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EU JOINT TRANSFER PRICING FORUM

Revised Compilation of comments on the Draft Report on Improving the Functioning of the Arbitration Convention (JTPF/004/2014/EN) following the JTPF meeting on 26 June

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I. Member States

Cyprus

Section 2.15 of the Draft Report: The Code of Conduct (2006/C 176/02) and the Revised Code of Conduct (2009/C 322/01), and the suspension of tax collection, have been implemented in Cyprus by Administrative Regulatory Act No. 87 / 2007 (Official Gazette No.4176, 23.2.2007) and Administrative Regulatory Act No. 463 / 2010 (Official Gazette No.4460, 19.11.2010) respectively. Copies in Greek may be accessed through the Tax Department Website through the following links

http://www.mof.gov.cy/mof/ird/ird.nsf/All/F91DCA251742B13EC2257688004577E5/$file/2007%20087%20kdp%20inc%20tax.pdf
http://www.mof.gov.cy/mof/ird/ird.nsf/All/3C06F257383E078BC22577F40024BA22/$file/2010%20463.pdf
Both the above Administrative Regulatory Acts provide for interpretation of the Arbitration Convention in accordance with the provisions of the respective Codes of Conduct and for suspension of tax collection during dispute resolution procedures under the Arbitration Convention. There is no provision in the Cyprus tax legislation for the interest on unpaid taxes to be waived in case of a Mutual Agreement Procedure(MAP). Normal rules apply in case of interest on unpaid tax and interest on repayment of tax as a result of an adjustment in a MAP, in the same way as for other adjustments.

Bulgaria

Section 2.15

8a)

In Bulgaria tax should be paid within 14 days from the delivery of the tax assessment act. The initiation of a domestic appeals or litigation procedure is not a reason to suspend the collection of tax as prescribed by the Tax and Social Insurance Procedure Code. Similarly, there is no legal basis in place providing for a suspension of tax collection in the cases of applications made under the EU AC. Consequently there is no different treatment between the enterprises engaged in cross-border dispute resolution procedures and those engaged in domestic disputes.

However the taxpayers may request suspension of tax collection from the administrative body of appeals or the court, as the case may be, only as regards that part of the tax liability which is disputed. The tax collection may be suspended if the taxpayer provides collateral in the amount of the tax at stake and the interest accrued.

8b)

No special rules exist for charging interest on unpaid tax when a case has been brought for consideration in a MAP under the EU AC. In Bulgaria interest is charged on unpaid tax. In the cases of repayment of taxes interest is charged and paid only if the tax has been collected on the basis of a tax assessment notice or equivalent act issued by the revenue administration. This rule equally applies to all types of tax adjustments.

Denmark

Re suspension of tax collection and interest charges during MAP:
In Denmark it is possible to suspend the tax collection during dispute resolution procedures under the AC. The terms for suspension are similar to the terms for suspension in case of a complaint to the National Tax Tribunal.

We have no specific provision dealing with interest on unpaid tax in relation to a suspension of the tax collection during dispute resolution procedures under the AC. As in other situations where the tax collection is suspended interest is charged on unpaid tax and interest is included in repayments.
We find the questions – in relation to the documentation required for initiating and conducting a MAP - posed by the UK interesting. However, we expect that the questions will require some time to discuss between the MS. Therefore, we are not prepared to discuss them at the next meeting if the aim is to finish the report in 2014. In our opinion it would be better to discuss them as part of the next mandate.

Finland

Please find below the Finnish comments on the remaining part of the draft report on Improving the Functioning the Arbitration Convention (Sections 2.14, 2.15 and Chapter III) as requested:

- Regarding the proposed CoC 9.3(h); we would be in favor of deleting the whole proposed CoC 9.3(h).
- Regarding the proposed amendment to CoC 9.3(d); we would be in favor of deleting the whole proposed sentence at the end of CoC 9.3(d).

Please also find the Finnish information on implementation of issues in section 2.15 of the draft report i.e. 8 (a) CoC (suspension of tax collection) and 8 (b) CoC (interest charges during dispute resolution):

- Tax collection cannot be deferred during dispute resolution under AC in Finland.
- Interests charges and refunds depend on the applicable article of the domestic legislation.

