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EU JOINT TRANSFER PRICING FORUM

Revised Draft Report on Improving the Functioning of the Arbitration Convention

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Note from the Secretariat

This Revised Draft Report reflects the discussion at the June 2014 meeting and the comments received from JTPF Members (see doc. JTPF/012/2014/EN, Compilation of comments on the Draft Report on improving the functioning of the Arbitration Convention following the JTPF meeting on 26 June).

Please note that suggested amendments to the Code of Conduct are referenced in the report as they would appear in a future Revised Code of Conduct (this also applies to points in the existing CoC which will be retained in the new CoC, but need to be renumbered in order to follow the changed structure of the new CoC). An updated draft of the Revised Code of Conduct is attached in Annex 1 to this Revised Draft Report.

MS who have not yet provided their information on the new Annex 3 (Tax collection and interest charges during cross-border dispute resolution procedures (new point 10 of the Code of Conduct) are invited to do so as soon as possible.

I. Introduction

1. The EU Joint Transfer Pricing Forum (JTPF) has carried out a comprehensive monitoring exercise of the practical functioning of Convention 90/436/EEC on the elimination of double taxation in connection with the adjustment of profits of associated enterprises[1] (Arbitration Convention, AC) and the revised Code of Conduct for the effective implementation of the Arbitration Convention (CoC)[2]. In this process the JTPF has drawn on experiences of Member States (MS) and non-government members (NGM) of the Forum, as well as on that of members of advisory commissions under the AC.

2. The monitoring has demonstrated that the AC and its related CoC provide for a well-balanced approach to dispute resolution. Guidance is available on important aspects, while at the same time a certain degree of flexibility is maintained as regards the allocation of powers to parties involved, in view of the administrative burden the procedure creates. Nevertheless, it was found that certain aspects of the functioning of the AC and the CoC could be improved. This Draft Report addresses relevant issues identified in the monitoring process by way of proposing amendments to the CoC.

Note from the Secretariat:

At the June 2014 meeting NGMs suggested to supplement the preamble of the next draft of the CoC with a principle on behavioural aspects. The Secretariat suggests the following addition to the preamble:

"Without prejudice to the respective spheres of competence of the Member States and the European Union, this revised Code of Conduct concerns the implementation of the Arbitration Convention and certain related issues concerning mutual agreement procedures under double taxation treaties between Member States. The application of the Arbitration Convention is governed by mutual trust, cooperation and transparency between all parties involved as well as by recognising the need to maintain a sustainable and reliable procedure for resolution of disputes in a timely and resource effective manner."

[1] OJ L 225, 20.8.1990, p.10.
[2] OJ C 322, 30.12.2009, p.1.

II. JTPF analysis and recommendations

1. Scope of the Convention (Chapter I, Articles 1 and 2 of the AC)

1.1 Application of the AC in the absence of an actual payment of tax

3. Article 6 (1) 2nd sentence AC provides that a "case must be presented within three years of the first notification of the action which results or is likely to result in double taxation within the meaning of Article 1". The question arises whether a case is eligible to MAP under the AC only once a cash payment is due. This is pertinent, for example, in cases where the entity subject to the transfer pricing adjustment has losses carried forward against which an upward adjustment could be offset or in cases where because of group relief an actual tax payment is not due.

JTPF recommendation (new point 1 in CoC)

"[An action which results or is likely to result in double taxation within the meaning of Article 1 of the Arbitration Convention does not require that the transfer pricing adjustment within the meaning of Article 4 of the Convention leads to an actual payment of tax. Therefore] cases where the entity subject to the adjustment within the meaning of Article 4 has losses carried forward against which an upward adjustment could be offset or cases where because of group relief no actual tax payment is due and similar situations, are within the scope of the Arbitration Convention."

Note from the Secretariat:

The second sentence was redrafted along the lines of the Chair's proposal at the June meeting and the third sentence was deleted. To address the concern that the former recommendation could be understood as allowing an interpretation that cases without double taxation and even cases of double-non taxation are covered by the AC, Members may discuss whether with the addition "and similar situations" the recommendation would still be valid without the first [bracketed] sentence.

1.2 Application of the AC dependent on MAP under DTC

4. The AC applies to issues of double taxation which arise from profit adjustments between associated enterprises in the meaning of Article 1 (1) and (3) and Article 4 (1) AC and from profit adjustments to permanent establishments (PE) in the meaning of Article 1 (2) and (3) and Article 4 (2) AC. The JTPF discussed cases where the application of the AC itself and the way it is applied depends on issues not covered by the AC. For example: MS have different views on whether a PE in the meaning of Article 5 of the OECD Model Tax Convention (OECD MTC) exists and, if so, how much profit should be allocated to it by virtue of Article 7 OECD MTC.

5. The issue of whether a PE exists (Article 5 OECD MTC) is indeed not covered by the AC. Disputes on this issue may therefore only be solved by other means, e.g. Mutual Agreement Procedure under an applicable Double Taxation Convention. However, once the existence of a PE is established, the AC should be applicable to solve an eventual dispute on the amount of profit attributable to this PE.

JTPF recommendation (new point 2 in CoC):

"If access to the Arbitration Convention or the treatment of cases under the Arbitration Convention depends directly on the result of a mutual agreement procedure under an applicable Double Taxation Convention, care should be taken to ensure that the deadline under Article 6(1) of the Arbitration Convention does not expire. The enterprise should file separate requests for a mutual agreement procedure under the Arbitration Convention and a mutual agreement procedure available under the applicable Double Taxation Convention. The requests may be combined in one letter. As a case cannot be regarded as having been submitted with the minimum information required under point 7.6 (a) (ii) CoC [*former point 5 (a) (ii)*] when necessary information from the mutual agreement procedure under an applicable Double Taxation Convention is missing, the two-year period referred to in Article 7 (1) AC will not start before the issue addressed under the Double Taxation Convention is solved (point 7.6 (b) (ii) CoC) [*former point 5 (b) (ii)*]."

Note from the Secretariat:

The paragraph was redrafted in accordance with the agreement reached at the June 2014 JTPF meeting. One MS made a reservation at the June meeting but lifted this reservation after the meeting.

1.3 Remedies against denial of access to the AC

Note from the Secretariat:

One MS commented that the broad topic of denying access to the AC still warrants discussion. Although the statistics indicate that very few requests were rejected by the reporting CA, denial of access with the argumentation that the case is not covered by the AC remains in their experience a very valid practical topic.

