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# **EU JOINT TRANSFER PRICING FORUM**

## ***PROCEDURAL IMPROVEMENTS TO THE ARBITRATION CONVENTION AND RELATED MUTUAL AGREEMENT PROCEDURES***

**Meeting of Wednesday 4 December 2002**

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**WORKING PAPER**

## **I. Introduction and context**

1. The number of mutual agreement and arbitration procedures with treaty countries is growing as a result of the rapid globalisation of the economy coupled with the increasing interest of tax administrations in transfer pricing issues. Accordingly, it is becoming increasingly important for the business community that double taxation caused by transfer pricing adjustments is eliminated as quickly as possible. (Please note that the term “transfer pricing” in this note refers to the computation of profits under both Article 7 and Article 9 of the OECD Model Tax Convention.)
2. Furthermore, multinational enterprises are faced with tax authorities with different domestic rules, which in many cases will result in them having a different approach to transfer pricing and to the procedures for dealing with tax disputes.
3. All double tax treaties that Member States have entered into contain a clause that is comparable to Article 25 of the OECD Model Tax Convention and that provides for mutual agreement procedures. In addition, the EU Arbitration Convention has been in place now since 1 January 1995 and some Member States have arbitration procedures incorporated in bilateral double tax treaties. Unlike the mutual agreement procedures (hereafter: MAP) under double tax treaties, the EU Arbitration Convention provides for a time limit for competent authorities to reach an agreement on the elimination of double taxation as a result of transfer pricing adjustments and also provides for a mandatory elimination of double taxation.
4. Although both business and tax authorities recognise the added value of the EU Arbitration Convention, a number of practical and organisational aspects have been left open in the Arbitration Convention which gives rise to problems in its concrete application. Following the FORUM’s decision taken at its meeting on 3 October 2002 the shortcomings of the Arbitration Convention should therefore be removed as soon as possible.
5. Within the remit, and having regard to the OECD Guidelines, the objective of the FORUM should be to consider how to effectively avoid double taxation for the business community within a reasonable time frame. To that effect the FORUM will focus on ways and means to develop pragmatic, non-legislative instruments such as Codes of conduct, Guidelines for common interpretation, Codes of best practice, memoranda, etc. in order to improve the effectiveness of mutual agreement and arbitration procedures. In that context the FORUM should also consider if taxpayers should have the right of initiative at all stages of dispute resolution procedures. In the view of Members from business this should include the composition of the advisory commission and the introduction of a complaint procedure with the European Court of Justice or the EU Commission. The FORUM should also examine if mutual agreement procedures under Double Tax Treaties could be merged with or replaced by improved procedures under the Arbitration Convention.
6. The first area for which common pragmatic solutions should be sought is the state of procedures during the interim period when not all Member States have ratified the Arbitration Convention. As regards the second part of the objectives, examining ways to improve the implementation of the Arbitration Convention, the FORUM should, in particular, focus on the following issues:
  - i) Definition of a common interpretation of the starting point of the two-year period for the first phase of the Arbitration procedure,

- ii) Development of more detailed rules concerning the second phase of the Convention,
  - iii) Search for a common approach to the problems related to tax collection and interest payments during mutual agreement procedures (including the first phase of the Arbitration Convention).
7. The purpose of this document is to provide suggestions and solicit Members' views on procedural improvements to the application of the Arbitration Convention and mutual agreement procedures.