France

In relation to section 2.10 of the draft report, and more particularly to its Annex 2, the implementation of the definition of "first notification" of Article 6(1) of the AC in French domestic law should be updated as follows (due to a change in terminology ; it is therefore not a change in substance) :
- la date de réception de la ~~notification de redressement~~proposition de rectification en cas de procédure de redressement contradictoire ;
- la date de réception de la notification des bases ou éléments d'imposition en cas de procédure d'office.

Germany

I would like

- to lift the German reservation on 1.2.. There is no need for a German footnote.
- to suggest to change the recommendation 1.3. (new point 5 in CoC) as follows: "Member States should exchange their views on whether the denial of access to the AC is justified."
- to suggest to add "at latest" ("Additionally the new first sentence … on the rights under the AC at latest at the time of first notification … .") in para 2.1. of the Summary Record.
- to confirm the scrutiny reservation on 2.3.. This topic is still under discussion between the German Federal Ministry of Finance and the German Länder. At the meeting in October, Mr. Naumann will hopefully be able to report on the outcome of the discussion.
- to lift the German scrunity reservation on 2.10.
- to submit our comments on 2.14 ff:

German comments on 2.14 ff. of the Draft Report on Improving the Functioning of the Arbitration Convention (DOC: JTPF/004/2014/EN of June 2014)

On 2.14 - Improving the "second phase" of the Arbitration Convention:

a) Composition and functioning of advisory commissions

The German administration representatives believe that the advisory commission concept laid down in the Arbitration Convention is that the commission should be composed of both competent authority representatives and independent person. Suggesting separate meetings of the independent persons would be contrary to what was intended in the Convention.
The "compromise" suggestion in para. 26 of the Draft, and the draft recommendation under para. 26, should consequently be dropped.

With respect to the highlighted "Note from the Secretariat" under para. 26, the same concerns apply: Art. 7 para. 1 of the Arbitration Convention requires that an advisory commission be "set up", i.e. it requires that an individual advisory commission be established for the individual case. The drafters of the Convention deliberately decided against a standing arbitration committee. Consequently, the idea of forwarding more than one case to the same advisory commission should not be further pursued.
Besides, the increased potential of finding that Art. 9 para. 3 applies to one or more of the independent person candidates (persons on the list who are or were adviser to one or each of the associated enterprises, or who are associated with a firm that advised or currently advises one of the enterprises and who therefore may not offer a sufficient guarantee of objectivity) speaks against the thought.

b), c) and d) no comments

e) Follow-up to advisory commissions' opinions

Para. 32 of the Draft states that Art 7(1) of the AC would block the expiration of the 2-year period when domestic remedies have been initiated by the enterprise. The current understanding of the German administration is that Art. 7(1), second sentence, which determines the starting point of the 2-year-period in cases of domestic remedies, applies only where a case has been submitted to a court or tribunal. Under current German practice, the second sentence of Art. 7(1) is not applied in cases of domestic administrative appeals (under German legislation, taxpayers generally have to go through administrative appeals first before they can go to court). Consequently, the current German view is that it is possible to have an advisory commission decision and at the same time a pending domestic administrative appeal which could potentially later go to court; which is why the current German circular on the Arbitration Convention requires that an advisory commission decision is implemented only if the domestic appeal is withdrawn.
Current German practice is therefore not in agreement with the statement in paras. 31 and 32, and not in agreement with Annex 4.
Adopting the view promoted in para. 32 and Annex 4 would be a disadvantage for taxpayers in comparison to current German practice. It is therefore suggested to more thoroughly discuss how Art. 7(1), second sentence, should be interpreted.

On 2.15 - Tax collection and interest charges:

For the German contribution for the annex with information on how MS have implemented the current recommendation on suspension of tax collection and on interest charges, see separate document.

Regarding the "improved language":
It appears that the suggested change is to say "…ensure that … enterprises… can benefit from suspension" instead of currently "…ensure that the suspension … can be obtained by enterprises".
For the German delegation it is not clear whether, and if how, the suggested amendment would change the meaning, and to what extent it would be an improvement. Amendments for mere style reasons should be avoided in order to avoid speculations on changes of meaning.

