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## **EU JOINT TRANSFER PRICING FORUM**

### **STATE OF PLAY OF THE IMPLEMENTATION OF THE CODE OF CONDUCT RELATED TO THE ARBITRATION CONVENTION**

**Meeting of Tuesday 23<sup>rd</sup> October 2007**

**Centre de Conférences Albert Borschette  
Rue Froissart 36 - 1040 Brussels**

#### **Background document**

Contact:

Jean-Marc Van Leeuw, Telephone (32-2) 295.89.36 E-mail: [Jean-Marc.Van-Leeuw@cec.eu.int](mailto:Jean-Marc.Van-Leeuw@cec.eu.int)

Edward Morris, Telephone (32-2) 295.15.67 [Edward.Morris@cec.eu.int](mailto:Edward.Morris@cec.eu.int)

## **Introduction**

The Code of Conduct for the effective implementation of the Arbitration Convention (90/436/EEC of 23 July 1990) was adopted by the Council of the European Union in December 2004.

The JTPF agreed in its working programme to monitor the implementation of the code. Therefore Member states have been invited to report on the way they have implemented this soft law instrument in their national laws or administrative practices.

It was considered as particularly important to give taxpayers the opportunity of knowing how Member states were dealing with point 5 of the Code on the suspension of tax collection during cross border dispute resolution procedures: "*Member States are recommended to take all necessary measures to ensure that the suspension of tax collection during cross-border dispute resolution procedures under the Arbitration Convention can be obtained by enterprises engaged in such procedures, under the same conditions as those engaged in a domestic appeals/litigation procedure although these measures may imply legislative changes in some Member States. It would be appropriate for Member States to extend these measures to the cross-border dispute resolution procedures under double tax treaties between Member States*".

## **Answers provided by EU tax administrations:**

### **AUSTRIA**

#### **a) Implementation of the Code of Conduct on the Arbitration Convention:**

According to the work programme 2006 Austria intends to issue administrative guidelines on transfer pricing. In the drafting of these guidelines the Code of Conduct of the AC will be taken into consideration.

#### **b) Position/situation in respect of the suspension of tax**

Payment facilities a suspension of tax collection:

Generally it is possible to apply for a deferral of tax payments or a payment of the taxes in instalments (Section 212 of the Federal Fiscal Procedure Act – § 212 Bundesabgabenordnung/BAO).

As far as the suspension of tax collection is concerned, currently it is only possible in connection with an appeal against the decision of the tax office (Section 212a of the Federal Fiscal Procedure Act – § 212a Bundesabgabenordnung/BAO).

In principle, a similar treatment could also be envisaged in the context of mutual agreement procedures based either on DTC or on the AC. Such measures would in any case only apply in “bona fide” case and comprise only that part of the tax due in relation to double taxation caused by the profit adjustment.

### **BELGIUM**

The Code was already implemented before its official adoption by the Council.

## **CYPRUS**

The implementation of the Code of Conduct including the suspension of tax collection will be implemented through the administrative practice of the Department of Inland Revenue.

The Cyprus Tax Administration is able and willing to suspend tax collection as recommended by the Code by virtue of the provisions of the Assessment and Collection of Taxes Laws (Art. 4,38,39,&40) and the provisions of the Income Tax Laws (Art.3&45).

## **CZECH Republic**

The CoC has been published through the websites of the Czech Tax Administration. In case of application AC we will follow recommendations done by this CoC. Thus its principles shall be implemented through the administrative practice.

As regards the suspension of tax collection during cross-border dispute resolution procedures under conditions of our tax law any remedies generally have no suspending effect. Exceptionally, the taxpayer may request the tax administration either to defer his tax payments or to allow him to pay by instalments, if immediate payment would cause serious detriment to the tax debtor or if it is impossible for other serious reasons to collect all of the tax arrears from the tax debtor.

## **DENMARK**

Through an administrative decision from January 7<sup>th</sup> 2005 (“SKM2005.2.TSS”) we have implemented the CoC on the AC in Danish administrative, legal practice by saying that “the Danish tax administration will apply the CoC when applying the AC.”

## **ESTONIA**

In Estonia, as for The Code of Conduct on the Arbitration Convention, we will not implement it into our national legislation, but we will implement it in practice as it is soft law. No practice has been so far developed.

The suspension of tax collection is possible according to the Estonian Taxation system already. (Estonian Taxation Act § 128(2) 5 and § 146(3) ).

## **FINLAND**

The competent authorities are aware of the Code and are committed to abide by it, but formal implementation is not planned.