## **II. Procedures to be followed during the interim period when not all Member States have ratified the extension of the Convention (see Annex I)**

8. The Arbitration Convention, which was originally concluded for a period of five years (cf. Article 20 of the Convention of 23 July 1990), entered into force on 1 January 1995 and expired on 31 December 1999. The Protocol amending the Convention of 23 July 1990 to the effect that the Arbitration Convention shall be extended for further periods of five years at a time was signed on 25 May 1999. This Protocol, which according to its Article 3 takes effect as from 1 January 2000, shall enter into force on the first day of the third month following the deposit of the instrument of ratification, acceptance or approval by the last Signatory State. Hence, until the last Contracting State has deposited its instrument of ratification, the Convention cannot formally re-enter into force.
9. Since six of the 15 EU Member States (Belgium, Greece, Italy, Ireland, Portugal and Sweden) have not deposited their instrument of ratification so far, the 1999 Prolongation Protocol has not yet entered into force. In contrast, some Member States having ratified the Convention, apply the provisions of the Convention but condition its application vis-à-vis other EU Member States to a reciprocal treatment. Therefore, in practice the Arbitration Convention is not being applied uniformly in the EU. In this regard, it is important to clarify the applicability of the Arbitration Convention between 1 January 2000 and its re-entry into force. Member States must reach consensus on the resolution of cases, both pending and new, during the interim period.
10. In this context it should equally be noted that three Member States (France, Greece and Ireland) have still not deposited their ratification instruments of the 1995 Convention concerning the accession of Austria, Finland and Sweden to the Arbitration Convention.
11. Furthermore, a number of Member States have not yet nominated the five independent persons of standing for the list of persons provided for in Article 9.4 of the Convention and informed the Secretary-General of the Council of the European Communities thereof.
12. According to Article 25 of the Vienna Convention on the law of Treaties which came into force on 27 January 1980, a Treaty or part of a Treaty is applied provisionally pending its entry into force if:
- the treaty itself so provides; or
  - the negotiating States have in some other manner so agreed.

The agreement does not require any specific format. The question is whether the Protocol gives sufficient evidence that there is a tacit agreement between Member States to apply the Convention temporarily, since the Protocol stipulates specifically that ratification is necessary for the re-entry into force. Nevertheless Contracting States could in principle reach such an agreement.

13. As the Arbitration Convention has not yet re-entered into force, some Member States take the view that any cases pending under the mutual agreement or arbitration procedure of the Convention could be continued only on the basis of domestic law and/or of the mutual agreement procedure of the bilateral double taxation treaties.

***Question 1:*** *Do Members agree that in any case, taxpayers should have access to double tax relief and should not suffer from the lack of ratification of the 1999 Prolongation Protocol by some Member States?*

14. Generally speaking two types of cases can be distinguished: cases where a request under the Convention has been made before 1 January 2000 and cases which have been initiated after that date.

***i) Procedure in cases where a request has been made by a taxpayer before 1 January 2000***

- a) *The competent authorities have not reached a mutual agreement within the two-year period which elapsed before 31 December 1999*

15. Most Member States take the view that cases, which have been initiated under the Arbitration Convention prior to 1 January 2000, should be completed according to the rules of the Arbitration Convention including arbitration.

16. Denmark and Finland take the view that the arbitration procedure (second phase) is suspended and will be taken up again once the Arbitration Convention will re-enter into force.

17. For Germany, which has already ratified the Prolongation Protocol, the arbitration procedure is suspended and will be taken up again once the Protocol has been ratified by the government of the other Member State and if and when the other Member State agrees.

- b) *The two-year period did not elapse before 31 December 1999*

18. On the basis of the replies that the Commission services' received on their questionnaire, most Member States continued to look for a mutual agreement under the Arbitration Convention with the other Member State. Denmark, Finland and Greece on the other hand suspended the mutual agreement procedure under the Arbitration Convention but continued under the provisions of the relevant bilateral tax treaty. The Commission services assume that in the latter case the two –year period is equally suspended.

19. The majority view on both types of cases seems to be supported by Article 18 sentence 2 of the Convention, which states that the Convention is applicable for procedures which have been started after the Convention has become effective, i.e. from 1 January 1995 until 31 December 1999.