I would also like to submit information on how the recommendations in point 8 (a) and (b) of the CoC were implemented:

Tax collection during cross-border dispute resolution procedures

Under current German legislation, suspension of tax collection is possible where a domestic administrative appeal has been filed and (1) where either serious doubts exist as to the legality of the tax assessment being disputed or (2) where collection without awaiting the outcome of the appeal would result for the person affected in unreasonable hardship not required by overriding public interests; suspension may be made dependent upon provision of collateral (so-called "*Aussetzung der Vollziehung*", section 361 para. 2 of the Fiscal Code or *Abgabenordnung*). A similar rule on suspension of collection exists where a tax assessment is appealed against in court (section 69 of the Tax Court Code or *Finanzgerichtsordnung*).

In situations without pending domestic appeal, collection can be deferred where collection at due date would result in considerable hardship for the debtor and the claim does not appear to be endangered by the deferment; such deferment may be granted as a rule only upon

application and provision of collateral (so-called *"Stundung"*, section 222 of the Fiscal Code or *Abgabenordnung*).

The sections referred to are general rules not specifically addressing cross-border dispute situations.
In practice, in most mutual agreement procedure cases involving a German transfer pricing adjustment, the taxpayer also filed a domestic administrative appeal which remains pending during the MAP, and tax collection is suspended in application of the first mentioned rule where the taxpayer requests such suspension. In many of the less frequent MAP cases involving a German adjustment but without pending domestic appeal, deferment under the latter rule is applied.

The local tax offices are in charge of granting suspension or deferment. It has not come to the attention of the Federal Ministry of Finance or the Federal Central Tax Office that there would be cases where both suspension and deferment were rejected in a situation with a pending MAP concerning a German adjustment. The Federal Ministry of Finance therefore currently does not see a necessity for proposing specific legislation addressing suspension of collection in case of pending MAPs.

Interest during cross-border dispute resolution procedures

Under current German legislation, interest on taxes for which collection is suspended or deferred is charged at a rate of 6% p.a., to the extent the tax assessment is not eliminated in the domestic appeal or in the MAP. Interest at the same rate is also charged for the time between the tax year and the adjusted assessment (but starting only 15 months after the tax year, and likewise only to the extent the adjusted assessment is not eliminated in a domestic appeal or MAP). Where tax has been collected and the assessment is later reduced in a domestic appeal or MAP, the taxpayer receives 6% interest on the repayment. This is general legislation not specifically addressing cross-border dispute situations.
In MAP situations, Germany applies the approach described in point 8(b)(iii) of the Revised Code of Conduct, i.e. any disadvantages a taxpayer may have due to different interest approaches in the other country will be considered when attempting to come to a mutual agreement where the taxpayer so requests. Taxpayers should address any potential interest issues in the MAP request and provide the competent authorities with information on the differences in the interest rules that will likely cause a problem.

Croatia

I would like to suggest definition of "gross negligence" as it is defined in Croatian Criminal Law, Article 29:
„The perpetrator acts with advertent negligence when he is aware that he might commit an offense but carelessly assumes that it will not occur, or that he will be able to prevent it from occurring."

I have to notice that English translation is not official, so it is possible that the term "advertent" could be replaced with "gross".

Ireland

Section 2.13
Gross Negligence

While Ireland acknowledges that the request was for a suggested definition of 'gross negligence', the concept of 'gross negligence' does not arise in Irish tax law and we are restricted to the concepts that are particular to this jurisdiction.
For the purposes of tax regulation in Ireland, taxpayer behaviour (in default) is set out in the Code of Conduct (tax authority guidelines) for Revenue Audit as being either (1) deliberate default, (2) careless behaviour with significant consequences or (3) careless behaviour without significant consequences:

- 'Deliberate behaviour' (which is not defined in law and for the purposes of statutory interpretation, would be given its plain or normal meaning) is established as:
    - that the facts of the case are consistent with intent to default, or
    - alternatively, that the taxpayer's actions or omissions were likely to result in a tax default and those actions or omissions cannot be explained solely by carelessness.
- 'Careless behaviour with significant consequences' is established in law as being 'careless behaviour' where the tax underpaid is in excess of 15% of the tax correctly payable.**
- 'Careless behaviour without significant consequences' is established in law as being 'careless behaviour' where the tax underpaid is 15% of the tax correctly payable or below.**

**Note: 'Careless behaviour' is defined[1] in Irish tax law as "…failure to take reasonable care".

Ireland's preference would be to use language consistent with our current regulatory regime and not to introduce a definition of gross negligence. We are concerned that this could necessitate new legislation which could in turn impact other aspects of Irish legislation.
As an alternative, each country could individually specify, either in the website of the EUJFTP
http://ec.europa.eu/taxation_customs/taxation/company_tax/transfer_pricing/forum or in the AC itself what they consider gross negligence to mean.

