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EU JOINT TRANSFER PRICING FORUM

Compilation of comments received on the draft Final Report on Improving the Functioning of the Arbitration Convention following the JTPF meeting on 24 October 2014

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Contact:
Hartmut Förster, Telephone (32-2) 29.55.511
Julia Topalova, Telephone (32-2) 29.59.311
E-mail: taxud-joint-transfer-pricing-forum@ec.europa.eu

I. Member States

Denmark

Denmark is not yet prepared to give up the scrutiny reservation on the recommendation in paragraph 2.10.

Denmark considers the change as a deterioration for the MS. Moreover, we do not think that it is likely that the two MS can agree on cancelling the procedure under the AC because of a lack of documentation. In this case the MS will most likely have opposing interests. Moreover, in case a MS asks for excessive documentation the enterprise can bring the case to court.

Germany

Concerning the German scrutiny reservations:

With respect to new subsection to point 1 of the CoC (see page 3 of the minutes and page 5 of the December draft; application of AC in cases of change in status/entity of taxpayer):
This German scrutiny reservation is withdrawn.

With respect to the addition to point 7.3 e of the CoC (see page 4 of the minutes and page 7 of the December draft; exchange of views in cases of denial of access):
This German scrutiny reservation is withdrawn.

With respect to new point 7.1 d of the CoC (see pages 5/6 of the minutes and page 9 of the December draft; no waiver of rights):
This German scrutiny reservation is withdrawn.

With respect to amended point 7.2 of the CoC (see page 7 of the minutes and pages 12/13 of the December draft; starting point of the 3 year period):
After review, the current wording proposal is not supported, as it does not make sufficiently clear that the targeted issue is the 3 year period. The current wording could be misunderstood as also being relevant for the starting point of the 2 year period under Article 7, as Article 7 refers to Article 6 (1).
The following amendment is suggested: In the second sentence of point 7.2 CoC, replace "in the meaning of Article 6 (1) AC" with "for purposes of the 3 year period under the second sentence of Article 6 (1) AC", so that it reads: "A request is considered as presented for 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."

With respect to amended point 8 of the CoC (see page 8 of the minutes and page 16 of the December draft; serious penalties):
This German scrutiny reservation is withdrawn.

With respect to new paragraph 39 (in the minutes referred to as paragraph 32) of the report (see page 9 of the minutes and page 20 of the December draft; follow up to advisory commission opinions):
After review, the current wording proposal is still not supported. The analysis of Article 7 is not shared. In particular, Article 7 (1) does not block the expiration of the 2 year period "when domestic remedies have been initiated", but only where cases have been "submitted to a court or tribunal". The German understanding so far is that therefore the expiration of the 2 year period is not blocked where domestic administrative appeals are pending (i.e. appeals not to a court or tribunal), even though later these cases may still go to a court or tribunal. Consequently, there may be cases where an administrative appeal is still pending at the time an advisory commission renders an opinion, and in such cases the acceptance of the applicant will be necessary for implementing the opinion (in the same way as described for the acceptance of mutual agreements in new point 7.7 of the CoC).

With respect to revised point 10 of the CoC (see page 10 of the minutes and page 21 of the December draft; interest charges):
This German scrutiny reservation is withdrawn.

Concerning the parts of the December draft report not discussed so far:

With respect to new paragraph 32 of the draft report (see pages 18/19 of the December draft; separate meetings of the independent persons):
The current new wording is not supported. The wording "giving independent persons of standing the formal possibility to hold separate deliberations was considered to require changes to the AC" suggests that the CoC would propose informal separate meetings, which it should not, as it would be against the intention of the AC. The issue can be resolved by deleting the word "formal".