***Question 2:*** *In order to achieve a uniform application of the Arbitration Convention, would those Member States, which hold the Arbitration Convention legally inapplicable, be prepared to join the majority view that cases, which have been initiated under the Arbitration Convention prior to 1 January 2000, should be completed according to the rules of the Arbitration Convention including arbitration?*

***ii) Procedure in cases where a request is made by a taxpayer after 1 January 2000***

20. The replies to the Commission services' questionnaire have revealed that Member States' views on this issue differ substantially. On the basis of the replies received, only one Member State (Italy) rejects the taxpayer's request to initiate a mutual agreement procedure under the Arbitration Convention and notifies the taxpayer that a new request needs to be made once the Convention re-enters into force.
21. Five Member States (Luxembourg, the Netherlands, Spain, Ireland and the United Kingdom) are in a position to continue the procedure as foreseen in the Convention if and when the other Member State agrees. If the other Member State does not agree, those Member States will – with the taxpayer's consent - initiate a mutual agreement procedure under the double taxation agreement with the other Member State. Nine more Member States (Austria, Belgium, Denmark, Finland, France, Germany, Greece, Portugal and Sweden) initiate a mutual agreement procedure but under the double taxation agreement with the other Member State (Austria and Denmark only if so requested by the taxpayer), with the effect that there is no time limit to reach a mutual agreement. In summary, although the vast majority of Member States initiate a mutual agreement procedure some do so under the Arbitration Convention with its two year time limit, whilst some do so only under double taxation agreements which have no time limit.
22. As regards the arbitration procedure, i.e. the second phase of the Convention, seven Member States (Austria, Belgium, Denmark, Finland, France, Italy and Sweden) take the position that it is suspended and can only be taken up once the Convention will re-enter into force (Italy only upon a new request).
23. Six Member States (Greece, Luxembourg, the Netherlands, Spain, Ireland and the United Kingdom) are in a position to handle the case under the arbitration procedure as foreseen in the Convention if and when the other Member State agrees. If the other Member State does not agree, those Member States will continue the mutual agreement procedure under the double taxation agreement with the other Member State (Spain only if so requested by the taxpayer).
24. Two Member States (Germany and Portugal) consider the arbitration procedure suspended and will take it up again once the Prolongation Protocol has been ratified by both Contracting States and if and when the other Contracting State agrees.
25. It seems clear that in cases where the application is made after 1 January 2000 not all Member States consider the Arbitration Convention to be legally effective at the time of application. Therefore, it is arguable that the Convention cannot be applied without certain restrictions. On the other hand, it seems unjustified to have taxpayers suffer from double taxation and double payment of taxes over years simply because some Member States have not yet ratified the 1999 Prolongation Protocol to which they agreed.

**Question 3:** *In order to mitigate the effects of Member States' different interpretations and positions would Member States be prepared to treat a request under the Arbitration Convention automatically as a request for MAP under the pertinent double taxation treaty to allow for the elimination of double taxation?*

**Question 4:** *Would Member States be prepared to count the period of negotiations under the MAP of the pertinent double taxation treaty for the determination of the two year period foreseen in the Arbitration Convention and enter into an agreement to initiate the arbitration procedure (the second phase of the Convention) two years after the commencement of the mutual agreement procedure under the double taxation treaty or if later as soon as the Prolongation Protocol has been ratified by both Contracting States?*

### **III. The starting point of the three- and two year- periods enshrined in the first phase of the Arbitration Convention.**

#### **i) The starting point of the three-year period (deadline for submitting the request according to Article 6.1 of the Arbitration Convention and Article 25.1 of the OECD Model Tax Convention)**

