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EU JOINT TRANSFER PRICING FORUM

REPORT ON THE RE-ENTRY INTO FORCE OF THE ARBITRATION CONVENTION

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

1. INTRODUCTION AND LEGAL CONTEXT

1. With the last Signatory State having deposited its instrument of ratification on 4 August 2004, the Arbitration Convention re-entered into force on 1 November 2004 (Article 3.1 of the Protocol on the extension of the Arbitration Convention, the so-called "Prolongation Protocol").
2. The Prolongation Protocol 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.
3. 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 from 1 January 2000 to 1 November 2004 will not be taken into account).

2. PENDING MUTUAL AGREEMENT PROCEDURES UNDER THE ARBITRATION CONVENTION

4. The replies to the questionnaire on pending mutual agreement procedures (MAPs) under the EU Arbitration Convention that was sent to Member States' tax administrations on 23 December 2004 revealed that a total number of 107 cases were pending as of 31 December 2004 (see Annex III)¹. In 65 of these cases the time already spent on mutual agreement procedures exceeded two years and in 24 cases the taxpayer made the request prior to 1 January 2000, which means that these cases were pending more than five years (unless the two-year time limit has been extended according to Article 7.4 of the Convention).
5. The results of the questionnaire clearly show the importance of the JTPF's work on the Code of Conduct for the effective implementation of the Arbitration Convention. Member States are, therefore, urged to expedite reaching mutual agreements on their pending MAPs under the Arbitration Convention, especially as regards those cases on which more than two years have already been spent.

¹ In cases where there was a mismatch in the reported number of pending MAPs in relation to two Member States, the larger number was taken into account. Italy and the Netherlands reported the number of pending cases as of 31 October 2004 and February 2005 respectively.

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

6. 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 ² (see Annex I).
7. 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.
8. 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.

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

9. The interim period ended on 1 November 2004. Member States, therefore, need 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.
10. 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.
11. On the question whether the Forum recognizes the need to provide guidance and develop, where possible, a common approach on the issues mentioned above, almost all Members from tax administrations answered positively.³ The Members from the *Swedish* and *Italian* tax administration expressed the view that the Forum's action

² See COM(2004)297 final of 23 April 2004

³ See the table in Annex II for a summary of Members' replies to this question.

should be limited to providing a clear overview and, respectively, guidance to taxpayers without establishing a common approach.

4.1 PROCEDURE IN CASES WHERE A REQUEST HAS BEEN MADE BY A TAXPAYER PRIOR TO 1 JANUARY 2000

12. In cases where a taxpayer's request to initiate a MAP under the Arbitration Convention was submitted to a tax administration prior to 1 January 2000, the provisions of the Arbitration Convention remained applicable after 1 January 2000. In other words, those 24 cases where the request was made prior to 1 January 2000 should have been resolved under the rules of the Arbitration Convention before the Convention re-entered into force on 1 November 2004. Instead, so far only two cases have been submitted to an advisory commission. One of these cases (between France and Italy) was resolved in March 2003.
13. **Those Member States that are concerned with the 24 cases where the taxpayer made the request prior to 1 January 2000, are urged to set up, without further delay, advisory commissions and submit those cases for arbitration.**

4.2 PROCEDURE IN CASES WHERE A REQUEST HAS BEEN MADE BY A TAXPAYER FROM 1 JANUARY 2000 TO 31 OCTOBER 2004

14. Paragraph 2.1.2 of the Forum's first report states that there is consensus that a taxpayer's request to invoke the Arbitration Convention was in principle valid under the Prolongation Protocol. It further states that this means that an enterprise could present a case to a competent authority but that in practice there was 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-entered into force.
15. *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 agreed (see Annex I).
16. **In these cases, and in line with the provisions of the Prolongation 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 possible after the Protocol entered into force, i.e. soon after 1 November 2004; and**
 - **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.**
17. *Austria, Belgium, Denmark, Finland, France, Italy, Portugal and Sweden* indicated that they accepted a taxpayer's request but continued the MAP under the double tax

treaty with the other Member State concerned (see Annex I; *Austria, Denmark and Italy* only if specifically requested by the taxpayer). Those Member States take the view that the Arbitration Convention was suspended during the interim period and was only taken up when it re-entered into force on 1 November 2004.

18. On the question whether 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 started when the Prolongation Protocol entered into force on 1 November 2004, *all Members* from tax administrations except the delegates for *Denmark, Finland, Italy and Sweden* answered that their countries would in principle subtract the period already spent on a MAP under a double tax treaty from the two year period provided for in Article 7.1 of the Convention.⁴ *Denmark, Finland, Italy and Sweden*, however, apply the rules of Article 7.1 of the Arbitration Convention only with effect from 1 November 2004, i.e. for cases presented to those Member States the two-year period provided for in Article 7.1 of the Convention started 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.
19. *All Tax Administration Members* except the delegates for *Denmark, Finland, Italy and Sweden* agree that the arbitration procedure (the second phase of the Convention) should be initiated as indicated under paragraph 16.⁵

4.3 PROCEDURE IN CASES WHERE A REQUEST IS MADE BY A TAXPAYER AFTER 1 NOVEMBER 2004.

20. **In line with the provisions of the Protocol, where a three-year application period was suspended on 1 January 2000 it restarted on 1 November 2004 and continues 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, restarted 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.