To address the issue, the Secretariat suggests further clarifying in the Code of Conduct that the AC applies to cases where the adjustment is made on the grounds of what is regarded as transfer pricing under the OECD TPG or the domestic law of a MS Although point 6.1 (a) CoC may already be understood as covering this, the principle may explicitly be clarified at the beginning of the CoC under the headline "Scope of the Arbitration Convention".

JTPF recommendation *(text to be inserted at the beginning of the CoC under the headline "Scope of the Arbitration Convention)*

"A case is covered by the Arbitration Convention where an action which results in taxation within the meaning of Article 1 of the Arbitration Convention is based on non-observation of the principles of Article 4, as advocated by the OECD Transfer Pricing Guidelines or as laid out in the national law of the Contracting State."

6. A Member State will not grant access to the AC if the case presented by the enterprise is not covered by the scope of the AC or excluded from the AC under Article 8 AC. The AC itself does not provide remedies against denial of access. However, some MS already have domestic legal remedies for determining whether a denial of access to the AC by their administrative bodies is justified (see MS TP profiles). For reasons of

transparency and fairness, a competent authority will inform the other competent authority(ies) when access to the Arbitration Convention is denied and provide them with the reasons for the denial. The competent authorities involved should endeavour to reach mutual agreement on whether the denial of access to the Arbitration Convention is justified.

JTPF recommendation (new point 5 in CoC)

"Member States should consider providing domestic legal remedies for determining whether the denial of access to the Arbitration Convention by their administrative bodies is justified."

Note from the Secretariat:

The recommendation was redrafted in accordance with the agreement reached at the June 2014 meeting. 5 MS made a scrutiny reservation. One MS confirmed its reservation in writing.

At the June meeting it was also agreed that MS should endeavour to reach an agreement on whether denial of access is justified. One MS suggested that MS should exchange views on whether the denial is justified rather than reaching an agreement. To reflect this, paragraph 6 (see above) and recommendation 7.3 (see below) were redrafted.

One MS commented that the Code would also benefit from clarifying the procedure foreseen in the AC for accepting/rejecting requests. The Secretariat suggests amending headline 1.3 of the report and adding the paragraph below to it (as a new item 7).

"**1.3 Access to the AC and remedies against the denial of access**"

"7. When an enterprise considers that the principles of Article 4 AC are not observed it can request access to the Arbitration Convention. The request can be made by either one of the two enterprises specified in Article 1 AC, but has to be presented to the competent authority of the Contracting State of which it is an enterprise or in which its permanent establishment is situated. Point 7.3 (h) CoC indicates that the competent authority receiving the request decides about whether minimum information in the meaning of point 7.6 (a) CoC (with or without an additional request (point 7.6 (a) (viii) CoC) is submitted and the claim is well founded. However, it would be difficult to solve a case by mutual agreement when one competent authority considers that the minimum information has not been submitted. This may have direct consequences on the length of time to obtain relief and whether such relief can ultimately be provided."

JTPF recommendation (addition to point 7.3 e) CoC

The competent authority will acknowledge receipt of a taxpayer's request to initiate a mutual agreement procedure within one month from the receipt of the request and at the same time inform the competent authority(ies) of the other Member State(s) involved in the case attaching a copy of the taxpayer's request. The competent authorities should reach a mutual understanding on whether they consider the minimum information as submitted. A competent authority will inform the other

competent authority(ies) when access to the Arbitration Convention is denied and provide them with the reasons for the denial. The competent authorities involved should endeavour to reach mutual agreement [exchange their views] on whether the denial of access to the Arbitration Convention is justified.

2. General provisions (Chapter II, Articles 3 to 14 AC)

2.1. Informing enterprises of their rights under the AC

7. Drawing on Best Practice No. 9 of the OECD MEMAP the JTPF recommends informing concerned enterprises of their rights under the AC in case of an adjustment. Such written notice or advice could be issued at the time a proposed adjustment is formally notified to the enterprise and could include general guidance on the availability of a mutual agreement procedure and how to go about protecting access to this mechanism. Some tax administrations have implemented the practice of advising enterprises of both their domestic and Convention rights and obligations at the time of the proposed adjustment, with successful results and positive feedback.

JTPF recommendation (new point 7.1 a) in CoC)

"A tax administration making an adjustment is encouraged to inform the enterprise [at the latest] at the time of the first notification of its rights under the Arbitration Convention, including about any time limits in the Convention for initiating a mutual agreement procedure. The onus for making a timely request in order to preserve access to the mutual agreement procedure rests with the enterprise and enterprises should take all reasonable steps to ensure that time limits do not expire.."

Note from the Secretariat:

The recommendation was redrafted in accordance with the agreement reached at the June 2014 meeting. One MS suggested adding "at the latest" before "at the time of the first notification".

2.2. Independence of CA from audit

8. In line with Best Practice No. 23 of the OECD MEMAP the JTPF recommends that in order to enhance the independence of a subsequent review of a case by a competent authority (CA), CAs maintain a level of autonomy from the audit function of a tax administration.

JTPF recommendation (new point 7.1 c) in CoC)

"Although competent authorities and audit (function) may belong to the same tax administration, competent authorities should maintain a degree of autonomy from the audit function of the tax administration in order to ensure the independence of any subsequent review of a case by the competent authority. The guiding principle should be that the competent authority's function is to ensure a fair and appropriate

application of the Arbitration Convention, not to seek to uphold all adjustments proposed by the tax authorities of its Member State."

Note from the Secretariat:

The recommendation was redrafted in accordance with the agreement reached at the June 2014 meeting.

2.3. No waiver of rights for audit settlements or blocking MAP access through unilateral APAs

9. Drawing on Best Practice No. 19 of the OECD MEMAP the JTPF recommends that blocking MAP access via audit settlements or unilateral APAs should be avoided.

JTPF recommendation (new point 7.1 d) in CoC)

"Enterprises and tax administrations should not include waiver of access to a mutual agreement procedure in audit settlements and unilateral APAs, as it would be inappropriate for two parties (the enterprise and one tax administration) to exclude a third party (the other tax administration) from the final resolution of a file in which they had an interest."

Note from the Secretariat:

The recommendation was redrafted in accordance with the agreement reached at the June 2014 meeting.