Section 2.15
Suspension of tax collection – Code of Conduct point 8(a)

Under Irish legislation there is no suspension of tax collection. A taxpayer may not appeal against a Revenue assessment or amended assessment until the return is filed and any tax due paid. The tax payer must pay, at a minimum, the undisputed amount of tax.

In order to avoid an interest charge on the disputed portion of the tax, then they must pay the tax per the Revenue assessment or amended assessment.

(Section 957AH of the Taxes Consolidation Act, 1997 applies for accounting periods starting on or after 1 January 2013, Section 957 of the same act for earlier periods)

[1] Section 1077E of the Taxes Consolidation Act 1997.

Interest charges during MAP – Code of Conduct point 8(b)

Where a refund arises from a MAP concluded under the EU Arbitration Convention, then no interest will be payable until 93 days have elapsed from the making of a valid claim. A valid claim is a claim that contains all the information the Revenue Commissioners may reasonably require to determine if and to what extent a repayment is due.

A claim for correlative relief is not considered to be a valid claim until the amount or quantum of the claim is agreed in writing between the two competent authorities. As such the opportunity to earn interest on any correlative relief is limited to the time period post competent authority agreement.
(Section 865A of the Taxes Consolidation Act, 1997)

Ireland adopts the approach as set out in Section 8 (b)(i) of the Code of Conduct e.g. tax is released for collection and repaid without attracting any interest.

Lithuania

Lithuania would like to take this opportunity in the process of revision of the Code of Conduct for the effective implementation of the Arbitration Convention 2009/ C 322/01 (hereinafter, Code of Conduct) to approach with the request to include reservation on point 1.2 of Code of Conduct („Thin capitalisation“) as indicated below:

Lithuanian‘s reservation:
Lithuania holds the view that only adjustments of interest deductions performed under national legislation based on the arm's length principle fall within the scope of the Arbitration Convention.

Netherlands

The Netherlands has implemented the recommendations on suspension of tax collection and interest charges. See below an unofficial English translation the part of our MAP Decree which deals with these topics.

The State Secretary for Finance has resolved to provide further details of the mutual agreement procedure available under a bilateral tax treaty or the EU Arbitration Convention.

Decree of 29 September 2008, No. IFZ2008/ 248M

"…..

8. Additional consequences of processing request for mutual agreement procedure

8.1 Deferral of tax payment
If the Netherlands is the state causing the double taxation (by, for example, making an adjustment in the income reported by a taxpayer), the Dutch tax administration will, at the taxpayer's request, grant a deferral of payment on that part of the tax charge that relates to the double taxation. It should be noted that in the event of a request for an early mutual agreement procedure, deferral will automatically be granted. In principle, deferral will be granted until both the domestic and the international procedures for resolving the dispute have been completed. The policy in this respect will be based on the policy applying to objections lodged against tax assessments (see Article 25(2) of the Tax Collection Guidelines *(Leidraad Invordering)* 2008). This means that the taxpayer will not suffer any loss of interest other than the obligatory assessment and collection interest (see section 8.2). This resolves the interest and financing problems that can result from mutual agreement and arbitration procedures. In certain exceptional cases, deferral can also be granted if the other state makes an adjustment (see
Article 25(2) referred to above).

8.2 Assessment and collection interest / Penalties
In addition to the actual adjustment or correction discussed in the mutual agreement or arbitration procedures, differences in domestic regulations in respect of the assessment and collection interest charged by states may result in a disproportional increase in the interest payable during the mutual agreement procedure. In some cases, the interest payable may even exceed the amount of the tax. Article 30k of the Dutch State Taxes Act *(Algemene wet inzake rijksbelastingen)* and Article 31a of the Dutch Collection of State Taxes Act *(Invorderingswet)* 1990 allow parties to deviate in certain instances from the provisions in domestic law while they are consulting on a mutual agreement
procedure. During the course of mutual agreement and arbitration procedures the Netherlands' competent authority will seek to align the assessment and collection interest charged to the taxpayer in one state with that payable to the taxpayer in the other state. A protocol to this effect has, for example, been agreed with France. lf a mutual agreement procedure being conducted also covers a penalty that has been imposed, the
policy applied will be in line with Article 25(2)(4) in conjunction with Article 25(2)(3) of the Tax Collection Guidelines 2008.
…."