With respect to the (extremely long) new paragraph 42 of the draft report, more particularly to what is below the heading "Requesting and providing information" (see pages 21/22 of the December draft):
First, there should be additional paragraph numbering after the heading "2.16 Other issues", a paragraph 42 that covers three pages is not very helpful.
Second, the sentence under the heading "Requesting and providing information" currently reads "The JTPF recognizes that tax administrations and taxpayers benefit from a cooperative and fully transparent mutual agreement procedure." This raises a concern regarding the "full transparence" and how that relates to the confidentiality of government to government communication. It could resolved by either deleting the reference to transparence (so that it would read " The JTPF recognizes that tax administrations and taxpayers benefit from a cooperative mutual agreement procedure") or by adding a reference to the confidentiality of government to government communication (so that it would read " The JTPF recognizes 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.")
New point 7.1 h CoC (as on page 22 of the December draft) is supported.

Still with respect to the (extremely long) new paragraph 42 of the draft report, now more particularly to what is below the heading "Information required for the start of the two-year period" (see pages 22/23 of the December draft):
This part, including the proposed additions to points 7.6 a vii and viii, should be deleted, and discussion of this should be postponed to the next round of revisions of the CoC or perhaps better to the discussion of potential amendments of the AC.
The legal consequences of breaches of the undertaking referred to in current point 7.6 a vii will need to be thoroughly reviewed and discussed. The "joint agreement" of CAs suggested in the proposed amended point 7.6 a vii raises the same issues as prior proposals concerning agreement on denial of access, such as what the legal basis for such agreement would be and how this relates to procedures under domestic law (including the possibilities to have CA decisions affecting access to MAP reviewed by domestic courts).

Spain

Following your request, Spain has gone through all its scrutiny reservations and the scrutiny reservations that are reflected in the Draft Report can be lifted. However, during the October meeting, and this is included in the minutes, Spain put forward other two scrutiny reservations on the following recommendations:

Point 1.1: Recommendation on paragraph 5, referred to the expression “similar situations” Such a reservation can also be lifted

Point 2.4: Implication of the new article 7 of the OECD MTC (2010)

As it has been raised during last meetings, Spain does not share the view of recommendation drafted in paragraph 16. Article 4 (2) of the Arbitration Convention should be interpreted according to bilateral Treaties between Member States. If there is no treaty, several circumstances have to be taken into consideration. The main one would be the common tax treaty policy of the Member States involved in the case, which might not be explicitly reflected by means of a reservation to Article 7 of the OECD Model Tax Convention.

Not all EU Member States tax treaty negotiators are including the new version of Article 7 in their new Tax Treaties; other Member States may include this new Article just in some cases. It could be inconsistent for competent authorities of these States to solve a case of attribution of profits to a permanent establishment according to principles that are not part of their tax treaty negotiation policy.

Furthermore, if there is no bilateral treaty, a solution according to the most recent version of Article 7 of the Model Convention will lead to a high degree of uncertainty for the taxpayers because domestic rules for attribution of profits might be different, even incompatible, from the new Article 7 of the OECD Model Convention. Taxpayers would be bound by the legal domestic framework in force at the time of filling their tax returns in the State where the permanent establishment is situated and, afterwards, they may see how a case can be solved according to different rules.

Spain is of the opinion that this recommendation implies that a MAP case may be solved taking into account principles not accepted by tax treaties policy makers that may create highly uncertain situations to the taxpayers. If the Final JTPF Report includes a

recommendation in the terms that is actually drafted, Spain will have to include a reservation to make clear its position.

Nevertheless, if you see that there is room to modify the recommendation in order to get a consensus drafting, I am ready to work on it.

France

1.1 Application of the AC in specific cases
§6:

If we agree that it may be important for the parties that have merged to get a relief of double taxation, the domestic law may limit the possibility of carrying forward losses supported by the entity that have been absorbed.

We would suggest a re-drafting of the last sentence of the recommendation: "Since relief of double taxation is generally still important for the parties then involved, the case should be handled under the AC unless the domestic law prevents the elimination of double taxation".

2.4 Implication of the new article 7 OECD MTC

§16

In our view, if there is a DTC between two MS then they are bound by the article 7 of such convention and article 4 §2 of the Arbitration convention would have the same meaning as the article 7 of the bilateral treaty.