2.4. Implication of the new Article 7 OECD MTC (2010)

10. In 2008 the OECD concluded its work on the attribution of profits to permanent establishments with publishing the report "Attribution of Profits to Permanent Establishments", approved by the OECD Committee on Fiscal Affairs in 2008. The report represents the outcome of the work on how the "separate arm's length enterprise" provision of Article 7 should be applied. The conclusions of the Report were implemented in the OECD MTC in two stages.

11. The first stage was the revision of the Commentary on Article 7 as Article 7 read before 22 July 2010. This stage was completed in the 2008 update of the OECD MTC. It was aimed at implementing the conclusions of the report that do not conflict with the interpretation previously provided in the Commentary on Article 7. The second stage was the finalization of a completely new Article 7 with related Commentary changes in the 2010 update of the OECD MTC.

12. The JTPF discussed the implications of these developments on the interpretation of Article 4 (2) AC.

JTPF recommendation (new point 6 b) in CoC)

"Article 4(2) of the Arbitration Convention should be interpreted in conjunction with the most recent version of Article 7 OECD Model Tax Convention and the relevant

Commentary. This will not apply in cases where a MS made a reservation in the OECD MTC against implementing the new version of Article 7 OECD MTC and in cases where the bilateral Double Taxation Convention between the Member States involved has a different wording. In cases where Member States have concluded bilateral Double Taxation Conventions, Article 4(2) should have the same meaning as the relevant Article on attributing profits to permanent establishments in the applicable Double Taxation Conventions, taking into account the OECD commentary on the provisions included in the concerned Double Taxation Convention."

Note from the Secretariat:

The recommendation was redrafted in accordance with the agreement reached at the June 2014 meeting.

2.5. Disputes likely to arise

13. The AC foresees that for cases where double taxation is likely to arise, MAP requests under the AC may already be submitted in advance. This possibility may, on the one hand, be seen as providing the advantage to address disputes at an early point in time. At the same time, however, an early submission of a MAP request may be seen as impeding efforts to solve the issue before MAP. An additional consideration is that the workload for CAs in dealing with cases where double taxation did actually arise is usually rather high.

14. Certain tools are already available for dealing with disputes likely to arise:

    a) For situations where certainty is sought for **future transactions** taxpayers may have recourse to an APA procedure[3].

    b) For situations where following a transaction an enterprise identifies a **risk that a dispute may raise,** the JTPF report on transfer pricing risk management[4] recommends that the enterprise should have the possibility to communicate with the tax administration at an early point in time (R4) and tax administrations may consider joint action (R5 and R9).

    c) For situations where a Contracting State **intends** to make an adjustment, the procedure in Article 5 AC is available. This procedure foresees that the enterprises in both States liaise between the two (or more) tax administrations involved.

    d) For situations where the action of a Contracting State is **likely to result in double taxation** the taxpayer may file for MAP under the AC (Article 6 (1) AC).

2.6. MAP request and informing the other CA involved

15. The JTPF considered that it would be helpful if both CAs involved were informed by the enterprise about a MAP request under the AC.

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3 Guidelines for Advance Pricing Agreements in the EU, COM(2007) 71 final

4 Commission Communication on the work of the EU Joint Transfer Pricing Forum in the period July 2012 to January 2014, COM(2014) 315.

JTPF recommendation (new point 7.3 d) in CoC)

"Enterprises should submit a copy of their request for a mutual agreement procedure under the Arbitration Convention to the other competent authority involved at the same time and with the same set of information as to the competent authority to which the request is addressed in accordance with Article 6 (1) of the Arbitration Convention. Where appropriate and allowed, this might be done through electronic means. In cases where the request is not made in a common working language, the enterprise should provide a translation of the request into a common working language. The fact that a copy of the request was submitted by the enterprise does not replace the obligation of the competent authority to inform the other competent authority about receiving the request under point 6.3 (d) nor should it be understood as limiting a competent authority's efforts to come to a satisfactory solution itself within the meaning of Article 6 (2) of the Arbitration Convention.".

Note from the Secretariat:

The recommendation and headline were redrafted in accordance with the agreement reached at the June 2014 meeting.

2.7. Guidance on Multilateral MAP

16. The OECD is currently working on multilateral approaches in the context of MAP. This OECD project builds on earlier work of the JTPF on triangular cases. At its meeting in March 2014 the JTPF agreed that further work on this issue by the JTPF would be postponed until the first results of the OECD project become known. It would then be decided whether and how this item should be taken forward by the JTPF, i.e. in this project or in the context of monitoring the guidance on non-triangular cases.

2.8. Informing the enterprise during MAP

17. The CoC already contains provisions (point 6.3 (b), (f) and (g)) that enterprises will be kept informed about: "all significant developments"; whether the case is considered as being well founded; the initiation of a MAP; whether the request is made within the time limits foreseen under the AC; and, about the starting point of the 2-year period.

2.9. Implications of MAP results for other years

18. The procedure for MAP requests which are linked to a former MAP can usefully be streamlined to the benefit of both taxpayers and tax administrations.

JTPF recommendation (new point 7.3 i) in CoC)

"Where a new request by an enterprise for a mutual agreement procedure is linked to issues which are already covered by an ongoing mutual agreement procedure with the same enterprise, competent authorities should, where appropriate, consider treating the new request together with the ongoing mutual agreement procedure. Where a request for a mutual agreement procedure is linked to issues which have already been covered in another mutual agreement procedure, competent authorities should typically consider applying the outcome in the earlier mutual agreement procedure to the new request and where appropriate, to apply that outcome."

Note from the Secretariat:

The recommendation was redrafted in accordance with the agreement reached at the June 2014 meeting.

2.10. The three-year period

19. According to Article 6 (1) of the AC, a case under the AC must be presented before the relevant competent authority within three years of the first notification of the action which results, or is likely to result, in double taxation within the meaning of Article 1 AC. The term first notification as the starting point of the three-year period under Article 6 (1) AC is determined differently by MS. Possible discrepancies may create insecurity for enterprises as regards time limits. For the determination of the starting point, the understanding of the term first notification by the MS whose action resulted in double taxation should be decisive. *Annex 2* contains information on the starting point of the three-year period for each Member State.

Note from the Secretariat:

A MS suggested providing clarification on whether a case which is presented within 3 years of the first notification of the action under Article 6(1) can be rejected as out of time where additional information requested by that State is received after the 3 year time limit. According to the Secretariat a distinction should be made between "presentation" of a case in the meaning of 6 (1) AC and "submission" of a case for the purpose of Article 7 (1) AC as elaborated in 7.6 (a) CoC.