26. Both Article 6.1 of the Arbitration Convention and Article 25.1 of the OECD Model Tax Convention state that a request for competent authority assistance must be presented within three years from the “first notification of the action” resulting in double taxation
27. Paragraph 18 of the Commentary to the OECD Model Tax Convention states that the provision fixing the starting point of the action resulting in double taxation “... should be interpreted in the way most favourable to the taxpayer.” Thus, the time limit should run only “... from the act of taxation itself, as evidenced by a notice of assessment or an official demand or other instrument for the collection or levy of tax.”
28. Most Member States consider the formal sending to the taxpayer of the tax re-assessment notice as the “first notification of the action” which results or is likely to result in double taxation. Four Member States (Portugal, Spain, Italy and Greece) take the formal sending of the tax audit report as the starting point for three-year period and for only three Member States (Denmark, Ireland and France) the formal communication to the taxpayer of the intention to make an adjustment constitutes “the action” that sets the period in motion.
29. In a joint comment on this issue Members from business take the view that the tax assessment should be the decisive point in time. However, the taxpayer should be allowed to present the case to the competent authority even before the tax assessment is issued, as soon as the tax authority notifies the taxpayer of an action that is likely to result in a tax re-assessment (e.g. a tax audit report).

30. Since failing to meet the three-year time limit results in losing the remedy to use the Arbitration Convention as a means to eliminate double taxation, the starting point of this period has to relate to an event, which is clearly recognisable for the taxpayer and the competent authorities. In this regard, the formal sending of a tax audit report does not provide certainty, because there are countries where such a formal tax audit report is not issued. Also, it is conceivable that even after the sending of the formal tax audit report the discussions still continue and the final tax assessment is different. Member States should, therefore, agree on an event that ensures a consistent application of the rule in all Member States.

***Question5:*** *Having regard to an interpretation most favourable for the taxpayer, would Members agree that the term "first notification of the action" should be construed as meaning the date of the tax re-assessment notice?*

***ii) The starting point of the two-year period (Article 7.1 of the Arbitration Convention)***

31. Twelve Member States consider that the two-year period starts when the competent authority receives a request from the taxpayer, two Member States (Belgium and Sweden) only on condition that all necessary information have been provided to the tax administration. For Greece the two-year period starts only when the other Member State notifies that it is not prepared to make a corresponding adjustment.

32. Article 7.1 of the Convention stipulates that the two-year period starts on the date " ... on which the case was first submitted to one of the competent authorities ...". This wording seems to support the position of those Member States that consider the two-year period to start when one of the competent authorities receives a request from the taxpayer.

33. In any case, it should be noted that according to Article 7.1 of the Convention " ... where the case has so been submitted to a court or tribunal [ . . . ] the term of two years [ . . . ] shall be computed from the date on which the judgement of the final court of appeal was given."

34. Germany takes the view that the two-year period starts when the competent authority receives a request from the taxpayer but a taxpayer should not be justified to claim the expiry of the two-year period (and request the tax administrations to invoke the arbitration procedure) if the mutual agreement procedure was delayed because of the lack of taxpayer's co-operation or documentation. In addition, the FORUM should discuss if a mutual agreement (both under the double tax treaty and the Arbitration Convention) should be closed unsuccessfully if a taxpayer does not co-operate or provide the tax administration with appropriate documentation.

35. The Netherlands assume that according to Article 7.1 of the Arbitration Convention the two-year period starts on the latest of the following two dates: a) the date on which the tax assessment incorporating the adjustments is irrevocably determined, or b) the date on which the competent authority receives the request. When both a domestic appeals procedure/litigation and a mutual agreement procedure (under either a Double Tax Treaty or the Arbitration Convention) are initiated the Netherlands can suspend the domestic appeals procedure/litigation and enter into "early" consultations with the competent authority of the other Contracting State. If these "early" consultations fail to eliminate the

double taxation the domestic proceedings can re-start. If the domestic appeals proceedings/litigation subsequently also fails to eliminate the double taxation then the competent authority procedure is continued. In such a case the Netherlands competent authority, at the taxpayer's request, may request the other Contracting State's competent authority to agree, under Article 7.4 of the Convention, to reduce the two-year period to a maximum of one year, starting from the date of the irrevocable determination of the tax re-assessment in the domestic proceedings. This reduction is requested on the grounds that some initial discussions have already taken place as part of the "early" consultations.