Spain

Spain supports the NGM and Nick proposal to deal with the documentation item referred to access to Arbitration. This is fundamental issue for both, tax administrations and taxpayers to have a clear view of the information that need to be submitted to the competent authorities in order to a case to be accepted. Although there are still fundamental issues under discussion we made good progress in last meeting and we have two meetings to include this topic in our discussions.

Recommendation 1.1: Application of the AC

As regards the recommendation of point 1.1., we are a bit puzzled. The JTPF started the discussion with the particular problem of the stating date of the 3 year period and I have the impression we are moving to make a list of cases that should or should not have access to Arbitration Convention, which is something different. Spain would propose to come back to the origin of this recommendation

The discussion of cases that should have access to the arbitration convention is a broader and much more difficult issue. Spain is of the opinion that a joint reading of Articles 1 and 4 of the Arbitration Convention leads to the conclusion that only cases that arise into a double taxation situation as a consequence of an arm´s length price adjustment should have access to AC; therefore, it should be no doubt that cases without double taxation, double non taxation or based on domestic law should not have access to the AC.

The purpose of 1.1 recommendation was to clarify the starting point of the three year period, considering the different administrative practices of each country, and we should keep focused on this idea.

Recommendation 2.13: serious penalties

As regards point 2.13, it might be difficult to reach an agreement on a definition of "gross negligence"; however, we might describe **patterns of behavior that should deny access to the Arbitration Convention**, apart from cases punishable under criminal law. I put forward these cases as a starting point for discussion:

- No submission of mandatory statements or tax returns
- Submission of false statements, financial records or false tax returns that have hidden relevant information to the tax administration.
- The use of false or fake documents of any kind.
- The use of straw persons to hide the real transaction or the ownership of assets which set hurdles in the investigation of the actual facts and circumstances
- Uncooperative behaviours during tax audit, such as stumbling block, resistance, unjustifiable delays or any impediments to get a clear view of the facts and circumstances of the transactions of the enterprise

- Artificial arrangements or an artificial series of arrangements which has been put into place for the essential purpose of avoiding taxation, and leads to a tax benefit[1] or an artificial reduction of the tax liability.
- …

As a consequence of these behaviour, the taxpayer pays less tax that he is legally obliged to pay by hiding income or information from tax authorities and in such cases, no access to the Arbitration Convention should be granted.

Recommendation 2.15: Tax collection and interest charges

As regards suspension and interests, Spain has especial law rules in both cases. Suspension of collection is granted automatically on request of the taxpayer, on the same principles required for suspension in case of domestic appeals and there are no accrued interests during the time of the MAP proceedings, according to the JTPF recommendation 8 (b) (i) of the Code of Conduct. I attached to this e mail the drafting of both provisions, with an unofficial translation in English.

Drafting of both provisions:
Disposición Adicional Primera de la Ley del Impuesto sobre la renta de no Residentes

5. Durante la tramitación de los procedimientos amistosos no se devengarán intereses de demora.

6.
1.º En los procedimientos amistosos, el ingreso de la deuda quedará suspendido automáticamente a instancias del interesado cuando se garantice su importe y los recargos que pudieran proceder en el momento de la solicitud de la suspensión, en los términos que reglamentariamente se establezcan.

No se podrá suspender el ingreso de la deuda, de acuerdo con lo previsto en el párrafo anterior, mientras se pueda solicitar la suspensión en vía administrativa o jurisdiccional.

2.º Las garantías admisibles para obtener la suspensión automática a la que se refiere el número anterior serán exclusivamente las siguientes:

a) Depósito de dinero o valores públicos.

b) Aval o fianza de carácter solidario de entidad de crédito o sociedad de garantía recíproca o certificado de seguro de caución.

3.º Si los procedimientos amistosos no se refieren a la totalidad de la deuda, la suspensión prevista en este apartado se limitará al importe afectado por los procedimientos amistosos.

[Unofficial Translation]

[1] Commission Recommendation of 6.12.2012 on aggressive tax planning

First additional Provision of the Amended Text of the Non Residents Income Tax Law (Mutual Agreement Procedure):

"5. No late payment interests will accrue during mutual agreement procedures.