Deferral of the payment of tax in cases of international double taxation is allowed by article 90 of the Tax Procedure Act (90§ Laki verotusmenettelystä 18.12.1995/1558)

## **FRANCE**

La France a soutenu sans réserve les travaux les travaux du Forum conjoint de l'Union européenne qui ont débouché par l'adoption par le Conseil d'un Code de conduite sur la mise en œuvre de la convention européenne d'arbitrage.

La France a publié le 23/02/2006 une instruction qui actualise sa doctrine en matière de traitement des procédures amiables ouvertes tant dans le cadre de la convention européenne d'arbitrage que dans le cadre d'un traité bilatéral. Elle reprend les conclusions du Code de conduite pour la mise en œuvre de la convention européenne d'arbitrage et s'inspire de celui-ci pour les procédures amiables bilatérales.

Par ailleurs, la France a adopté un texte spécifique – l'article L189A du Livre des procédures fiscales – qui met en place une procédure de suspension de la prescription de la mise en recouvrement en cas d'ouverture d'une procédure amiable, quel qu'en soit son type. Le texte en est le suivant :

« Lorsqu'à la suite d'une proposition de rectification, une procédure amiable en vue d'éliminer la double imposition est ouverte sur le fondement d'une convention fiscale bilatérale ou de la convention européenne 90/436/CEE relative à l'élimination des doubles impositions en cas de correction des bénéfices d'entreprises associées du 23 juillet 1990, le cours du délai d'établissement de l'imposition correspondante est suspendu de la date d'ouverture de la procédure amiable au terme du troisième mois qui suit la date de la notification au contribuable de l'accord ou du constat de désaccord intervenu entre les autorités compétentes. ».

Ces dispositions sont applicables aux procédures amiables ouvertes à compter du 1er janvier 2005.

## **GERMANY**

Germany has revised its Manual on Mutual Agreement and Arbitration Procedures. The revised version of the Circular Letter, which takes account of the Code of Conduct, was issued on 13<sup>th</sup> July 2006. As regards the suspension of tax collection during MAPs under the Arbitration Convention or a double tax treaty with another Member State, the Ministry of Finance is currently examining possible legislative amendments to the General Tax Code that would allow for the suspension of tax collection outside of an appeal procedure.

## **GREECE**

According to the legislation in force in Greece, in case of an appeal within the prescribed time on behalf of the taxpayer against tax administration assessment decisions, an amount representing 10% of the tax in dispute (main tax, added tax and remaining taxes and duties assessed with it) must still be paid. The assessment of the remaining 90% is suspended until the relevant judicial decision is taken.

Moreover, according to the provisions of articles 200-205 of Code of Administrative (Legal) Procedure the collection of the above mentioned percentage of pre-assessment (10%) can also be suspended, by those especially defined in these provisions.

The above concern generally all the taxpayers and all types of tax disputes. Therefore also apply to disputes for which a cross border procedure settlement is pending.

Consequently, we believe that it is not necessary to introduce additional legislative measures for the suspension of tax collection, especially in cases where dispute resolution procedures are in progress, since this issue is already covered, even indirectly, by the existing legislation.

When these issues are finalized at European Community Level and legislative adaptations are deemed necessary, the Greek Tax Administration will examine the whole matter anew.

## **HUNGARY**

The Hungarian Government has accepted the concept and draft of Act of Parliament on modifications of Tax Procedure Act on 26th of September 2007 thus the draft shall be filed to the Parliament within a week and the final voting session on the draft shall be held on early November.

This draft of Act contains rules of incorporation of some significant rules of Code of Conduct, such as:

- (i) suspension of tax collection [Art. 160. (2) of Act of Tax Procedure Act]
- (ii) formal acknowledgement of receipt of taxpayer's request, minimum content of request, starting point of 2-year-deadline [Art. 176/A. of Act of Tax Procedure Act].

The guideline on application of AC and CC shall be drafted simultaneously.

## **IRELAND**

Staff in the Competent Authority area have been made aware of the Code of Conduct.

As regards suspension of tax collection during cross-border dispute resolution procedures, where an assessment is made on a taxpayer in respect of any undercharge to tax, the taxpayer is entitled to enter an appeal against the assessment. The taxpayer is required to pay the tax that, in the taxpayer's opinion, is due and payable. The balance of the tax involved will be suspended pending determination of the appeal. In general, the competent authority will be prepared to allow an appeal to remain open while an alternative procedure for dispute resolution has a prospect of resolving the point at issue.

## **ITALY**

In order to apply the code of conduct, Italy does not need to implement it in its own legislation. Presently all offices involved in MAP AC are aware of its existence and of its importance and are doing their best in order to apply it.