If there is no DTC between two MS then the meaning of the article 4 is to be clarified by the competent authorities of both MS. Amongst other elements, they would take into consideration the article 7 of OECD MTC. But not necessary the 2010 version and its whole commentary.

In our view, the point 6 should mention that the article 7 OECD MTC and its commentary are of great assistance in the application and interpretation of the article 4 of Arbitration convention.

If the proposed recommendation of §16 were strongly supported by other MS, we would suggest to use a drafting inspired by §33 of the introduction to the OECD MTC ("existing conventions should, *as far as possible,* be interpreted *in the spirit of* the revised Commentaries") but not something as strong as the current proposal.

Like Spain and Italy, France invites thus the Secretariat to propose a new drafting of this recommendation.

2.11 Guidance on position papers

§25: France considers that the Code of conduct should not introduce rigid rules for the exchanges between competent authorities. It might be useful that the CoC contains some principles for an efficient communication between CA but an excess of details would create an unnecessary burden of work for CA.

2.13 Serious penalties

§29: France made a declaration when signing the Convention to clarify the meaning of "serious penalties" ("The term 'serious penalties' includes criminal penalties and tax penalties such as penalties for failure to make a tax return after receiving a summons, for lack of good faith, for fraudulent practices, for opposition to tax inspection, for secret payments or distribution, or for abuse of rights. ").

Its practice since 1995 proves that France hasn't made an extensive use of this provision!

We wouldn't thus agree with a recommendation not recognising the right of Member States to deny access to the AC in the case of opposition to tax inspection, secret payments or distribution, or abuse of rights.

2.14 Improving the 2nd phase

§35:

The first sentence ("the advisory commission may request MS (...) to appear before the advisory commission") seems odd when considering article 9§1 ("the advisory commission referred to in Article 7 (1) shall consist of, in addition to its Chairman

two representatives of each competent authority concerned; this number may be reduced to one by agreement between the competent authorities...").

How a MS may be requested to appear before an advisory commission of which it is already a member?

We would thus suggest to delete this sentence.

2.16 Other issues

new point 7.1 (h): we support this recommendation.

addition to point 7.6 (a) (viii), comment on the last sentence of the recommendation ("A competent authority should....") : France considers that the Code of conduct should not introduce rigid rules for the exchanges between competent authorities. It might be useful that the CoC contains some principles for an efficient communication between CA but an excess of details creates an unnecessary burden of work for CA.

Concluding remark

§44 France believes that the EU JTPF should contribute to the objectives of the BEPS plan without competing with the OECD.

We suggest thus to have a careful approach of the future work (as it is done for the work on multilateral MAP, see §20). We think that it is premature to list the possible changes of the AC itself and would suggest to postpone this discussion to the end of 2015, after the delivery of BEPS plan, notably on action 14. In our view, paragraph 44 should thus be deleted.

Annex 2

A general English translation might be sufficient ("the date of receipt of the first tax assessment notice or equivalent") since the annex 2 will contain the exact wording in French.

Italy

Remedies against denial of access to the AC

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".

During the JTPF meeting last October, I had informed that Italy would most probably present a note to be inserted in a footnote, in order to better clarify the situation in Italy and not create unfounded expectations about the possibility, not provided for in the Italian legislation, that in the future the notes of the Competent Authority may be challenged. All above-mentioned, for the time being **Italy wishes to keep the scrutiny reservation.**

JTPF recommendation (addition to point 7.3 e) CoC

"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." **Italy can lift the scrutiny reservation**.

Independence of CA from audit

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 AC, not to seek to uphold all adjustments proposed by the tax authorities of its Member State".

In the October meeting, Italy expressed a final reservation on this recommendation. However, due to a recent law introduced at the end of 2014, **I am glad to inform that Italy can now cancel its final reservation.**

Implications of the new article 7 (OECD Model).