The Secretariat suggests adding after the first sentence of new point 7.2 (*former point 4 CoC*) the following:

"A request is considered as presented in the meaning of Article 6 (1) AC when it contains the information listed in point 7.6 (a) (i) – (vii) CoC."

2.11. Guidance on position papers

20. The existing guidance on position papers contained in point 6.4 CoC can benefit from further clarification.

JTPF recommendation (amended point 7.4 in CoC)

Exchange of position papers

(a) Member States undertake that when a mutual agreement procedure has been initiated, the competent authority of the country in which a tax assessment, i.e. a final decision of the tax administration on the income, or equivalent has been made, or is intended to be made, which contains an adjustment that results, or is likely to result, in double taxation within the meaning of Article 1 of the Arbitration Convention, will send a position paper to the competent authority(ies) of the other Member State(s) involved in the case. The position paper will contain the information relevant for understanding the case under consideration. Depending on the facts and circumstances of the case the position

paper may set out e.g.:

(i) General information:

- legal name, address and taxpayer identification number of the person requesting assistance, its related persons in the other country, if applicable, and the basis for determining the association;
- the contact details of the competent authority official in charge of the case
- broad overview of the issue, transactions, business, and basis for the adjustment
- the tax years affected
- amount of income and tax adjusted in each tax year, if applicable
- summary of relevant information from the original tax return

(ii) the case made by the person making the request;

- description of the exact nature of the issue or adjustment
- if relevant, calculations with supporting data (these may include financial and economic data and reports relied upon, explanatory narratives as well as taxpayer documents and records where relevant and appropriate).

(iii) the competent authority's view of the merits of the case, e.g. why it believes that double taxation has occurred or is likely to occur;

(iv) how the competent authority suggests that case might be resolved with a view to the elimination of double taxation together with a full explanation of the proposal.

(b) The position paper will contain a full justification of the assessment or adjustment and will be accompanied by basic documentation supporting the competent authority's position and a list of all other documents used for the adjustment, e.g.

- outline of comparable transactions and comparability adjustments;
- description of the methodology employed for the adjustment; and
- an explanation of the appropriateness of the transfer pricing methodology employed for the adjustment (i.e. an explanation why it believes the adjustment achieves an arm's length outcome; identification of tested party, if applicable; industry and functional analysis, if a relevant study is not already included elsewhere in the taxpayer's submission).

(c) The position paper will be sent to the competent authority(ies) of the other Member State(s) involved in the case as quickly as possible taking account of the complexity of the particular case and no later than four months from the latest of the following dates:

(i) the date of the tax assessment notice, i.e. final decision of the tax administration on the additional income, or equivalent;

(ii) the date on which the competent authority receives the request and the minimum information as stated under point 7.6(a).

(d) Member States undertake that, where a competent authority of a country in

which no tax assessment or equivalent has been made, or is not intended to be made, which results, or is likely to result, in double taxation within the meaning of Article 1 of the Arbitration Convention, e.g. due to a transfer pricing adjustment, receives a position paper from another competent authority, it will respond as quickly as possible taking account of the complexity of the particular case and no later than six months after receipt of the position paper

(e) The response should take one of the following two forms:

(i) if the competent authority believes that double taxation has occurred, or is likely to occur, and agrees with the remedy proposed in the position paper, it will inform the other competent authority(ies) accordingly and make such adjustments or allow such relief as quickly as possible;

(ii) if the competent authority does not believe that double taxation has occurred, or is likely to occur, or does not agree with the remedy proposed in the position paper, it will send a responding position paper to the other competent authority(ies) setting out its reasons and proposing an indicative time scale for dealing with the case taking into account its complexity. To enable the competent authorities to identify the areas of disagreement and to understand the position of the responding competent authority, a rebuttal or response paper could include e.g.:

- indication of the areas or issues where the competent authorities are in agreement or disagreement;
- requests for additional information and explanations necessary to clarify particular issues;
- presentation of other or additional information considered pertinent to the case, but not raised in the initial position paper; and
- submission of proposals or views to resolve the issue.

The proposal will include, whenever appropriate, a date for a face-to-face meeting, which should take place no later than 18 months from the latest of the following dates:

(aa) the date of the tax assessment notice, i.e. final decision of the tax administration on the additional income, or equivalent;

(bb) the date on which the competent authority receives the request and the minimum information as stated under point 7.6(a).

(f) Member States will further undertake any appropriate steps to speed up all procedures wherever possible. In this respect, Member States should envisage to organise regularly, and at least once a year, face-to-face-meetings between their competent authorities to discuss pending mutual agreement procedures (provided that the number of cases justifies such regular meetings)."

Note from the Secretariat:

The text above highlighted in yellow reflects the agreement reached at the June 2014 meeting. In 7.4 a (iii) and (iv) it was clarified whose view/suggestion are meant.

2.12. MAP outcome and domestic remedies

21. CAs have a legitimate concern that - in case of domestic court or administrative proceedings carried out in parallel to a MAP - an agreement reached in MAP may be in contradiction with a relevant court decision (or the outcome of other available domestic remedies). Possible risks of abuse also represent a valid concern.

> **JTPF recommendation (new point 7.7 in CoC)**
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> "If the terms and conditions of an agreement reached in a mutual agreement procedure are not satisfactory to the enterprise, the enterprise may withdraw its request for a mutual agreement procedure under the Arbitration Convention.
> When at the time an agreement is reached under the procedure of Article 6(2) of the Arbitration Convention, domestic remedies are still pending, the implementation of this agreement should be subject to its acceptance by the enterprise and the enterprise's withdrawal from domestic remedies such as appeals concerning the issues settled in a mutual agreement procedure under the Arbitration Convention."

22. Member States' practices in this respect are indicated in the Member States Transfer Pricing profiles[5] published on the JTPF website.

Note from the Secretariat:

The recommendation and paragraph 22 below were redrafted in accordance with the agreement reached at the June 2014 meeting.

2.13. Serious penalties

23. Dispute resolution under the AC does not need to be initiated and may be suspended if one of the enterprises involved is subject to a "serious penalty" for the transactions giving rise to the profit adjustment (Article 8). MS have made unilateral declarations to the AC on what they consider a serious penalty in the meaning of Article 8 (1) AC. As the CoC already suggests that a serious penalty should only be applied in exceptional cases like fraud it would be beneficial to define the term fraud.