We will give appropriate publicity to the code of conduct, publishing it on two websites: Department of Tax Policy's and Revenue Agency's.

As far as it regards the suspension of tax collection during a MAP AC, 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.

## **LATVIA**

As the Arbitration Convention was ratified and is in force in Latvia since 1 June, 2007, Latvia hasn't any intend at this moment regarding implementation of Code of Conduct in legislative way. The Code of Conduct as it is soft law will be accepted as a best practice and will be considered in developing the administrative guidelines and administrative practice.

### **Suspension of tax collection:**

The domestic law of Latvia provides the provisions which allow suspending of tax collection when the tax assessment of tax administration is litigated or appealed. Also the tax collections' suspension is possible on the decision of tax administration. Such a decision could be used also in the scope of Arbitration Convention

## **LITHUANIA**

### **Implementation of Code of Conduct on the Arbitration Convention**

The Tax Administration of Lithuania hasn't plans for any kind of formal implementation of the Code on Conduct of the AC. It will be implement in administrative practices. Also Tax Administration is preparing Guidelines on transfer pricing and in drafting of these Guidelines the Code of Conduct will be taken in consideration.

### **Situation concerning the suspension of tax**

In our Law on Tax Administration we have a provision that allows for the suspension of tax collection when taxpayer appeal against the tax administrator's decision.

## **LUXEMBOURG**

There seems to be no need to implement the code of conduct into national legislation (or parts of it), the code has been made available to tax administration members involved in mutual agreement procedures,

The tax administration is able and willing to suspend tax collection as recommended by the code.

## **MALTA**

With regard to the Code of Conduct, the Legal Notice incorporates the Arbitration Convention into Maltese Law and specifies that this Convention is to be interpreted in line with the said Code

### **Suspension of tax collection:**

Article 41(1) of the Income Tax Management Act states that:

"Where notice of objection or appeal against an assessment has been given, the Commissioner may, in his discretion, keep in abeyance the collection of not less than ninety per cent of that part of the tax assessed there under which is in dispute."

This legislation applies to all disputes, whether purely domestic or cross-border. Furthermore, the practice of the Inland Revenue (even before the existence of the Code) has been to apply such discretion so as not to collect 90% (at least) of the tax in dispute.

## **NETHERLANDS**

The Netherlands will update and streamline its publications on mutual agreement procedures. The Code of Conduct on the Arbitration Convention will be included in this updated decree. In practice the Netherlands has already started to apply the Code of Conduct.

### **Suspension of tax collection**

Par. 3.1.8. of the Netherlands' Ministry of Finance of Decree No. IFZ 2001/295M, officially published in Dutch on 30 March 2001 reads: "Where the Netherlands is the state making the adjustment, the Netherlands' tax administration will upon request grant a deferral of payment on that part of the tax charge that is related to the adjustment. In principle, deferral will be granted until the date on which 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, Paragraph 2, of the Tax Collection Guidelines 1990 (*Leidraad Invordering* 1990))."

## **POLAND**

We consider the procedures currently used in Poland in line with the rules set up in the CC on the AC and therefore we do not see any particular need to change the law. Suspension of tax collection is possible in certain situations: i) in case of important interest of taxpayer on his request, ii) in case of important State interest. In both cases decision is taken by head of tax office.

## **PORTUGAL**

Some administrative guidelines are presently under way to disclose through the website the provisions of the Code of Conduct. It is also deemed to be necessary to introduce, as soon as possible, a change to the legal regulations on transfer pricing for that part concerning the procedures in respect of the so-called "corresponding adjustments" with the purpose of establishing that the Code of Conduct shall apply to those cases covered by the Arbitration Convention.

### **Suspension of tax collection:**

The suspension of payment of tax under the provisions of the arbitration convention will be implemented as from January 2008.

## **SLOVAK REPUBLIC**

In relation to implementation of the Code of Conduct on the Arbitration Convention, the Slovak Republic intends to publish guidance for the tax administration and also for the taxpayers. However, the suspension of the tax collection, as recommended by the Code of Conduct, will require several further legislative changes. But now this is a clearly political issue due to early elections held in June 2006.

Third column of the table should mention the word "Exceptionally" due to the fact that upon request of a tax debtor, the tax administration may waive, partially or fully, a tax in arrears (other than value added tax and excise taxes in arrears) payable by an individual, in case the recovery of such a debt would seriously prejudice the maintenance of the tax debtor or persons maintained thereby or if its recovery would lead to a collapse of the business of the tax debtor, while the proceeds from its liquidation would probably be lower than the taxes, which might be generated by the tax debtor in the tax periods to come. The tax debtor shall submit evidence of compliance with the criteria above.