JTPF recommendation (new point 6 b) in CoC)

Italy has bilateral tax treaties with all EU countries. Taking this into consideration, the most important part of the recommendation for us is the following one *"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"* which we agree with.

The other part of the recommendation *("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)* is not directly relevant for Italy. According to this, we did not make scrutiny reservation on this recommendation. Nonetheless, the concerns raised by Spain seem to be correct. I think that a consensus drafting would be welcome.

Serious penalty

JTPF recommendation (amended point 8 in CoC)

The proposal made by Mr Alan McLean to replace the current text of the Code of Conduct *"…MSs are recommended to clarify or revise their unilateral declarations in the Annex to the Arbitration Convention in order to better reflect that a serious penalty should only be applied in exceptional cases like fraud"* with the following text: *"…Member States are recommended to deny access to the AC when serious penalty are applied only in exceptional cases like fraud"* was approved during the October meeting. The agreed text has the advantage of not insisting - as the current text of the code of conduct - on the amendment of the unilateral declarations by the States, although pursuing the same result.

The quoted text, however, was expanded by the following sentence*: "Exceptional cases like fraud include tax fraud, willful default and gross negligence,"* which actually contains significant new elements compared to the current text of the code of conduct.

According to Italy, the term *fraud* certainly cannot include *gross negligence*. Thus the above sentence *("Exceptional cases like fraud includes tax fraud, willful default and gross negligence")* already contains in itself important inaccuracies. Furthermore, the inclusion of *gross negligence* in the cases where it is possible to suspend the access to the Arbitration Convention (see Article 8, serious penalties) will achieve the result, not intended in Article 8, that a large number of requests would be denied access to the MAP under the Arbitration Convention. As opposed to the fraud that can be found in very rare cases, *gross negligence* on the part of businesses may well occur in transfer pricing cases.

In consideration of the above, **we would like to propose to the Forum the elimination of the entire sentence ("Exceptional cases ...)**, so as to leave the paragraph substantially equal to the current code of conduct. We are confident that this proposal can meet the consensus of Forum Members. On the other hand, the alternative proposal to keep the sentence and delete the word *"gross negligence"*, explicitly excluding gross negligence from the cases provided for denying access to the mutual agreement procedure under the Arbitration Convention, could be not acceptable for some member countries.

Tax collection and interest charges

JTPF recommendation (improved language of point 10 in CoC)

With reference to the existence of different approaches to interest charges and refunds during the time needed to complete the mutual agreement procedure, the present text of the Code of Conduct recommends to Member States 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)".

According to the existing text Member States may choose among the three above-mentioned different approaches, while the Final Draft proposes to add the following sentence to the current wording: *"When, nevertheless, asymmetry results, MS should seek to eliminate any resulting asymmetry in the MAP process where possible."* Considering that several delegations requested more time to reflect on this issue (which was addressed at the close of the meeting), the topic will be resumed in March. In any case, we can anticipate that Italy intends to request the deletion of this sentence. Actually, it is not clear why what is ultimately already included in the third approach should be provided for all countries.

With reference to Annex 3 to the Final Draft and to the information about the implementation of the recommendation by Member States, Italy sent an e-mail on the 22nd of October 2014. We take this opportunity to confirm that Italy applies the second approach. In accordance with our domestic legislation, at the end of a MAP procedure, the Italian Tax Administration reimburses the interest incurred on the amount of taxes to be refunded to taxpayers and, consistently, claims interests on the amount of taxes to be collected from taxpayers. The calculation of the amount of interests to be reimbursed or to be collected has to follow internal rules.

III. Concluding remarks

The Final Report proposes a list of possible changes to the Arbitration Convention and, among these, the widening of its scope to tax cases concerning the existence of a permanent establishment. Italy would like to express a negative opinion about this proposal.