> **JTPF recommendation (amended point 8 in CoC)**
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> "As Article 8(1) provides for flexibility in refusing to give access to the Arbitration Convention due to the imposition of a serious penalty, and considering the practical experience acquired since 1995, Member States are recommended to clarify or revise their unilateral declarations in the Annex to the Arbitration Convention in order to better reflect that a serious penalty should only be applied in exceptional cases like fraud.

[5] See http://ec.europa.eu/taxation_customs/taxation/company_tax/transfer_pricing/forum/index_en.htm#membership

Tax fraud is a form of deliberate evasion of tax which is generally punishable under criminal law. The term includes situations in which deliberately false statements are submitted or fake documents are produced.[6]"[This applies not only to cases where the aforementioned situations arise because of deliberate action but also in cases where there is a failure to take reasonable care, e.g. gross negligence[7] [which results in criminal law sanctions.]]

Note from the Secretariat:

At the June meeting some JTPF Members expressed concerns that the additional sentence would exclude cases where a penalty is considered serious because of gross negligence. In the written comments one MS does not support a definition of gross negligence as this term is not used in its domestic law and suggests the terminology "deliberate default", "careless behaviour with significant and without significant consequences"

NGMs are against listing further examples of exceptional cases like "gross negligence", as it may widen the application of Article 8 of the AC and lead to more restrictions of cases under the AC. If the Forum feels that reference to gross negligence is truly required, than they suggest to qualify "gross negligence" as restricted to cases that are subject to criminal law sanctions otherwise the result will be an increase of uncertainty for the taxpayer.

The Secretariat suggests clarifying in the end that cases where there is a failure of taking reasonable care [gross negligence] are also included. The term "gross negligence" could be explained in a footnote along the lines of what is suggested by Croatia.

2.14. Improving the "second phase" of the Arbitration Convention

a) Composition and functioning of advisory commissions

23. The composition of advisory commissions is governed by Article 9(1) of the AC. Article 11 (2) AC provides that "The advisory commission shall adopt its opinion by a simple majority of its members".

24. The presence of competent authorities on the panel and especially their right to vote on the opinion of the advisory commission was criticised by 3 of the 4 chairmen of advisory commissions from whom the JTPF sought feedback[8] in 2013 on the functioning of the "second phase" of the Arbitration Convention. They pointed out that although it is of great value to have CAs on the commission in order to give

[6] Communication from the Commission to the European Parliament and the Council on concrete ways to reinforce the fight against tax fraud and tax evasion including in relation to third countries, COM (2012) 351, 27.06.2012

[7] Acting with gross negligence is understood as being aware that an offense might be committed but to carelessly assume that it will not occur or that it can be prevented from occurring

[8] See document JTPF/010/2013/EN

independent members full information on all aspects of the case including their own position and the reasons for it, their status as full members of the advisory commission with voting power seems to be an obstacle to the efficient functioning of the commission. In particular, chairmen of advisory commissions pointed out that:

- the principles of arbitration suggest that interested parties do not sit on an arbitration panel;
- representatives of CAs can delay the proceedings of the advisory commission, as they take much of the meeting time by continuing exchanges of view;
- presence of CAs' representatives may inhibit necessary discussion on the issues among the independent members;
- representatives of CAs do not want usually to prejudice their jobs by agreeing with the other side's view; a compromise is therefore unlikely and this means in practice that the decision of the commission is generally taken by the (three) independent members only, unless they agree to fully support the view of one of the Member States. If CAs are not present in the advisory commission, the independent persons of standing and the Chair could decide on an opinion in a more expedite and efficient manner.

25. From a Member State's point of view it is important that representatives of CAs are full members of the advisory commission, so as to ensure that their case is presented well. CAs' representatives on the panel are normally two and MS consider that this is adequate, as it allows them to send to the advisory commission two professionals with different profiles (e.g., a lawyer and an economist).

26. The possibility to appoint only one representative per CA is already foreseen in Article 9(1). Revising voting powers within the advisory commission would, however, require a change to the AC. As a compromise it is suggested that independent persons of standing should be able to hold separate deliberations. In addition, the possibility to appoint only one representative per CA could be emphasized in the CoC.

JTPF recommendations (amended point 9.2 (c) and new point 9.3 (h) in CoC)

"(c) The advisory commission will normally consist of two independent persons of standing in addition to its Chairman and one or two representatives of each competent authority. For triangular cases, where an advisory commission is to be set up under the multilateral approach, Member States will have regard to the requirements of Article 11(2) of the Arbitration Convention, introducing as necessary additional rules of procedure, to ensure that the advisory commission, including its Chairman, is able to adopt its opinion by a simple majority of its members."

"(h) The Chairmen and the independent persons of standing will be able to hold separate deliberations in order to discuss and formulate the opinion of the advisory commission which will then be agreed with the representatives of competent authorities."

Note from the Secretariat

One MS suggests redrafting the suggested amendment to the first sentence of 9.2. c) as follows:

"The advisory commission will normally consist of two independent persons of standing in addition to its Chairman and two, or one if so specifically agreed upon, representatives of each competent authority."

Two MS suggest deleting 9.3 h) entirely and one MS additionally suggests removing paragraph 26. One MS suggests redrafting point 9.3 h) as follows:

"The Chairman and the independent persons of standing will be able to e.g. hold separate deliberations in order to discuss and formulate a draft opinion of the advisory commission."

As regards the Note from the Secretariat under paragraph 26, one MS does not support to pursue the idea of submitting more than one case to an arbitration committee further as the drafters of the Arbitration Convention deliberately decided against a "standing arbitration committee".

b) Opening statement by the enterprise and auditor(s)

27. The chairmen of advisory commissions surveyed by the JTPF in 2013 argued that hearing enterprises and auditors at the outset of the arbitration procedure can usefully inform and facilitate the deliberations of advisory commissions. In the case of hearings of enterprises, this involves interviewing not only tax experts, but also persons occupying high operational and management positions in the enterprise - familiar with the business strategy, international market conditions and the reasons behind the enterprise's transfer pricing strategy.

28. The AC and CoC already envisage the possibility that auditors and enterprises may appear before the advisory commission (Article 10 AC and point 7.3 (d) CoC). It would nevertheless be useful to explicitly inform enterprises of the possibility to state their case before the advisory commission.

