



EUROPEAN COMMISSION  
DIRECTORATE-GENERAL  
TAXATION AND CUSTOMS UNION  
Direct taxation, Tax Coordination, Economic Analysis and Evaluation  
**Company Taxation Initiatives**

Brussels, February 2013  
Taxud/D1/

**DOC: JTPF/003/REV1/2013/EN**

## **EU JOINT TRANSFER PRICING FORUM**

### **Background document:**

### **TAs' contributions on AC MAP cases taking longer than 2 years**

**Meeting of 14 February 2013**

Contact:

Jean-Marc Van Leeuw, Telephone (32-2) 29.58.936

Hartmut Förster, Telephone (32-2) 29.55.511

E-mail: [taxud-joint-transfer-pricing-forum@ec.europa.eu](mailto:taxud-joint-transfer-pricing-forum@ec.europa.eu)

## **A. Background**

For the JTPF meeting on 25 October 2012 a paper called "Monitoring Overview and Proposals" was discussed and the JTPF formally agreed to start to monitor the Arbitration Convention (AC) and the related Code of Conduct (CoC) in 2013.

In this context, the summary record of the JTPF meeting on 25 October 2012 mentions, that it would be essential to know why MAP cases under the AC "take longer than 2 years". In order to achieve a balance between the need for detailed information and the administrative burden connected with such an exercise, TAs agreed on making a qualitative analysis of their pending cases to find out the concrete reasons why cases take longer than 2 years. These responses are summarized hereafter.

This revised version includes a summary of the Italian contribution.

## **B. Summary of the contributions**

### **Denmark**

-Denmark reported the following reasons for MAP cases taking longer than 2 years:

- The Competent Authority is waiting for the reception of the position paper
- The Competent Authority is waiting for the final court decision

### **France**

France reported the following reasons for MAP cases taking longer than 2 years:

- On going appeal procedure
- Sometimes the lack of information, but most of the time, lack of opportunities to effectively and usefully discuss the case with the other competent authority for bringing the positions closer to each other

### **Germany**

The German CA would first like to re-emphasise that there is a difference whether a case "takes longer than 2 years" or whether there is a delay "beyond the 2-year period under Article 7 of the AC". A case that in the current JTPF AC statistics appears as older than two years is not necessarily one with a delay beyond the 2-year-period under Article 7 AC. Currently, a case appears as "pending" in the statistics as soon as the request for an AC MAP has been communicated from the Member State where the request was filed to the other Member State. This point in time is never the starting point for the 2-year-period under Article 7 AC. In many cases the starting point for the 2-year-period is, for various reasons, considerably later. There are also AC MAP cases where no 2-year-period applies (Art. 7 3. AC).

In summary, for Germany it can be said that only in about half of the cases that appear as older than 2 years in the statistics there was indeed a delay beyond the 2-years-period referred to in Article 7 AC. Of the 168 cases reported as pending at the end of 2011, 65 cases were reported as pending since 2009 or earlier. In 27 cases the duration was due to reasons foreseen

in the AC, e.g. pending court decisions or on going arbitration. 38 cases had gone beyond the 2-years-period of Article 7 AC, but for many not much beyond. Of the 31 still unresolved cases beyond the 2-years-period, in roughly one third of them the delay appeared predominantly allocable to the other CA, in another third predominantly allocable to the German CA or at least the German administration in general. In that latter group, staff movements appear as a major reason for delays. In the last third, it appeared difficult to single out one or two specific reasons for the delay. Rather there was a mixture of issues causing several smaller delays that add up.

### **Ireland**

For Ireland, the main reasons for delays in concluding MAPs relate to insufficient resources at CA level and delays by companies in producing information requested by CAs.

### **Spain**

Spain reported the following reasons for MAP cases taking longer than 2 years

- One third of the pending cases are pending before Court
- The pending cases are generally very complex cases
- One third of pending cases due to the absence of an answer from the other CA

### **The Netherlands**

The Netherlands reported the following reasons for MAP cases taking longer than 2 years:

- Different point of view of the CA (opposite views);
- Lack of response of the CA (e.g. due to a shortage of personnel or due to complicated internal procedures);
- The financial importance of a case (in tax money);
- Lack of response from the taxpayer (provision of information).