## **SLOVENIA**

In Slovenia, Accession Convention to the Arbitration Convention will be implemented through Law on Ratification of the Accession Convention. Law will be passed by the Parliament. At the moment, we are drafting the Law; the main task that has to be finalised before draft Law is presented to the Parliament is assuring correct language versions of the text of the Convention. Unfortunately, this is quite time consuming work, but we are determined to finalise it as soon as possible. We will keep you informed about the progress

## **SPAIN**

Spain has updated its domestic TP rules (New regulation included in Law 36/2006 published in the official gazette on 30<sup>th</sup>.November 2006). The preamble of the law refers explicitly to the reports of the Transfer Pricing Forum. It also introduces suspension of recollection of taxes when a MAP or AC is requested

## **SWEDEN**

We consider the procedure currently used in Sweden in line with the rules set up in the Code of Conduct on the Arbitration Convention and therefore have not taken any specific steps of implementation.

The Swedish system regarding penalties, tax surcharge, is based on the taxpayer providing the Tax Authority with misleading, incorrect or insufficient information. Remission of the tax surcharge might be given in certain situations. Tax collections can be suspended during any MAP.

The legal reference relevant for the possibility to grant suspension in Sweden is 17:6 in the Tax Collection Act. (Chapter 17, paragraph 6).

## **UNITED KINGDOM**



The Code of Conduct on the Arbitration Convention is accepted as best practice by the UK.

Consideration is being given to further publicity for the best practice that would be helpful alongside other issues that arise in operating mutual agreement procedures.

Questions about tax collection are matters of domestic law. Where any discretion is allowed, the terms of the Code of Conduct are recognised as best practice.

## **Summary table:**

This table derived by Secretariat from MS replies and describes the actual situation (at the beginning of October2007).

Member States	Implementation through a legislative instrument / <b>legal reference</b>	Implementation through administrative practice / <b>administrative reference</b>	Possibility to suspend tax collection / <b>legal reference</b>
Austria		In preparation	YES § 212a Bundesabgabenordnung (BAO) Federal Fiscal Procedure Act
Belgium		YES	YES Art 410 alinéa 3 of Cir 1992
Cyprus		YES	YES Assessment and Collection of Taxes Laws (Art. 4,38,39,& 40) and the provisions of the Income Tax Laws (Art.3&45).
Czech Republic		YES	Exceptionally
Denmark		YES Administrative decision (SKM 2005.2.TSS)	YES Art. 51 of the Tax Administration Act
Estonia		YES	YES Taxation Act §128(2) 5 and §146 (3)
Finland		YES	YES Art. 90 of the Tax Procedure Act
France		YES	YES Livre des procédures fiscales Art. L189A
Germany		YES	NO Under examination
Greece		YES	YES
Hungary	An Act of Parliament amending/modifying the Tax Procedure Act is in	Guidance of the Ministry of Finance is in preparation.	YES An Act of Parliament amending/modifying the Tax Procedure Act is under finalisation.

	preparation.		
Italy		YES	YES Law nr.99 of 22 arch 1993
Ireland		YES	YES Part 41 of the Taxes Consolidation Act 1997 <sup>1</sup>
Latvia		In preparation	YES
Lithuania		NO In preparation	YES Chapter 110 of the Law on Tax Administration No IX-2112
Luxembourg		YES	YES Loi générale des impôts 22/05/1931 § 251
Malta	YES Legal notice		YES Art. 41 of the Income Tax Management Act
Netherlands	YES Decree		YES Par. 3.1.8. of Decree No. IFZ 2001/295M
Poland		YES	YES art. 67a §1 pkt 2 Tax Ordinance
Portugal		YES	NO In 2008 a new legislative procedure will provide for suspension
Slovak Republic		NO In preparation	Exceptionally
Slovenia	?	NO In preparation	NO In preparation
Spain	YES ( 36/2006 Preamble)	YES	YES ( 1.36/2006 D.A.1 <sup>a</sup> )
Sweden		YES	YES Chapter17, paragraph 6 in the Tax Collection Act
United Kingdom		YES	YES

<sup>1</sup> As regards suspension of tax collection during cross-border dispute resolution procedures, where an assessment is made on a taxpayer in respect of any undercharge to tax, the taxpayer is entitled to enter an appeal against the assessment. The taxpayer is required to pay the tax that, in the taxpayer's opinion, is due and payable. The balance of the tax involved will be suspended pending determination of the appeal. In general, the competent authority will be prepared to allow an appeal to remain open while an alternative procedure for dispute resolution has a prospect of resolving the point at issue.