JTPF recommendation (amended point 9.3 (d) in CoC)

"(d) Whilst respecting Article 10 of the Arbitration Convention, the advisory commission may request Member States and in particular the Member State that issued the first tax assessment notice, i.e. final decision of the tax administration on the additional income, or equivalent, which resulted, or may result, in double taxation within the meaning of Article 1 of the Arbitration Convention, to appear before the advisory commission. At the outset of the arbitration procedure each of the enterprises involved should be informed by their respective competent authorities of their right to make a statement before the advisory commission."

Note from the Secretariat:

One MS suggests deleting the last sentence.

c) Preparation of the arbitration procedure

29. The 6-month period envisaged under the AC for an advisory commission to deliver an opinion can be considered generally appropriate. However, at the beginning of this period sufficient information should already be available to the commission, so that it can deliver its opinion in a timely and efficient manner. The time until an advisory

commission is established should be used by the competent authorities to compile all relevant information, so that it is already available at the beginning of the procedure.

JTPF recommendation (amended point 9.2 (f) in CoC)

"(f) Member States will provide the advisory commission before its first meeting, with all relevant documentation and information and in particular all documents, reports, correspondence and conclusions used during the mutual agreement procedure. To assist the advisory commission in completing its work in a timely and efficient manner, the competent authorities will use the time period needed to establish the advisory commission to collect and prepare all necessary information, so that it is already available at the outset of the procedure."

d) Remuneration of chairmen and independent members of advisory commissions

30. Point 7.3 (f) (ii) CoC provides for a remuneration in the amount of 1000 EUR per meeting date per person. Although it is recognised that members of advisory commissions do substantial work outside official meetings of the advisory commission (reading written material, exchanging emails, making conference calls, agreeing the wording of the opinion, travelling) the existing CoC determines remuneration on the basis of meeting days and not by reference to actual time spent on the case due to the objectivity of this criterion.

e) Follow-up to advisory commissions' opinions

31. According to Article 12 AC the competent authorities concerned are expected to take a decision which eliminates the double taxation within 6 months of the delivery of the advisory commission's opinion (their decision may actually deviate from the advisory commission's opinion). Acceptance by the enterprise of this decision is not formally required under the AC and the decision may therefore be implemented without the enterprise's agreement. However, it can be expected that an enterprise would generally be satisfied when double taxation is removed.

32. Nevertheless, the relation between the AC and domestic remedies needs to be considered in this context. Article 7(1) AC blocks the expiration of the 2-year period when domestic remedies have been initiated by the enterprise, Article 7 (2) AC allows Member State to initiate or continue judicial proceedings and Article 7 (3) AC provides - for cases where the domestic law does not allow the competent authority to derogate from the decision of their juridical bodies - that an advisory commission shall not be set up before the time provided for an appeal has expired or the right for an appeal has been withdrawn. The chart in *Annex 4* to this report clarifies the relationship between domestic remedies and the AC.

Note from the Secretariat:

One MS expressed concerns with respect to paragraph 32 and Annex 4 as being not in line with their current practice and suggested to discuss the interpretation of Article 7 (1) second sentence more thoroughly.

33. Where the rules on specific domestic remedies and appeals in a MS create the possibility for inconsistencies, the MS concerned may need to take the necessary action to prevent this, e.g. by requiring the enterprise to withdraw from the domestic remedies and appeals which concern the issues to be settled under the AC before entering the "second phase".

2.15. Tax collection and interest charges

34. It is recognised that tax collection should be suspended during dispute resolution procedures under the AC and that Member States' different approaches to interest charges and refunds during that procedure do not adversely affect enterprises. The Code of Conduct (point 8) provides for measures aimed to ensure that the same conditions as those available for domestic appeals or litigation procedures are available in case of filing for a MAP procedure under the AC.

35. Annex 3 contains information on how MS have implemented the recommendation on suspension of tax collection and on interest charges.

JTPF recommendation (improved language of point 10 in CoC)

(a) Member States are recommended to take all necessary measures to ensure that during cross-border dispute resolution procedures under the Arbitration Convention enterprises engaged in such procedures can benefit from suspension of tax collection under the same conditions as those engaged in a domestic appeals or 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 taxation treaties between Member States.
(b) Considering that, during mutual agreement procedure negotiations, a taxpayer should not be adversely affected by the existence of different approaches to interest charges and refunds during the time it takes to complete the mutual agreement procedure, Member States are recommended to apply one of the following approaches:
(i) tax to be released for collection and repaid without attracting any interest; or
(ii) tax to be released for collection and repaid with interest; or
(iii) each case to be dealt with on its merits in terms of charging or repaying interest (possibly during the mutual agreement procedure)."

Note from the Secretariat:

One MS does not agree to the revised language in the recommendation.

2.16. Other issues

Note from the Secretariat:

At the June 2014 meeting NGMs suggested to explicitly address in the report points 14 – 16 of the revised discussion draft (doc. JTPF/011/REV2/2014), i.e. information not sufficient, cancelling MAP and information submitted in MAP but not in audit. With respect to the possibility for CAs to mutually cancel a MAP under the AC in certain cases one MS expressed its strong preference to discuss all currently identifiable issues that potentially require changes to the Code of Conduct in October and include them in the final report leaving out only those issues that require changes to the Convention itself.

Two MS supported discussing these points in their written comments. One MS indicated it would not be ready to discuss them within the current mandate of the JTPF.

As a compromise, the Secretariat suggests adding the following two items to the report/CoC (renumbering of the other sub-items under item 2 in the report will be done as necessary):

[*To be inserted in the report after item 2.3*] **Requesting and providing information**

"The JTPF recognises that tax administrations and taxpayers benefit from a cooperative and fully transparent mutual agreement procedure. Therefore all necessary information available at the time of the request for initiating the mutual agreement procedure should be provided by the enterprise to the tax administration(s)."

JTPF recommendation (new point 7.1 (h) CoC

"h) The enterprise should provide all necessary information available at the time of the request to initiate the mutual agreement procedure. Requests for additional information and responses to those requests should be complete, well-targeted and submitted without unnecessary delay. In the case of subsequent material changes in the information or documentation previously submitted as part of, or in connection with, a request to initiate a mutual agreement procedure, the enterprise should inform the competent authority(ies) thereof and submit the new information or documentation relevant to the issues under consideration. Failure to co-operate during any part of the procedure of the Arbitration Convention may have direct consequences on the length of time needed to obtain relief and whether such relief can ultimately be provided."