36. For Members from business it is unacceptable that the two-year period may start only when a Member State has formally notified the other Contracting State that it is not prepared to make a corresponding adjustment. They also consider it inappropriate to have the two-year period only start if all necessary information have been provided to the tax administration, first because the definition of "necessary information" is unclear and secondly because this could result in penalising a taxpayer. They add that both tax administrations normally have access to information available to the taxpayers resident in their country and that they could exchange such information.

***Question 6:*** *Are Members prepared to agree that the two-year period should start on the date at which one of the competent authorities receives the taxpayer's request?*

#### **IV. Proceedings during MAP (also including here the first phase of the Arbitration Convention): discussion on the principles of a possible common approach**

##### ***i) Expediting the MAP procedure***

37. Double taxation – and most often double payment of taxes - resulting from transfer pricing adjustments can lead to a heavy financial burden for taxpayers. Considering the lengthy procedure of most MAP this situation may last for a significant amount of years.
38. This is why mutual agreement cases should be dealt with as expeditiously and effectively as possible. In order to achieve that objective, the Arbitration Convention provides for a two-year time limit to resolve a case by concluding a mutual agreement.
39. Similarly, the United Kingdom and the United States have agreed on Administrative Arrangements designed to set out how they will operate MAP under the UK/USA Double Taxation Convention. These Arrangements set a target time scale of 18 months from transmittal of a position paper by one Contracting State. The Competent Authorities shall deliver a position paper within 120 days from receipt of the presentation of a case under the MAP. If it has not proved possible to resolve a particular case within the 18-months time scale, the Arrangement provides that the case will be reviewed at a more senior level to ensure that all appropriate action is being taken.
40. Experience of Member States has shown, however, that in certain situations even the two-year period provided for by the Arbitration Convention may be too short because of the complexity of the case, language problems (translations often take a long time) or because other Contracting States are involved.



41. The lack of transparent provisions on when and how Member States should establish their positions can be another reason for delay. Practical arrangements in this respect, which are relevant also for MAP under double taxation treaties, could improve substantially the mutual agreement procedure and avoid submission of a case to the advisory commission before sufficient negotiations have taken place. In this regard, the FORUM could analyse different alternatives to expedite dispute resolution procedures in order to relieve double taxation as quickly and efficiently and in as many cases as possible, and with the lowest possible costs for business and tax administrations.
42. For example, agreements on deadlines for specific actions and practical arrangements concerning means of communication seem necessary to expedite and facilitate the MAP. Member States could publicly indicate their aim to respect certain deadlines (if however not respected there would be no legal sanctions).
43. A Member from business proposes that consequences of non-compliance with the two-year period of Article 7.1 of the Convention should also be regulated
44. On the basis of proposals made by the Member of the Dutch tax administration, possible (indicative) procedural arrangements could, for example, be the following:
  - a) *Start of the two-year period*
    - aa) The Member State that made the adjustment sends, within one month after receipt of the taxpayer's request, a receipt confirmation to the other Member State indicating the starting date of the two-year period.
    - bb) The other Member State, within one month, either agrees on this starting date or indicates an alternative date that it considers to be the starting date for the two-year period.
    - cc) If Member States cannot agree, they try to find a solution within one month after the proposal of the alternative date. If dispute continues, the alternative date is considered the starting date of the two-year period. Within two weeks the Member State that made the adjustment notifies the taxpayer of this date.
  - b) *Submission of position papers*
    - aa) The Member State that made the adjustment aims to send its position paper to the other Member State within three months after receipt of the taxpayer's request [*the Netherlands would add: " or within three months after sending the tax re-assessment notice (in case the latter occurs after the former)"*]
    - bb) In case the other Member State is not prepared to make a corresponding adjustment it aims to submit its position paper, accompanied with possible additional questions, within six months upon receipt of the position paper of the Member State that made the adjustment. Within one month the Member State that made the adjustment contacts the other Member State in order to agree on procedural arrangements with respect to the means of continuing the case (written procedure, telephone contact, e-mail, face to face meeting).

