement procedure is linked to issues which have already been covered in another mutual agreement procedure regarding the same enterprise, competent authorities should typically consider applying the outcome in the earlier mutual agreement procedure to the new request and where appropriate, to apply that outcome. *[addition, report item 2.9]*

7.4 Exchange of position papers *[former point 6.4 CoC, amended based on report item 2.11]*

(a) Member 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 authority(ies) of the other Member State(s) involved in the case. The position paper will contain the information relevant for understanding the case under consideration. Depending on the facts and circumstances of the case the position paper may set out e.g.:

(i) General information:

- legal name, address and taxpayer identification number of the person requesting assistance, its related persons in the other country, if applicable, and the basis for determining the association;
- the contact details of the competent authority official in charge of the case
- broad overview of the issue, transactions, business, and basis for the adjustment
- the tax years affected
- amount of income and tax adjusted in each tax year, if applicable
- summary of relevant information from the original tax return

(ii) the case made by the person making the request:

- description of the exact nature of the issue or adjustment
- if relevant, calculations with supporting data (these may include financial and economic data and reports relied upon, explanatory narratives as well as taxpayer documents and records where relevant and appropriate).

(iii) the competent authority's view of the merits of the case, e.g. why it believes that double taxation has occurred or is likely to occur;

(iv) how the competent authority suggests that 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, e.g.

- outline of comparable transactions and comparability adjustments;
- description of the methodology employed for the adjustment; and
- an explanation of the appropriateness of the transfer pricing methodology employed for the adjustment (i.e. an explanation why it believes the adjustment achieves an arm's length outcome; identification of tested party, if applicable; industry and functional analysis, if a relevant study is not already included elsewhere in the taxpayer’s submission).

(c) The position paper will be sent to the competent authority(ies) of the other Member State(s) 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 7.6(a).

(d) Member 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. To enable the competent authorities to identify the areas of disagreement and to understand the position of the

responding competent authority, a rebuttal or response paper could include e.g.:

- indication of the areas or issues where the competent authorities are in agreement or disagreement;

- requests for additional information and explanations necessary to clarify particular issues;

- presentation of other or additional information considered pertinent to the case, but not raised in the initial position paper; and

- submission of proposals or views to resolve the issue.

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 7.6(a).

(f) Member States will further undertake any appropriate steps to speed up all procedures wherever possible. In this respect, Member 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).

7.5 EU triangular transfer pricing cases *[former point 6.2 CoC]*

(a) As soon as the competent authorities of the Member 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(s).

(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:

(i) the competent authorities can decide to take a multilateral approach (immediate and full participation of all the competent authorities concerned); or

(ii) 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

(iii) 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).

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

Participation as (an) observer(s) 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.

7.6 The starting point of the two-year period (Article 7(1) of the Arbitration Convention) *[former point 5 CoC]*

(a) 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:

(i) identification (such as name, address, tax identification number) of the enterprise of the Member State that presents its request and of the other parties to the relevant transactions;

(ii) 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);

(iii) identification of the tax periods concerned;

(iv) copies of the tax assessment notices, tax audit report or equivalent leading to the alleged double taxation;

(v) 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;

(vi) an explanation by the enterprise of why it considers that the principles set out in Article 4 of the Arbitration Convention have not been observed;

(vii) 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; in case the enterprise does not respect this undertaking the competent authorities could jointly agree to cancel the procedure under the AC, and

(viii) any specific additional information requested by the competent authority within two months upon receipt of the taxpayer's request. Requests for additional information should be well-targeted and responses to those requests should be complete, and submitted without unnecessary delay. A competent authority should inform the other competent authority(ies) about additional information requested.

(b) The two-year period starts on the latest of the following dates:

(i) the date of the tax assessment notice, i.e. a 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 7.6 (a).

7.7 Domestic remedies *[addition, report item 2.12]*

If the terms and conditions of an agreement reached in a mutual agreement procedure are not satisfactory to the enterprise, the enterprise may withdraw its request for a mutual agreement procedure under the Arbitration Convention.