* * *

With reference to Annex 2 and the Italian footnote, could you please insert the word "always" between the word "not" and the word "apply". The new text will read: "The definition does not always apply to requests according to Article 25 (1) of the OECD Model Tax Convention, as the relevant "action" triggering the starting point of the three-year period could be other than a transfer pricing adjustment."

With reference to Annex 3, I sent you an e-mail on the 22nd of October 2014 (Italy's contribution to the discussion on document JTPF/004/REV1/2014). If it can be helpful for you, here the text is:

<u>Tax collection and interest charges</u>

Member States are asked to submit information on how the recommendations in point 8 (a) CoC (suspension of tax collection) and 8 (b) CoC (interest charges during MAP) were implemented.

As far as it regards the suspension of tax collection during a MAPAC, the Italian law n.99 of 22 March 1993, which ratified the Arbitration Convention, already provided for the suspension of the collection or of the execution proceedings to international disputes started in accordance with the Arbitration Convention.

With reference to interest charges during MAP, Italy applies the approach described in point 8 b ii of the Revised Code of Conduct: interest is charged on unpaid tax and interest is included in repayments.

Netherlands

The EU JTPF is currently working on a report on Improving the Functioning of the Arbitration Convention. The results will be implemented in an updated version of the code of conduct to the AC. We would like to inform you that the Netherlands wants to lift its reservation to thin cap paragraph in the code of conduct to the AC. You are, therefore, kindly requested to exclude the NL thin cap reservation when the new updated version of the code of conduct is prepared. Please confirm that this change will be made into the new updated code of conduct to the AC.

Austria

Input from AUSTRIA regarding ANNEX 3 of the Code of Conduct (Tax collection and interest charges during cross-border dispute resolution procedures)

Tax collection during cross-border dispute resolution procedures:

In Austria requests to suspend collection of tax can be made in the course of a mutual agreement procedure if an appeal has been filed. Depending on the case, a suspension of tax collection may be available upon request if the amount of the tax is directly or indirectly dependent on the outcome of an appeal filed by the taxpayer (section 212a BAO). Suspension of tax is not granted if it seems to be less likely that the appeal will be successful, or the appeal challenges a decree as to matters that do not deviate from a submission of the taxpayer, or the conduct of the taxpayer aims at endangering the collection of the tax.

Alternatively, irrespective of whether an appeal has been filed, unilateral relief may be available in order to avoid international double taxation or for reciprocal treatment (section 48 BAO).

In addition, in certain cases taxes due can be deferred (section 212 BAO).

Interest during cross-border dispute resolution procedures:

Under current Austrian legislation, interest on taxes for which collection is suspended in an appeal procedure is charged at the normal rate of 2% added to the base interest rate of the European Central Bank, to the extent the tax assessment is not eliminated in the domestic appeal or in a MAP (section 205 BAO). Correspondingly, if an amount of tax that has already been paid is reduced at a later point in time as a consequence of an appeal, the taxpayer may request the payment of interest in the amount of 2% above the base interest rate for the time between payment of the tax and announcement of the decree reducing the amount of tax (section 205a BAO).

If taxes due are deferred (section 212 BAO), interest at the rate of 4.5% added to the base interest rate of the European Central Bank may be charged for deferred payment of taxes.

Poland

Poland wishes to make some comments regarding draft Final Report and make final reservations to proposed amendments to revised Code of Conduct.

I. 1.1 Application of the AC in specific cases; b) Application of the AC in case of changes in the status of the taxpayer/entity subject to double taxation

Poland is aware of the fact 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, nevertheless due to Polish tax legislation it will be not possible to handle the MAP in case of the entities or enterprises involved may have dissolved. According to Polish tax legislation in such case there will be no taxpayer and consequently any overpayment of tax cannot be refunded so reached agreement could not be enforced.

Thus, Poland would like to make reservation to JTPF recommendation (new sub point to point 1 in CoC):

Poland shall not apply the mutual agreement procedure under the Arbitration Convention in case of liquidation of the entities or enterprises involved or in any case when according to Polish tax legislation no eligible taxpayer is involved.