**Question 7:** *Would Members be prepared to agree on a target time scale for dealing with mutual agreement cases, and if so, would they be prepared to include the necessary provisions in domestic regulations/instructions or administrative arrangements between Member States?*

**Question 8:** *Could the FORUM agree with the arrangements as described above?*

**ii) Suspension of assessment and collection of tax during mutual agreement procedures**

45. Double taxation, which is the subject of the mutual agreement and arbitration procedure, and the lack of rules on collection or suspension of tax due during mutual agreement procedures can constitute a substantial loss of cash-flow for businesses.
46. Although rules on suspension of tax exist in most domestic tax legislation in case of appeal and litigation, these rules are absent in EU cross-border cases. Whereas instant tax collection could be justified in certain cases when dealing with third countries, the existing EU Treaty network, the Mutual Assistance Directive 77/799 and Directive 76/308/EEC on mutual assistance for the recovery of claims relating to certain levies, duties, taxes and other measures, should be sufficient guarantees to secure tax collection in due time.
47. For that reason, there was agreement at the FORUM's meeting on 3 October 2002 that the issue of suspension of tax collection (together with the issue of interest charges – or similar supplementary payments – and interests on tax refunds) during a mutual agreement or arbitration procedure were issues that could be examined. The MAP could be improved so that suspension of tax collection was possible to the same extent as when an adjustment is appealed against to national courts.

**Question 9:** *Could it be envisaged (for example by way of a memorandum of understanding) to suspend the collection of tax and interest, during a mutual agreement procedure both under double tax treaties and the Arbitration Convention?*

**Question 10:** *Alternatively, would the Forum be prepared to analyse different alternatives to alleviate or even eliminate double payment of taxes (for example the deferral of the assessment)?*

**iii) Interest charges and refunds during mutual agreement procedures**

48. Interest charges – or similar supplementary payments – on tax resulting from transfer pricing adjustments constitute an important liquidity issue for businesses. In some cases, the amount of interest due may actually be larger than the amount of additional taxes.
49. To resolve the interest and financing problems in mutual agreement and arbitration procedures, the competent authorities of Member States could ensure that the assessment and collection of interest charged by one Member State match the assessment of interest refunded by the other Member State. Another possibility to eliminate or, at least, alleviate

double payment would be to include interest payments and refunds in mutual agreements reached between Member States

50. Member States are, in any case well advised to avoid a mismatch between Member States in charging interest for tax arrears and tax refunds as this could lead to unjustified double payments or double advantages for taxpayers.

***Question 11:*** *Would it be possible to put in place arrangements that provide for a consistent assessment of interest charges or refunds in relation to tax re-assessments or corresponding adjustments resulting from transfer pricing adjustments in other Member States?****iv) Transparency and taxpayer participation***

51. The competent authority of the state in which the taxpayer requesting a MAP under a double tax treaty or the Arbitration Convention is resident, is not obliged to "honour" the taxpayer's objection and initiate the mutual agreement procedure accordingly. Rather, the Convention (as under Article 25 of the OECD Model Tax Convention) grants the competent authority the right to judge if the objection is legitimate. Only if the competent authority believes that the objection is legitimate will it endeavour to solve the alleged case of double taxation, either by itself or through mutual agreement with the other contracting state. If the competent authority believes, however, that the objection is not legitimate, the taxpayer has no right to appeal such decision.

***Question 12:*** *Are Members aware of cases where a taxpayer's request to initiate a mutual agreement procedure under a double tax treaty or the Arbitration Convention has been rejected? If so, on which grounds?*

52. To a greater extent than in other situations, the underlying facts and circumstances play a key role in making and substantiating transfer pricing adjustments. In most cases, the underlying facts and circumstances are both complex in nature and numerous in quantity. Experience shows that taxpayers involved in mutual agreement and arbitration procedures relating to transfer pricing adjustments would like an opportunity to explain their position to the competent authority.
53. However, during the mutual agreement procedure both under double tax treaties and the Arbitration Convention, the taxpayer has no legal right to be heard or to bring up information or documentation he deems relevant. Conversely, during the arbitration procedure the taxpayer has the right (and – upon request from the advisory commission - the obligation) to bring up relevant information, evidence or documents which seem to him to be of use to the advisory commission in reaching a decision. The competent authority of each contracting state involved, in principle, has the same rights and obligations (Article 10.1 of the Convention). The taxpayer also has the right and the obligation to appear or be represented before the advisory commission (Article 10.2 of the Convention).