6.

1. In mutual agreement procedures, the payment of the tax due will be automatically suspended at the request of the interested party provided that at the time of the request for suspension the amount, including any surcharge payable, is guaranteed under the terms formally provided for.

   The debt cannot be suspended under the terms of paragraph above while the suspension is still available by administrative or jurisdictional procedures.

2. In order to obtain the automatic suspension referred to in paragraph 1 above, only the following guarantees are eligible:
   a) Deposit of money or government securities.
   b) Bank surety or guarantee issued by the credit institution or mutual guarantee company, or security insurance certificate.

3. Should the mutual agreement procedure cover only part of the debt, the suspension provided for in this paragraph shall be limited to the amount so covered."

Sweden

1. Swedish reservation regarding a new point 5 in the Revised Code of Conduct for the effective implementation of the Arbitration Convention (CoC)

The JTPF recommendation (new point 5) reads as follows: "Member States should provide domestic legal remedies for determining whether the denial of access to the Arbitration Convention by their administrative bodies is justified."
According to the Swedish national legislation it is not possible to appeal against denial of access to the Arbitration Convention. Sweden therefore makes a reservation regarding a new point 5 in the Revised Code of Conduct for the effective implementation of the Arbitration Convention.

2. Written comments on the remaining part of the draft report (Sections 2.14, 2.15 and Chapter III)

As reported to the JTPF Secretariat on June 23, 2014 Sweden has the following comments to Section 2.14:
JTPF recommends the following amendment to point 9.2 (c):
"The advisory commission will normally consist of two independent persons of standing in addition to its Chairman and one or two representatives of each competent authority."
Since the main rule is two representatives from each competent authority Sweden suggests the following wording instead:

"The advisory commission will normally consist of two independent persons of standing in addition to its Chairman and two, or one if so specifically agreed upon, representatives of each competent authority."

JTPF recommends a new point 9.3 (h):
"The Chairmen and the independent persons of standing will be able to hold separate deliberations in order to discuss and formulate the opinion of the advisory commission which will then be agreed with the representatives of competent authorities."

Sweden suggests the following wording instead:
"The Chairman and the independent persons of standing will be able to e.g. hold separate deliberations in order to discuss and formulate a draft opinion of the advisory commission."
In Chapter III JTPF suggests as a possible issue for consideration to include an application of the AC to establish the existence of a permanent establishment (Article 5 OECD MTC)

Sweden is of the opinion that such an application should not be considered. 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.

3. On section 2.15 of the draft report MS 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

8 (a) CoC (suspension of tax collection)

According to Swedish law (Skatteförfarandelagen, Chapter 63, Section 4) the competent authority of Sweden may grant a deferral to pay the tax, which is the subject of a competent authority case. This practice is applied fairly generously in Sweden. However, the taxpayer must have been subject to double taxation and the tax must have been paid in the other country in order for the deferral to be granted. Since many years it is the practice of Sweden to grant a deferral with the Swedish tax claim attributed to the disputed income or with an amount corresponding to the foreign tax on that income, whichever is the lowest.

8 (b) CoC (interest charges during MAP)

Sweden applies the following approach according to 8 (b) CoC:
(ii) tax to be released for collection and repaid with interest

United Kingdom

We would suggest that the information areas mentioned in sections 14-16 of the paper JTPF/011/REV2/2013/EN warrant discussion, ideally as part of the current monitoring work. That is:

- Information not sufficient for MAP
- Cancelling MAP
- Information submitted in MAP, but not in audit

We note from the minutes that the NGMs highlighted these issues too (after we had left).

In particular the question of information necessary to start the 2 year time limit for arbitration seems an area of fundamental importance for the effective and transparent operation of the EU Arbitration Convention.
Some of the "denial of access" issues mentioned in JTPF/002/2013 (e.g. 1.1 and 1.4) and JTPF/11/REV2/2013 are also not included in the current draft and this broad topic warrants discussion in our view. Although the statistics indicate that very few requests were rejected by the reporting CA, denial of access issues remain in our experience a very valid practical topic.
In respect of new and emerging practical issues potentially requiring clarification in the Code of Conduct we have recently encountered the following positions from other Member States that would be appropriate for discussion by the Forum, perhaps also under a broad denial of access heading:

- That Article 6(2) of the EU Arbitration Convention does not require another State to accept a case validly presented to the UK under Article 6(1) into the bilateral MAP phase or adjust all years. One view seen is that the final sentence of Article 6(2) relates only to the implementation of the outcome of MAP, so that years outside normal domestic time limits for adjustment can be excluded from admission. Connected to this is the question of whether a claim needs to be made by both associated enterprises and whether, and under what circumstances, a Member State can reject a case presented to them for bilateral discussion under Article 6(2) by another Member State.

