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EU JOINT TRANSFER PRICING FORUM

SECRETARIAT DISCUSSION PAPER ON THE RE-ENTRY INTO FORCE OF THE ARBITRATION CONVENTION

Meeting of Thursday 16 September 2004

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Working document

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Please note: This paper concerns only existing parties to the Arbitration Convention

1. INTRODUCTION AND LEGAL CONTEXT

1. The Protocol on the extension of the Arbitration Convention (the "Prolongation Protocol") has now been ratified by all Member States.
2. Article 3.1 of the Protocol stipulates that this instrument shall enter into force on the first day of the third month following the deposit of the instrument of ratification, acceptance or approval by the last Signatory State to take this step. The last Signatory State deposited its instrument of ratification on 4 August 2004. The Arbitration Convention will, therefore, re-enter into force on 1 November 2004.
3. The Protocol further provides in its Article 3.2 that it shall take effect as from 1 January 2000, which means that the Arbitration Convention shall be applied retroactively from 1 January 2000.
4. Article 3.3 of the Protocol specifies that the period beginning on 1 January 2000 and ending on the date of entry into force of the Protocol (i.e. 1 November 2004) shall not be taken into account in determining whether a case has been presented within the time specified in Article 6.1 of the Arbitration Convention (i.e. in calculating the three year period for submitting a case, the period 1 January 2000 to 1 November 2004 will not be taken into account).

2. PROCEEDINGS DURING THE INTERIM PERIOD (1ST JANUARY 2000 TO 31 OCTOBER 2004) WHEN NOT ALL CONTRACTING STATES HAD RATIFIED THE PROLONGATION PROTOCOL

5. The JTPF examined already in 2002 and 2003 the different practical situations and problems which can occur during the interim period and the possible consequences on the implementation of the Arbitration Convention when it re-enters into force. The discussions in the Forum on the issue of proceedings during the interim period showed that all Member States took the position to initiate a MAP either under the rules of the Arbitration Convention (if the other Member State agreed) or under the double tax treaty with the other Member State. Member States' positions are reflected in Annex 1 to the Forum's first report (see attachment).
6. The discussion also showed that the majority of Members supports the idea that time spent on a MAP under a double tax treaty should be subtracted from the two-year period foreseen in Article 7.1 of the Arbitration Convention once the competent authorities initiate or continue the MAP under the Arbitration Convention.
7. The overall conclusion was that although the JTPF found it useful to clarify the approaches of the different national tax authorities during the interim period, considering the transitional nature and the limited impact of the interim period, no proposals or recommendations having regard to this period should be issued.

3. CONSEQUENCES ON THE IMPLEMENTATION OF THE ARBITRATION CONVENTION WHEN IT RE-ENTERS INTO FORCE

8. The interim period will end on 1 November 2004. This imminent event requires Member States to know how to proceed from this date with pending cases, i.e. requests to invoke the Arbitration Convention that were filed during the interim period. In addition, considering that Article 3.3 of the Prolongation Protocol provides for the suspension of the three-year application period (deadline for submitting the request according to Article 6.1 of the Convention) from 1 January 2000 to 1 November 2004, taxpayers may still for some time present cases to competent authorities where the starting point of the three-year period dates back after 1 January 1997. In other words, taxpayers may still file requests where the first tax assessment notice or equivalent which results, or is likely to result, in double taxation dates back to 1997 and any subsequent years.
9. For taxpayers it is of paramount importance for their legal certainty to know how Member States will proceed as regards the implementation of the Arbitration Convention from 1 November 2004.

Question 1: *Does the Forum recognize the need to provide guidance and develop, where possible, a common approach on the issues mentioned above?*

3.1 Procedure in cases where a request has been made by a taxpayer from 1 January 2000 to 31 October 2004

10. Paragraph 2.1.2 of the Forum's first report states that there is consensus among Member States that a taxpayer's request to invoke the Arbitration Convention is in principle valid under the Prolongation Protocol. It further states that this means that an enterprise may present a case to a competent authority but that in practice there is no time limit for the MAP nor for initiating the arbitration phase. However, the Forum concluded that in any case tax administrations would apply the Convention including the arbitration phase once the Convention re-enters into force.
11. *Germany, Greece, Ireland, Luxembourg, the Netherlands, Spain and the United Kingdom* indicated that they would accept a taxpayer's request and continue the MAP under the Arbitration Convention (first phase) if the other Member State agrees. So far, no case presented by a taxpayer during the interim period has been submitted to arbitration.