When at the time when an agreement is reached under the procedure of Article 6(2) of the Arbitration Convention, domestic remedies are still pending, the implementation of this agreement should be subject to its acceptance by the enterprise and the enterprise's withdrawal from domestic remedies such as appeals concerning the issues settled in a mutual agreement procedure under the Arbitration Convention.

8. Serious Penalties (Article 8 AC) *[former point 3 CoC, amended based on report item 2.13]*

Member States should deny access to the Arbitration Convention when serious penalties are applied only in exceptional cases like fraud. [Exceptional cases like fraud include tax fraud, wilful default and gross negligence.]

9. Proceedings during the second phase of the Arbitration Convention (Articles 9-12 AC) *[former point 7 CoC]*

9.1 List of independent persons *[former point 7.1 CoC]*

(a) Member States commit themselves to inform without any further delay the Secretary-General of the Council 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, Member States will join a curriculum vitae of those persons, which should, among other things, describe their legal, tax and especially transfer pricing experience.

(c) Member 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 Member States to confirm the names of their independent persons of standing or give the names of their replacements.

(e) The aggregate list of all independent persons of standing will be published on the Council's website.

(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 Member 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.

9.2 Establishment of the advisory commission *[former point 7.2 CoC]*

(a) Unless otherwise agreed between the Member States concerned, the Member 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 Member State(s).

(b) Competent authorities should establish the advisory commission no later than six 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.

(d) The advisory commission will be assisted by a secretariat for which the facilities will be provided by the Member State that initiated the establishment of the advisory

commission unless otherwise agreed by the Member 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 Member States concerned.

(f) Member 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. To assist the advisory commission in completing its work in a timely and efficient manner, the competent authorities will use the time period needed to establish the advisory commission to collect and prepare all necessary information, so that it is already available at the outset of the procedure. *[addition, report item 2.14 c)]*

9.3 Functioning of the advisory commission *[former point 7.3 CoC]*

(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 in point 9.2(f).

(b) The proceedings of the advisory commission will be conducted in the official language or languages of the Member 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 Article 10 of the Arbitration Convention, the advisory commission may request Member States and in particular the Member 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 of the Arbitration Convention, to appear before the advisory commission. At the outset of the arbitration procedure each of the enterprises involved should be informed by their respective competent authorities of their right to make a statement before the advisory commission. *[addition, report item 2.14 b)]*

(e) The costs of the advisory commission procedure, which will be shared equally by the Member 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 Member 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 Member State which has taken the initiative to establish the advisory commission;

(ii) the fees of the independent persons of standing will be fixed at EUR 1 000 per person per meeting day of the advisory commission, and the Chairman will receive a fee higher by 10 % than that of the other independent persons of standing.

(g) Actual payment of the costs of the advisory commission procedure will be made by the Member State which has taken the initiative to establish the advisory commission, unless the competent authorities of the Member States concerned decide otherwise.

9.4 Opinion of the advisory commission *[former point 7.4 CoC]*

Member States would expect the opinion to contain:

(a) the names of the members of the advisory commission;

(b) the request; the request contains:

(i) the names and addresses of the enterprises involved;

(ii) the competent authorities involved;

(iii) a description of the facts and circumstances of the dispute;

(iv) 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 which 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 Member 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 which 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 Member 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.

10. Tax collection and interest charges during cross-border dispute resolution procedures *[former point 8 CoC, amended based on report item 2.15]*

(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 or 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 taxation 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:

(i) tax to be released for collection and repaid without attracting any interest; or

(ii) tax to be released for collection and repaid with interest; or

(iii) each case to be dealt with on its merits in terms of charging or repaying interest (possibly during the mutual agreement procedure).

When, nevertheless, asymmetry results, MS should seek to eliminate any resulting asymmetry in the MAP process where possible.

FINAL PROVISIONS (Chapter III, Articles 15 to 22 AC)

11. Double taxation treaties between Member States (Article 15 AC) *[former point 6.5 CoC]*

As far as transfer pricing cases are concerned, Member States are recommended to apply the provisions of points 1, 2 and 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 taxation treaties between Member States.

12. Admissibility of a case *[former point 2 CoC]*

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.

13. Monitoring *[former point 10 CoC]*

In order to ensure the even and effective application of this Code of Conduct, 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 this Code of Conduct.