II. 1.3 Access to the AC and remedies against denial of access

Poland would like to notice that most of Member States do not have domestic legal remedies for determining whether the denial of access to the Arbitration Convention by their administrative bodies is justified, including Poland.

Thus, Poland would like to make reservation to JTPF recommendation (new point 5 in CoC):

Poland considers MAP as not formalized procedure to which Polish tax procedural legislation do not apply and as such there is no possibility to provide legal remedies for determining whether the denial of access to the Arbitration Convention by its administrative bodies is justified.

III. 2.14. Improving the “second phase” of the Arbitration Convention; e) Follow-up to advisory commissions’ opinions

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 agreement, they shall be obliged to act in accordance with that opinion.

Thus, Poland would like to make reservation:

Poland is of opinion, that if enterprise involved do not withdraw a request for MAP before advisory commission deliver its opinion, the competent authorities shall be obliged to act in accordance with that opinion unless they take a decision which deviates from the advisory commission's opinion but will eliminate the double taxation within six months of the date on which the advisory commission delivered its opinion.

IV. Note from the Secretariat:

One MS is of the opinion that applying the AC to establish the existence of a permanent establishment should not be considered. For them, 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.

Do you share this view?

In our understanding the issue is in fact addressed in the recommendation of the JTPF - a new paragraph 2 in CoC, i.e. existence of the PE must be decided in advance based on the MAP DTA.

Romania

ANNEX 2

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

EN: *„There is no specific provision embedded in the national legislation regarding the starting point of the 3 years period in the sense of art. 6 (1) of the Arbitration Convention. From the point of view of the Competent Authority, the following rule applies: the starting point of the 3 years period in the meaning of art. 6 (1) of the Arbitration Convention is the*

date of the communication, by the tax authorities of the final tax assessment (if it includes the transfer pricing adjustments)".

RO: „Nu există o prevedere specifică încorporată în legislația națională cu privire la momentul de începere a termenului de 3 ani în sensul art. 6 (1) din Convenția de arbitraj. Din punctul de vedere al Autorității Competente, se aplică următoarea regulă: data de începere a termenului de 3 ani în sensul art. 6 (1) din Convenția de arbitraj este data comunicării deciziei finale de impunere de către autoritățile fiscale (în cazul în care aceasta include ajustările preţurilor de transfer)"

ANNEX 3

Tax collection and interest charges during cross border dispute resolution procedures (point 10 Code of Conduct)

EN: *„Under the Romanian tax legislation there is no provision allowing suspension of the tax collection until a MAP is concluded. However, in general suspension of tax collection is possible where a judicial appeal has been initiated by the taxpayer".*

RO: „Legislaţia fiscală din România nu include prevederi care să permită suspendarea colectării taxelor şi impozitelor până la finalizarea unei proceduri amiabile. Totuşi, în general, suspendarea colectării taxelor şi impozitelor este posibilă în cazul iniţierii unei acţiuni în instanţă de către contribuabil."

Finland

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- page 8: *2.10. The three-year period:* **Finland would like to lift its scrutiny reservation**
- page 13: *2.14. Improving the "second phase" of the Arbitration Convention - b) Opening statement by the enterprise and auditor(s):* **Finland would like to lift its scrutiny reservation**
- page 15: *2.16. Other issues JTPF recommendation (new point 7.1 (h) CoC):* **Finland would suggest the following wording (or wording of similar nature):**

"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. (DELETE: In 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) ADD: 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 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."

Slovenia

ANNEX 3

Please find below information requested by your e-mail dated 3 July 2014 and 18 December 2014 on the section 2.15 of the draft Report JTPF/004/FINAL/2014/EN regarding how the recommendations of point 8 (a) CoC (suspension of tax collection) and 8 (b) CoC (interest charges during MAP) are implemented in a Member State (Annex 3).