21. **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 was**

^{4, 5} See the table in Annex II for a summary of Members' replies to this question.

made after 1 January 2000 the three-year application period started on 1 November 2004 and ends on 31 October 2007.

5. LIST OF INDEPENDENT PERSONS OF STANDING FOR THE ADVISORY COMMISSION (ARTICLE 9 OF THE ARBITRATION CONVENTION)

22. According to information provided by the Council's Secretariat General, three Contracting States (Greece, 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.
23. Consequently, paragraph 4.1 of the Code of Conduct⁶ 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.
24. **Considering the procedural consequences of the re-entry into force of the Arbitration Convention as mentioned under chapter 4.1 and 4.2 of this report, and in light of the numerous cases which should now be submitted to arbitration, in particular those cases where the request was made prior to 1 January 2000, Contracting States are urged to comply with the aforementioned recommendations of the Code and designate their independent persons of standing or update their list.**

⁶ Council document 12695/2/04 REV 2 FISC 173 of 31 March 2005

ANNEX I: MEMBER STATES' POSITIONS DURING THE INTERIM PERIOD⁷

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				

⁷ Source: COM(2004)297 final of 23 April 2004

ANNEX II: SUMMARY OF MEMBER STATES' REPLIES TO THE QUESTIONS

Member State	<i>Q1: Does the Forum recognize the need to provide guidance and develop, where possible, a common approach on the issues mentioned in paragraphs 1 to 10?</i>	<i>Q2: Do 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?</i>	<i>Q3: Do Member States who answer positively to question 2, agree that the arbitration procedure (the second phase of the Convention) should be initiated as indicated under paragraph 12 ?</i>
Austria	YES	YES if this is common view	YES if other Member State agrees
Belgium	YES	YES	YES if other Member State agrees
Denmark	YES	NO	N/A
Finland	YES	NO	N/A
France	YES strongly supported and necessary also as regards the effect on the three year period	YES	YES if other Member State agrees
Germany	YES	YES provided that all relevant documentation was available and that there have been effectively MAP negotiations to eliminate double taxation	YES if other Member State agrees and in chronological order and in function of the resources available
Greece	YES	YES	YES if other Member State agrees
Ireland	YES	YES	YES if other Member State agrees
Italy	Limit action to providing guidance to taxpayers without establishing a common approach	NO	N/A

Luxemburg	YES	YES	YES if other Member State agrees
Netherlands	YES	YES in principle.	YES in principle, if other Member State agrees. However, there might be cases where the 2-years period has elapsed and where a competent authority agreement is within reach. In order to have a possibility to reach such agreement the arbitration procedure (second phase) cannot start before 6 months after 1 November 2004, i.e. 1 May 2005.
Portugal	YES, strongly supported and necessary	YES if this is common view	YES if other Member State agrees
Spain	YES	YES	YES if other Member State agrees
Sweden	Limit action to providing a clear overview without establishing a preferred approach	NO, considering the specific situation for Sweden	N/A
United Kingdom	YES	YES if other Member State agrees	YES if other Member State agrees

**ANNEX III: MEMBER STATES REPLIES TO THE QUESTIONNAIRE ON
PENDING MAPs UNDER THE EU ARBITRATION CONVENTION**

**1. Total amount of pending MAPs under the EU Arbitration Convention in relation to
Member States as of 31/12/2004^{8,9}**

	DK	DE	EL	ES	FR	IE	IT	LU	NL	AT	PT	FI	SE	UK
BE	0	5	0	0	6	0	1	1	1	0	0	0	0	0
	DK	1	0	0	1	0	0	0	0	0	0	0	0	1
		DE	0	2	17	0	1	0	11	0	1	0	0	7 8
			EL	0	0	0	0	0	0	0	0	0	0	0
				ES	7	0	0	0	0	0	0	0	0	1
					FR	1	3	0	13	0	2	0	0	15
						IE	0	0	0	0	0	0	0	0
							IT	0	1	0	0	0	0	0
								LU	0	0	0	0	0	0
									NL	0	0	0	2	5
										AT	0	0	0	0
											PT	0	0	0
												FI	0	0
													SE	0

Total 107

⁸ Italy and the Netherlands reported the number of pending cases as of 31 October 2004 and February 2005 respectively.

⁹ Discrepancies in the number of pending cases reported by Member States may result from cases considered closed on 31/12/2004 by one Member State but not yet formally closed by the other Contracting State.

2. Total amount of pending MAPs under the EU Arbitration Convention as of 31/12/2004¹⁰ in relation to the year when the request was received by the tax administration

Requests received prior to 2000	Requests received in 2000	Requests received in 2001	Requests received in 2002	Requests received in 2003	Requests received from 01/01 to 31/10/2004	Total pending cases
24	8	12	24	23	16	107

3. Time already spent on MAPs listed in No. 1 and 2 above (only pending cases) as of 31/12/2004¹¹

< 1 year	1-2 years	2-3 years	3-4 years	> 4 years	Total
21	21	20	15	30	107

¹⁰ Italy and the Netherlands reported the number of pending cases as of 31 October 2004 and February 2005 respectively.

¹¹ Italy and the Netherlands reported the number of pending cases as of 31 October 2004 and February 2005 respectively.