[To be inserted in the report after item 2.11] **Information required for the start of the two-year period (Article 7 (1) AC)**

"Point 5 (a) (vii) CoC provides that for the purpose of Article 7 (1) AC, a case will be regarded as having been submitted when the enterprise provides any specific additional information requested by the competent authority within 2 months of the receipt of the enterprise's request. Instances were reported where the information requested was not provided in a sufficient and timely manner or was considered as overly burdensome and comprehensive by the taxpayer. The JTPF is of the view that the case-specific nature of transfer pricing sets limits to providing prescriptive guidance on the specific kind of information or certain time limits. Implementing specific procedures for determining whether information requested is necessary or provided in a sufficient manner is regarded as disproportionate. Instead the common interest in solving cases of double taxation in a timely and efficient manner and the principles of well-targeted and appropriate action are being recalled. For reasons of transparency, it is recommended that competent authorities inform the other competent authorities about the additional information requested."

JTPF recommendation (addition to point 7.6 (a) (viii) CoC new)

(viii) any specific additional information requested by the competent authority within two months upon receipt of the taxpayer's request. Requests for additional information and responses to those requests should be complete,

well-targeted and submitted without unnecessary delay. A competent authority should inform the other competent authority(ies) about additional information requested.

III. Concluding remarks

36. All parties involved in dispute resolution under the AC have an interest that double taxation is removed in a timely and resource effective manner. This Draft Report proposes amendments to the CoC to this effect. New guidance respects the fact that resolving transfer pricing disputes often requires case-specific approaches. It also rests on the principle that the application of the AC is governed by mutual trust between all parties involved and the recognition of the need to maintain a sustainable and reliable procedure for resolution of disputes.

37. Beyond the amendments to the Code of Conduct proposed in this Revised Draft Report the JTPF notes that based on the findings of the AC and CoC monitoring process carried out, changes to the AC itself may be discussed in the future. Possible issues for consideration include:
    - Composition of advisory commissions (Article 9 AC)
    - Alternative approaches to arbitration (e.g. last best offer approach, also called "baseball arbitration") compared to the independent opinion approach currently provided under the AC (Article 11)
    - Possibility for CAs to mutually cancel the procedure under the AC in certain cases
    - Application of the AC to establish the existence of a permanent establishment (Article 5 OECD MTC).

Note from the Secretariat:

One MS is of the opinion that applying the AC to establish the existence of a permanent establishment should not be considered. For them, introducing a substantive rule in the AC to establish whether a permanent establishment exists could come into conflict with a corresponding provision of a tax treaty leading to "double non taxation" for a country applying the exemption method.

Do you share this view?

ANNEX 1

Revised Code of Conduct
for the effective implementation of the Arbitration Convention

[Preamble]

"Without prejudice to the respective spheres of competence of the Member States and the European Union, this revised Code of Conduct concerns the implementation of the Arbitration Convention and certain related issues concerning mutual agreement procedures under double taxation treaties between Member States. The application of the Arbitration Convention is governed by mutual trust, cooperation and transparency between all parties involved as well as by recognising the need to maintain a sustainable and reliable procedure for resolution of disputes in a timely and resource effective manner."

SCOPE OF THE ARBITRATION CONVENTION (Chapter I, Articles 1 and 2 AC)

1. Cases covered

(a) *[addition report item 1.3]*

"A case is covered by the Arbitration Convention where an action which results in taxation within the meaning of Article 1 of the Arbitration Convention is based on non-observation of the principles of Article 4, as advocated by the OECD Transfer Pricing Guidelines or as laid out in the national law of the Contracting State."

(b) *[addition, report item 1.1]*

"[An action which results or is likely to result in double taxation within the meaning of Article 1 of the Arbitration Convention does not require that the transfer pricing adjustment within the meaning of Article 4 of the Convention leads to an actual payment of tax. Therefore] cases where the entity subject to the adjustment within the meaning of Article 4 has losses carried forward against which an upward adjustment could be offset or cases where because of group relief no actual tax payment is due and similar situations, are within the scope of the Arbitration Convention."

2. ***[addition, report item 1.2]*** **Application dependent on the outcome of a mutual agreement procedure under a DTC**

"If access to the Arbitration Convention or the treatment of cases under the Arbitration Convention depends directly on the result of a mutual agreement procedure under an applicable Double Taxation Convention, care should be taken to ensure that the deadline under Article 6(1) of the Arbitration Convention does not expire. The enterprise should file separate requests for mutual agreement procedure under the Arbitration Convention and the mutual agreement procedure available under the applicable Double Taxation Convention. The requests may be combined in one letter. . As a case cannot be regarded as having been submitted with the minimum information required under point 7.6 (a) (ii) CoC [*former point 5 (a) (ii)*] when necessary information from the mutual agreement procedure under an applicable Double Taxation Convention is missing the two-year period referred to in Article 7

(1) AC will not start before the issue addressed under the Double Taxation Convention is solved (point 7.6 (b) (ii) CoC [*former point 5 (b) (ii)*."

3. *[former point 1.1 CoC]* **EU triangular transfer pricing cases**

"(a) For the purpose of this Code of Conduct, a EU triangular case is a case where, in the first stage of the Arbitration Convention procedure, two EU competent authorities cannot fully resolve any double taxation arising in a transfer pricing case when applying the arm's length principle because an associated enterprise situated in (an)other Member State(s) and identified by both EU competent authorities (evidence based on a comparability analysis including a functional analysis and other related factual elements) had a significant influence in contributing to a non-arm's length result in a chain of relevant transactions or commercial/financial relations and is recognised as such by the taxpayer suffering the double taxation and having requested the application of the provisions of the Arbitration Convention.

(b) The scope of the Arbitration Convention includes all EU transactions involved in triangular cases among Member States."

4. *[former point 1.2. CoC]* ***Thin capitalisation***[9]

"The Arbitration Convention makes clear reference to profits arising from commercial and financial relations but does not seek to differentiate between these specific profit types. Therefore, profit adjustments arising from financial relations, including a loan and its terms, and based on the arm's length principle are to be considered within the scope of the Arbitration Convention."

