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EU JOINT TRANSFER PRICING FORUM

PROPOSAL OF THE NETHERLANDS TO IMPROVE THE PRACTICAL FUNCTIONING OF THE ARBITRATION CONVENTION

BACKGROUND DOCUMENT

MEETING OF WEDNESDAY 4 DECEMBER 2002
CENTRE DE CONFÉRENCES ALBERT BORSCHETTE
RUE FROISSART 36 - 1040 BRUSSELS

At the meeting of 3 October, the Forum asked the delegation members to submit their comments on the issues raised concerning the Arbitration Convention within the next two weeks. While we are pleased to take advantage of this opportunity, the limited time granted for comments together with its coincidence with the completion of the questionnaire and other obligations prevents us from addressing the various points in any great depth, for which reason this paper merely sets out our general attitude. We would nonetheless be happy to contribute to any deliberations needed to settle differences concerning double taxation in general and problems raised by the Arbitration Convention in particular.

As stated at the meeting, there are two factors that the Netherlands considers to be of crucial importance in devising an arrangement for settling international double taxation differences caused by transfer pricing adjustment:

- guaranteed removal of the international double taxation (procedure must be effective);

- a solution must be arrived at as soon as possible.

As regards the first point, the Arbitration Convention does guarantee removal of double taxation since, if the Member States concerned are unable to agree through mutual consultation, the second phase ensures that a solution is found through the arbitration committee. However, the Arbitration Convention does not stipulate how the two years available for consultations between the Member States concerned are to be used. No transparent provisions thus exist as to how the deadlines for the adoption (within the two-year period) of positions by the Member States concerned are to be applied. In our view a practical arrangement between the Member States regarding the application of such deadlines would help to speed up the arbitration procedures. Moreover this would prevent arbitration procedures being submitted to an arbitration committee before an adequate exchange of positions between the Member States has taken place.

In this connection, we would refer to the UK/US arrangement for the application of the mutual consultation procedures.. There are two components to this agreement. Firstly deadlines are set for the adoption of positions. Secondly it is stipulated that if the deadlines are not met, the application will be referred to a higher level. Since the Arbitration Convention provides for assessment by a third party to be made by the arbitration committee, we find this second step inappropriate to a possible practical arrangement between the Member States. Having said that, a practical arrangement concerning the deadlines to be applied and the method of communication is in our view needed (the UK/US arrangement also

makes provision for consultations between the competent authorities three times a year). Under the arrangement the Member States could state their intention to strive to meet the deadlines laid down in the arrangement (pledge). Failure to abide by this arrangement would have no (legal) implications. An arrangement could consist of the following components. The components, like the said deadlines are indicative. This will of course require further oral deliberation.

Possible components of a practical procedural arrangement:

- Within one month of receiving the request, the country having made the adjustment will send an acknowledgement of receipt containing a position on the start of the two-year period.

- Within one month of receiving the acknowledgement of receipt from the other country, the other country concerned will indicate whether it agrees with the position of the adjusting country regarding the start of the two-year period. If the other country concerned cannot agree with the position of the adjusting country, it will indicate its own desired date for the start of the two-year period.

- If the two countries disagree on the start of the two-year period, agreement on the start of the two-year period will be reached within one month of the last statement of position. If disagreement continues, the date will be set at the latest date proposed. The adjusting country will notify taxable persons of the date when the two-year period is to start or has started within two weeks of agreement on the start of the period being reached.

- The adjusting country will endeavour to send a statement of its position to the other competent authority within three months of the submission of the request, or (should this be later) within three months of the finalisation of the (re)assessment containing the adjustment.

- The other competent authority will endeavour to send an (initial) written statement of its position to the adjusting state within six months of receiving the statement of position from the adjusting state, together with any additional questions that need to be answered. Should this other competent authority take the view that a corresponding adjustment is not appropriate and that further consultation is desirable, then it will make this view clear in its statement of position. Within one month of receiving the statement of position from this other competent authority, the competent authority of the adjusting state will then contact this other competent authority in order to agree procedural arrangements as to how this request

should subsequently be processed (a written procedure, by telephone, e-mail or through discussions in a meeting).

Further to the foregoing remarks regarding the completion of the first phase of the arbitration process, our views on the matters covered by the Issues Paper are as follows:

The starting point of the two- and three-year periods

The Dutch view concerning the start of these periods is set out in the completed questionnaire which has been or will soon be returned. If no clear arrangements can be made concerning the start of the two- and three-year periods, we suggest that procedural arrangements be made as to how, shortly after the submission of the request, a joint position can be reached concerning the start of these periods in individual cases. See above proposals concerning the start of the two-year period. At all events it would seem useful to publish a list setting out the various views of the Member States so that the position of the other Member State concerned can easily be determined.

As regards the start of the two-year period, the Netherlands takes the view that this period only begins after the assessment containing the adjustment has been finalised. Thus, if the taxpayer opts to undergo the national legal procedures first, the two-year period will only begin after these legal procedures have been completed. However, since this is recognised as being very impractical in a lot of cases, the Dutch transfer pricing decree also permits a mutual agreement or arbitration procedure to be started at an early stage. In such a situation the taxpayer has to give consent for the national procedures to be suspended pending the consultations with the other competent authority and for the national procedures to be withdrawn if the double taxation is totally removed.

Proceedings of the second phase of the Arbitration Convention

The Netherlands agrees that more specific procedural guidelines are needed for the second phase of the Arbitration Convention. However, the limited time allowed for reactions prevents us from providing more extensive documentation in this regard.

As to whether or not precedents should be created, we would make the following ancillary comment:

- The OECD transfer pricing guidelines are dynamic in nature. They are regularly adapted so that they continue to meet the demands made of them. It has to be acknowledged that the OECD transfer pricing guidelines still do not offer a (prescribed) solution for all potential problems.

In the light of this ancillary comment, we take the view that all the advantages and disadvantages of precedents should be charted before any decision is taken.

Procedures to be followed during the interim period when not all Member States have ratified the Convention

The Dutch view concerning the processing of arbitration requests after 1 January 2000 is set out in the completed questionnaire, which has been or will soon be returned.

The Netherlands considers it very important that some clarification be provided concerning how the Arbitration Convention is to be applied at the moment and as to the approach to be adopted regarding the period that has elapsed between 1 January 2000 and the time when the Arbitration Convention actually comes back into force.

We should like to propose a potentially interesting approach to the application of the Arbitration Convention for the period for which the protocol has not yet been ratified by all countries. The Vienna Convention addresses the question as to how such interim periods should be treated.

Under Article 25 of the Vienna Convention:

1. A treaty or a part of a treaty is applied provisionally pending its entry into force if:

(a) the treaty itself so provides; or

(b) the negotiating States have in some other manner so agreed.

Point (a) does not apply in any case since the protocol only stipulates that the period between 1 January 2000 and entry into force does not count towards the period referred to in Article 6 of the Arbitration Convention.

Point (b) may be applied. The form of the agreement is discretionary but, since it has to be possible to prove that such an agreement has been reached, the positions have to be jointly defined. The question arises whether the protocol suffices as proof that the Member States have agreed on the continued application of the Arbitration Convention. Probably not, because the protocol specifically stipulates that ratification is required for entry into force. The most that could be said is that this was the intention. If other documents show that the parties have agreed on this, it can then be assumed that the Arbitration Convention can provisionally be applied from 1 January 2000.

Should this not be the case then the parties (or any of the parties) can of course still agree on such an arrangement. However, it probably cannot be given any retrospective effect.