In Slovenia the provisions relating to the tax collection and interest charges are governed in the Tax Procedure Act. According to those provisions tax is collected and interest is charged notwithstanding the type of remedy used (that is domestic appeal (litigation procedure) or dispute resolution procedure under the EU Arbitration Convention or Bilateral Tax Treaty). If the outcome of the remedy used is favourable to the taxpayer, the taxpayer is being reimbursed for the tax collected with interest.

Sweden

New point 5 in CoC
Regarding the new point 5 in the Revised Code of Conduct for the effective implementation of the Arbitration Convention (CoC), Sweden would like to keep the reservation.

New point 6b in CoC
We share the view of other member states that it might be valuable to try to further elaborate on this issue in order to try to find a consensus approach.

United Kingdom

The UK made a scrutiny reservation on part e) of section 2.14 because there are some complex issues in this area we needed to think about.

In the UK the Competent Authority can derogate from a Court decision. However in practice taxpayers would suspend their domestic appeal whilst MAP was ongoing. This means that a taxpayer may still have an open appeal following arbitration and elimination of double taxation. Generally we would not expect the taxpayer to want to pursue this appeal but theoretically they could and this would be a real concern for us and, no doubt, our treaty partners.

Current paragraph 39 of the draft paper appears to simply restate the effect of Article 7 without adding any clarification of its meaning which, if so, seems to make it superfluous. Paragraph 40 recognises that States may need to take action to prevent inconsistencies in practice but seems to suggest that the fault is with the domestic law of some Member States, implying that should be changed, rather than with the very odd and unclear drafting of Article 7 of the Convention itself.

Article 7(3) is not relevant to the UK, nor I understand Germany, because our Competent Authorities can derogate from the Court decision. It appears to us that the literal meaning of Article 7 (1) and (2) taken together in this situation is that a domestic appeal can be made or pursued following submission to the advisory commission, i.e. that cases can be submitted to an arbitration hearing before the domestic appeal is heard, but that only late appeals would end up at the advisory commission (because otherwise the 2 year time limit for arbitration would not have expired). Article 7(5) adds to the confusion by arguably implying that the provisions of Article 7 do not actually need to be applied!

In practice however we would look to list cases for the advisory commission once the substantive MAP process had been going on for 2 years (even though it might be argued that we were strictly not required to by the AC). We therefore would like the Revised Code of Conduct to state that part of the good faith conduct expected from taxpayers under the EU Arbitration Convention is that they will commit not to pursue domestic appeals following elimination of double taxation relating to the same issue. This is probably best done via the undertaking required from the taxpayer at point 7.6 (a) (vii) of the new CoC mentioned in section 2.16 of the draft.

So, in short, we would like to amend Paragraphs 39 and 40.

The German written comments made before the October meeting indicate that their practice is to work on the basis that the second paragraph of Article 7(1) applies only where a case has been submitted to a court or tribunal. We would support that interpretation as a reasonable one and, as Germany say, this would be to the advantage of taxpayers. To take the other literal interpretation, rather than following the spirit of the AC, would appear to reduce the value of the EU Arbitration Convention and worsen dispute resolution within the EU at a time when the OECD is asking us to remove obstacles. I have cc'd our German colleagues in the interests of finding out their current thinking here and whether they have suggested wording that we can agree with them beforehand.

Although we have made this point before we would like to respectfuly reiterate that the functioning of the EU Arbitration Convention is a key issue for the EUJTPF and we would strongly favour spending longer on this paper to ensure that it is as comprehensive and useful as possible. We assume that most of the delegates will remain the same when the mandate is renewed and it does not appear critical to us to finalise the paper at the next meeting. We also, in the background, have the work of the OECD/G20 on dispute resolution and it may be sensible to reflect on that before a new Code of Conduct is issued. If however there is no option other than to finalise the paper in March we will endeavour to use the time before that meeting to do further work and correspond with other members of the Forum on key issues.

Finally given the concerns about the deficiencies of the wording of the Arbitration Convention it may be useful to cover in the EUJTPF what the process of changing that Convention may be.