### **United Kingdom**

For the UK, the main reason delaying the examination of a case is reaching an agreement with the other CA on the starting point of the 2 year period (Article 7 1.).

### **Italy**

It should be noted that that a different definition of open case (or closed case) can have an impact on the two-year period and, as a consequence, on the reasons causing delays of more than 2 years, as this is a qualitative analysis, Italy is of the opinion that it is more useful not to deal with definition problems and simply indicate the reasons why it takes so long to terminate the process.

One of the most frequent reasons for the delay has been the delayed or incomplete information from the Competent Authority receiving the taxpayer's request to the other Competent Authority.

Italy thinks that it would be very helpful for the other Member State to receive, by the first Member State, the information together with the taxpayer's request and all the enclosed documents. In addition to this, if documents as specified under point 5(a) of the code of conduct are missing and the first Competent Authority requires them to the taxpayer, the latter Competent Authority should send them to the other Competent Authority as soon as it receives it.

With reference to documentation, Italy wants to highlight the importance for both Competent Authorities to receive a copy of the tax assessment notice, which generally explains the reasons for the taxation.

Some taxpayers present their AC MAP request when they receive the Tax Audit Report but before a tax assessment notice has been notified. This could be fine, provided that those taxpayers send a copy of the tax assessment notice to the Competent Authority as soon as they receive it. Without having information on the tax assessment notice and on its content, the Competent Authority cannot properly deal with the tax case. Actually, the tax assessment notice can have a different content from the Tax Audit Report.

Italy has also encountered some juridical problems, caused by the interrelation between Arbitration Convention and internal provisions. Nevertheless, most problematic issues have been recently clarified to the taxpayers in Circular n.21/E issued on the 5th of June 2012: "International Tax Disputes Resolution. The Mutual Agreement Procedures".

In addition to this, sometimes Competent Authorities (ave some difficulty to prepare the position paper within the time limits provided for in the code of conduct. This can partially depend on the fact that Competent Authorities need to collect information on the tax cases from other Tax Administration offices and this internal exchange of letters and information from one office to the other takes time. Italy takes this opportunity to highlight the importance of written position papers which help Competent Authorities understand the tax case and take the right decision on it. Bilateral negotiations should deal only with those cases where both written position papers have already been exchanged.

In the listing of the causes for delay, we should include the cases pending before Courts. Finally, we think that for most Competent Authorities the most important reason for the delays arises from a serious lack of human resources. The team dealing with the AC MAPs and the MAPs is generally also involved in Tax Treaty negotiations. In addition to this, the same team often attends meetings at the OECD and at the EU.

### **C. Secretariat's conclusion**

The yearly statistics on pending cases under the AC provide a general overview about the duration between the year when a case has communicated from the MS where the request was filed to the other MS and the reporting date, i.e. end of the reporting year. However, a duration of more than 2 years needs to be distinguished from the questions whether in a case the 2 year period under Article 7 1.) AC is exceeded. It should not be concluded that cases pending for more than 2 years are cases that should have been sent to an advisory commission

as there are several reasons foreseen under the AC for not doing so like e.g. pending court cases, arbitration etc.

On the other hand the following reasons reported should attract JTPF attention because they are directly related to the well-functioning of the AC:

- Starting point of the 2 year period
- Provision of a position paper
- Lack of reaction from the other CA or the taxpayer

These issues are addressed in the discussion paper on ways to improve the functioning of the Arbitration Convention (doc JTPF/002/2013/EN).

The following reasons reported for not keeping the deadlines envisaged by the AC seem to be beyond the scope of what can be improved in the context of the AC and the CoC:

- Complex cases and financial importance of the case at stake
- Different views between CAs
- Lack of CAs' resources