***Question 13:*** *Does the FORUM consider that the opportunity for taxpayers to participate in the mutual agreement process should be enhanced (e.g. by presenting the relevant facts and arguments) and that the right to participate in their domestic laws/regulations/instructions should be granted?*

**Question 14:** *Should taxpayers be kept informed of the progress of their case (on a regular basis or on the taxpayer's request) and be granted the right to information in domestic laws/regulations/instructions?*

**v) Other issues**

**Question 15:** *What do Members think would be other effective ways to improve current mutual agreement procedures (both under double tax treaties and the Arbitration Convention)?*

**V. Proceedings of the second phase of the Arbitration Convention: establishment and functioning of the advisory committee.**

54. The drafting of the Arbitration Convention does not address a number of practical aspects concerning the arbitration phase, thus providing little guidance to the parties concerned. The following proposals for some implementing rules on a number of practical and organisational aspects of the second phase of the Arbitration Convention are presented for discussion and approval. The proposed rules for certain Articles of the Convention are a result of contacts in the framework of the Council financial questions group in 1996/97.

**55. Ad Article 7 and Article 11**

- (1) The place where the advisory commission meets and the place where its opinion is to be delivered may be determined in advance by the competent authorities of the Contracting States concerned.
- (2) If the competent authorities do not agree, the place in question shall be determined by the advisory commission.

**Question 16:** *Does the FORUM think that the place in question should in any case be at a central place, e.g. at the EU Commission in Brussels, if the competent authorities of the Contracting States concerned do not agree otherwise?*

**56. Ad Article 7, paragraph 1**

The Contracting State to whom the case was presented takes the initiative for the establishment of the advisory commission and arranges for its meeting.

**57. Ad Article 9**

- (1) The proceedings of the advisory commission shall be conducted in the official language or languages of the Contracting States involved, unless the competent authorities decide otherwise by mutual agreement, taking into account the wishes of the advisory commission.

- (2) The advisory commission may order that the party from whom a statement or document emanates arranges for a translation into the language or languages in which the proceedings are conducted.

58. Ad Article 9, paragraph 1

The advisory commission referred to in Article 7(1) will normally consist of two independent persons of standing in addition to its Chairman and the representatives of the competent authorities.

59. Ad Article 11, paragraph 2

The opinion shall contain in any case:

- (a) the names of the members of the advisory commission;
- (b) the request; the request contains :
  - (1) the names and addresses of the enterprises involved;
  - (2) the competent authorities involved;
  - (3) a description of the facts and circumstances of the dispute;
  - (4) a clear statement of what is claimed.
- (c) a short summary of the proceedings;
- (d) the arguments and methods on which the decision in the opinion is based;
- (e) the opinion;
- (f) the place where the opinion is delivered;
- (g) the date on which the opinion is delivered;
- (h) the signatures of the members of the advisory commission.

60. Ad Article 11, paragraph 3

- (1) The costs of the advisory commission procedure, which shall be shared equally by the Contracting States concerned, shall be the administrative costs of the advisory commission and the fees and the expenses, if any, of the independent persons of standing.
- (2) The reimbursement of the expenses of the independent persons of standing will be limited to the reimbursements usual for high-ranking civil servants of the Contracting State, which has taken the initiative to establish the advisory commission.
- (3) The fees of the independent persons of standing shall be fixed at Euro 1,000 per person per full day spent on the case, unless the competent authorities of the Contracting States concerned decide otherwise. The Chairman however will receive a 10% higher fee than the other independent members. The total amount of fees spent on the case paid to the independent persons of standing, including the Chairman, shall be limited to a maximum amount of Euro 100,000 per opinion.