12. **In these cases, and in line with the provisions of the Protocol, the arbitration procedure (the second phase of the Convention) should be initiated as follows (unless the two-year time limit has been extended according to Article 7.4 of the Convention):**

- For cases where the mutual agreement procedure was initiated more than two years before 1 November 2004: as soon as the Protocol enters into force, i.e. on 1 November 2004

- For cases where the mutual agreement procedure was initiated less than two years before 1 November 2004: two years after the commencement of the mutual agreement procedure

13. *Austria, Belgium, Denmark, Finland, France, Italy, Portugal and Sweden* indicated that they would accept a taxpayer's request but continue the MAP under the double tax treaty with the other Member State (*Austria, Denmark and Italy* only if specifically requested by the taxpayer). Those Member States consider the Arbitration Convention suspended and only taken up once it re-enters into force.

14. Cases presented to those Member States have to be dealt with under the Arbitration Convention once the Prolongation Protocol enters into force. It follows that for those cases the two-year period provided for in Article 7.1 of the Convention starts on 1 November 2004. Members from business have argued that tax administrations should not be given more than a total of two years for the MAP, especially considering that the negotiators most probably were the same persons.

Question 2: *Do those Member States agree that the time spent on a MAP under a double tax treaty should be subtracted from the two-year period foreseen in Article 7.1 of the Convention which starts when the Prolongation Protocol enters into force on 1 November 2004?*

Question 3: *If yes, do those Member States agree that the arbitration procedure (the second phase of the Convention) should be initiated as indicated under paragraph 12 ?*

3.2 Procedure in cases where a request is made by a taxpayer after 1 November 2004.

15. **In line with the provisions of the Protocol, where a three-year application period was suspended on 1 January 2000 it will restart on 1 November 2004 and continue until a full period of three years has been completed.**

Example:

Following a tax audit in 1996 of tax year 1994 a transfer pricing adjustment is made. The date of the tax re-assessment notice containing the transfer pricing adjustment, which results, or is likely to result in double taxation, is 30 June 1997. The three-year application period provided for in Article 6.1 of the Convention starts on 1 July 1997 and is suspended from 1 January 2000 to 1 November 2004 (see Article 3.3 of the Prolongation Protocol). The application period, with 6 remaining months, restarts on 1 November 2004 and ends on 30 April 2005. The taxpayer can, therefore, present its case concerning tax year 1994 to a competent authority until 30 April 2005.

16. For cases where the first notification of the action which results or is likely to result in double taxation within the meaning of Article 1 of the Convention is made after 1 January 2000 the three-year application period starts on 1 November 2004 and ends on 31 October 2007.

4. ESTABLISHMENT OF THE ADVISORY COMMISSION

17. As observed in paragraph 2.4 of the JTPF's first report to the Commission, and according to information provided by the Council's Secretariat General, five Contracting States (Greece, Finland, Ireland, Portugal and Sweden) have so far not nominated their independent persons of standing, eligible to become a Member of the advisory commission as referred to in Article 7 (1) of the Convention. Other Contracting States' nomination lists date from shortly after the adoption of the Convention in 1990 which puts into question their current value.

18. Consequently the draft Code of conduct recommends that Contracting States commit themselves to inform without any further delay the Secretary General of the Council of the European Union of the names of the five independent persons of standing, eligible to become a Member of the advisory commission and inform, under the same conditions, of any alteration of the list.

19. Considering the procedural consequences of the re-entry into force of the Arbitration Convention as mentioned under 3.1, and the need to establish advisory commissions already from November 2004 onwards, Contracting States are urged to comply with the aforementioned recommendations of the Code and designate their independent persons of standing or update their list.

ANNEX I: MEMBER STATES' POSITION DURING THE INTERIM PERIOD

| ANNEX I | | | | |
|--|---------------------------------------|--|--|---|
| Member States' positions during the interim period (request filed after 1 January 2000) | | | | |
| Arbitration Convention | | | | |
| Mutual Agreement Procedure (first phase) | | Arbitration Procedure (second phase) | | |
| Accept request and continue under AC if other MS agrees | Accept request but continue under DTA | AC suspended so only taken up when it re-enters into force | Continue procedure if other MS agrees ** | |
| Austria | X* | X | | |
| Belgium | X | X | | |
| Denmark | X* | X | | |
| Finland | X | X | | |
| France | X | X | | |
| Germany | X | | | X |
| Greece | X | | | X |
| Ireland | X | | | X |
| Italy | X* | X | | |
| Luxembourg | X | | | X |
| Netherlands | X | | | X |
| Portugal | X | X | | |
| Spain | X | | | X |
| Sweden | X | X | | |
| UK | X | | | X |
| * Only if specifically requested by the taxpayer | | | | |
| ** If the other Member State does not agree, those Member States will - with the taxpayer's consent - continue the MAP under the double taxation agreement with the other Member State | | | | |