- That their domestic law prevents them from granting relief in any mutual agreement phase of the Arbitration Convention.

- That a case presented within 3 years of the first notification of the action under Article 6(1) can be rejected as out of time where additional information requested by that State on receipt of the claim is received after the 3 year time limit. (Note: the UK again has a valid in-time claim here).

Some of these areas may already be intended to be within the "Possibility for CAs to mutually cancel the procedure under the AC in certain cases" potential future issue bullet point at Paragraph 37 of the draft report JTPF/004/2014/EN but our strong preference, would be to discuss all currently identifiable issues that potentially require changes to the Code of Conduct in October and include them in the final report leaving out only those issues that require changes to the Convention itself. This is because we would want to ensure that any revised Code of Conduct is as comprehensive as possible. Information not sufficient for MAP relates to point 5 of the current Code of Conduct and is certainly one of those. Denial of access would appear to be another.
We believe such issues are best addressed now rather than listed as separate future work items even if this slightly delays the finalisation of the Draft Report on Improving the Functioning of the Arbitration Convention. If the Forum are open to this we will endeavour to provide some suggested some draft wording ahead of the October meeting to aid discussion.

Section 2.15
In the UK requests to suspend collection of tax when an application is made under the EU AC can be made. Where there is no open appeal, and thus no domestic legal basis for suspension, informal arrangements may be made to not pursue collection pending the outcome of the MAP.

There is no provision in UK law for the interest on unpaid tax to be waived because the matter has been subject to MAP. Our normal rules charging interest on unpaid tax, and including interest on repayments, apply in the same way as for any other adjustment formally or informally stoodover.

II. Non-governmental Members

Section 2.13 Serious penalties
NGMs want to reinforce that a serious penalty should only be applied in exceptional cases in order to minimize restriction of cases under the Arbitration Convention (AC). We agree it is beneficial to provide clarification and an example of such exceptional case, and support the current reference to fraud and its definition as per the communication from the Commission of 27 June 2012. In our view, listing further examples of exceptional cases like "gross negligence" is not supported as it may widen application of article 8 of the AC and lead to more restriction of cases under the AC.
If the Forum feels reference to "gross negligence" is truly required, than we suggest to qualify "gross negligence" as restricted to cases that are subject to criminal law sanctions otherwise the result will be an increase of uncertainty for the taxpayer.

Section 2.14 Improving the "second phase" of the AC
NGMs support the recommendations suggested.

With regards to Annex 4 to the Report, NGMs suggest to make the following clarifications:

1st Phase: suggest adding red text in blue text balloons on top line:

CA Agreement Reached? Art . 6 (2) AC
Taxpayer Agreement and withdrawal from all remedies required**.**
Taxpayer Agreement given and withdrawal made?

2nd Phase: suggest adding red text in red text balloons:

2nd phase is blocked until appeal is expired or withdrawn
2-year period does not ~~expire~~ commence yet (2nd phase blocked)

Section 2.15 Tax collection and interest charges
NGMs recommend extending this section beyond application to interest only, and to apply to all charges and refunds, including VAT and secondary adjustments. NGMs want to reinforce that this section is of great importance in practice given that the amount of interest and other potential consequences such as VAT or secondary adjustments can be greater than the actual amount of the adjustment subject to MAP.

Additionally, with regards to points (i) to (iii) of the recommendation, NGMs feel that the recommendation should read such that it warrants a consistent approach to be adopted by both Member States in the MAP at hand.

Additional information regarding AC

NGMs suggest that the items discussed under sections 14-16 of the summary record of the March JTPF meeting (reference JTPF/003/2014/EN) should be addressed by the Forum. In addition, NGMs suggest discussing at the Forum behavioural aspects regarding the application of the AC, with a view to include wording to that end in the preamble of the Code of Conduct.