- (4) Actual payment of the costs of the advisory commission procedure shall be made by the Contracting State which has taken the initiative to establish the advisory commission, unless the competent authorities of the Contracting States concerned decide otherwise.

#### 61. Ad Article 12

The decision of the competent authorities and the opinion of the advisory commission will be communicated as follows:

- (a) Once the decision has been taken, the competent authority to whom the case was presented shall send a copy of the decision of the competent authorities and the opinion of the advisory commission to each of the enterprises involved;
- (b) If the competent authorities of the Contracting States concerned agree that the decision and the opinion may be published, they shall only do so if both of the enterprises involved communicate in writing to the competent authority to whom the case was presented that they do not have objections to publication of the decision and the opinion. With the consent of the enterprises involved, the competent authorities of the Contracting States concerned can also agree to publish the decision and the opinion without mentioning the names of the enterprises involved and with deletion of any further details that might disclose the identity of the enterprises involved.

**Question 17:** *Is there agreement on the above provisions?*

**Question 18:** *Could they be included in some kind of non-legislative instruments (Codes of conduct, Guidelines for common interpretation, Codes of best practice, memoranda, etc.)?*

### **VI. Interaction of the mutual agreement and arbitration procedure with administrative and judicial appeals**

62. Taxpayers are entitled to appeal against a tax re-assessment if they are of the opinion that a transfer pricing adjustment is not justified. They can, in addition, invoke the mutual agreement or arbitration procedure.
63. In some Member States the competent authority will, however, not negotiate a case with the competent authority of the Contracting State involved as long as the taxpayer can contest the tax re-assessment at administrative or judicial level. It can be argued that, until the domestic appeals procedure has been completed, it is not clear whether or not double taxation will indeed arise and, if so, what amount will actually be involved.
64. In certain situations, however, it may be inefficient for the competent authority to wait until the taxpayer has exhausted all remedies provided by the domestic law before entering into negotiations with the competent authority of the Contracting State. For this reason, some Member States offer taxpayers the possibility to request the competent authority to enter into consultation with the competent authority of the Contracting State despite the fact that domestic appeals procedures are still pending. Most of these Member States grant a request to this effect only if (i) the Court of Appeal has approved the

suspension of legal proceedings for the duration of the mutual agreement or arbitration procedure, and (ii) the taxpayer undertakes to cease legal proceedings if the mutual agreement or arbitration procedure leads to the elimination of the double taxation.

65. In this respect it should be noted that Article 7.3 of the Convention provides that “ ... where the domestic law of a Contracting State does not permit the competent authorities of that State to derogate from the decisions of their judicial bodies,...[ the arbitration procedure] shall not apply unless the enterprise of that State has allowed the time provided for appeal to expire, or has withdrawn any such appeal before a decision has been delivered.” Apart from the problem that domestic legislation in some Member States does not allow the competent authority to deviate from court decisions, the aforementioned provision constitutes in practice a limitation to the application of the Arbitration Convention.
66. The practice of certain Member States not to initiate a MAP under a double tax treaty or the Arbitration Convention unless the taxpayer has waived his right to appeal, can be regarded as yet another limitation to the application of the Convention. It could be argued that this rule is inconsistent with the Arbitration Convention, which stipulates in Articles 6.1 that an enterprise may “ ... irrespective of the remedies provided by the domestic law of the Contracting States concerned, ... ” present its case to the competent authority. Similarly, Article 7.1 para. 2 states that “Enterprises may have recourse to the remedies available to them under the domestic law of the Contracting States concerned.”

***Question 19:*** *Do Members see the need to re-consider and analyse in depth the interaction of the Arbitration Convention with the administrative and judicial appeals available under the domestic legislation of Member States? Would Member States be prepared to co-ordinate the MAP with their respective internal appeals processes to expedite the resolution of cases?*