5. *[addition, report item 1.3]* **Denial of access**

"Member States should consider providing domestic legal remedies for determining whether the denial of access to the Arbitration Convention by their administrative bodies is justified."

DISPUTE RESOLUTION PROCEDURE (Chapter II, Articles 3 to 14 AC)

6. Principles applied (Article 4 AC)

(a) *[former point 6.1. (a) CoC]*

The arm's length principle will be applied, as advocated by the OECD, without regard to the immediate tax consequences for any particular Member State.

(b) *[addition, report item 2.4]*

Article 4(2) of the Arbitration Convention should be interpreted in conjunction with the most recent version of Article 7 OECD Model Tax Convention and the relevant Commentary. This will not apply in cases where a MS made a reservation in the

[9] Reservations by certain MS to be inserted in the final version.

OECD MTC against implementing the new version of Article 7 OECD MTC and in cases where the bilateral Double Taxation Convention between the Member States involved has a different wording. In cases where Member States have concluded bilateral Double Taxation Conventions, Article 4(2) should have the same meaning as the relevant Article on attributing profits to permanent establishments in the applicable Double Taxation Conventions, taking into account the OECD commentary on the provisions included in the concerned Double Taxation Convention."

7. [*former point 6 CoC]* **Mutual Agreement Procedure under the Arbitration Convention (Articles 6 and 7 AC)**

7.1 *[former point 6.1 CoC]* ***General Provisions***

(a) *[addition, report item 2.1]*

A tax administration making an adjustment is encouraged to inform the enterprise [at the latest] at the time of the first notification of its rights under the Arbitration Convention, including about any time limits in the Convention for initiating a mutual agreement procedure. The onus for making a timely request in order to preserve access to the mutual agreement procedure rests with the enterprise and enterprises should take all reasonable steps to ensure that time limits do not expire.."

(b) Cases will be resolved as quickly as possible having regard to the complexity of the issues in question.

(c) *[addition, report item 2.2]*

Although competent authorities and audit (function) may belong to the same tax administration, competent authorities should maintain a degree of autonomy from the audit function of the tax administration in order to ensure the independence of any subsequent review of a case by the competent authority. The guiding principle should be that the competent authority's function is to ensure a fair and appropriate application of the Arbitration Convention, not to seek to uphold all adjustments proposed by the tax authorities of its Member State..

(d) *[addition, report item 2.3]*

Enterprises and tax administrations should not include waiver of access to a mutual agreement procedure in audit settlements and unilateral APAs, as it would be inappropriate for two parties (the enterprise and one tax administration) to exclude a third party (the other tax administration) from the final resolution of a file in which they had an interest..

(e) Any appropriate means for reaching a mutual agreement as expeditiously as possible, including face-to- face meetings, will be considered. Where appropriate, the enterprise will be invited to make a presentation to its competent authority.

(f) Taking into account the provisions of this Code of Conduct, a mutual agreement should be reached within two years of the date on which the case was first submitted to one of the competent authorities in accordance with point 7.6(b) of this Code of Conduct. However, it is recognised that in some situations (e.g. imminent resolution of the case

or particularly complex transactions, or triangular cases), it may be appropriate to apply Article 7(4) of the Arbitration Convention (providing for time limits to be extended) to agree a short extension.

(g) The mutual agreement procedure should not impose any inappropriate or excessive compliance costs on the person requesting it, or on any other person involved in the case.

h) *[new paragraph suggested after 2.15 of the report]*
The enterprise should provide all necessary information available at the time of the request to initiate the mutual agreement procedure. Requests for additional information and responses to those requests should be complete, well-targeted and submitted without unnecessary delay. In the case of subsequent material changes in the information or documentation previously submitted as part of, or in connection with, a request to initiate a mutual agreement procedure, the enterprise should inform the competent authority(ies) thereof and submit the new information or documentation relevant to the issues under consideration. Failure to co-operate during any part of the procedure of the Arbitration Convention may have direct consequences on the length of time needed to obtain relief and whether such relief can ultimately be provided.

7.2** [former point 4 CoC]* ***The starting point of the three-year period (deadline for submitting the request according to Article 6(1) of the Arbitration Convention)

The date of the 'first tax assessment notice or equivalent which results or is likely to result in double taxation within the meaning of Article 1 of the Arbitration Convention, e.g. due to a transfer pricing adjustment'[10], is considered as the starting point for the three-year period. A request is considered as presented in the meaning of Article 6 (1) AC when it contains the information listed in (point 5 (a) (i) – (vii) CoC *(reference to be updated)*). As far as transfer pricing cases are concerned, Member States are recommended to apply this definition also to the determination of the three-year period as provided for in Article 25.1 of the OECD Model Tax Convention on Income and on Capital and implemented in the double taxation treaties between Member States.

7.3** [former point 6.3. CoC]* ***Practical functioning and transparency

(a) In order to minimise costs and delays caused by translation, the mutual agreement procedure, in particular the exchange of position papers, should be conducted in a common working language, or in a manner having the same effect, if the competent authorities can reach agreement on a bilateral (or multilateral) basis.

(b) The enterprise requesting the mutual agreement procedure will be kept informed by the competent authority to which it made the request of all significant developments that affect it during the course of the procedure.

(c) The confidentiality of information relating to any person that is protected under a

[10] Reservation by Italy to be inserted.

bilateral tax convention or under the law of a Member State will be ensured.

(d) *[addition, report item 2.6]*

Enterprises should submit a copy of their request for a mutual agreement procedure under the Arbitration Convention to the other competent authority involved at the same time and with the same set of information as to the competent authority to which the request is addressed in accordance with Article 6 (1) of the Arbitration Convention. Where appropriate and allowed, this might be done through electronic means. In cases where the request is not made in a common working language, the enterprise should provide a translation of the request into a common working language. The fact that a copy of the request was submitted by the enterprise does not replace the obligation of the competent authority to inform the other competent authority about receiving the request under point 6.3 (d) nor should it be understood as limiting a competent authority's efforts to come to a satisfactory solution itself within the meaning of Article 6 (2) of the Arbitration Convention.

(e) *[addition report item 1.3* The competent authority will acknowledge receipt of a taxpayer's request to initiate a mutual agreement procedure within one month from the receipt of the request and at the same time inform the competent authority(ies) of the other Member State(s) involved in the case attaching a copy of the taxpayer's request. The competent authorities should reach a mutual understanding on whether they consider the minimum information as submitted. A competent authority will inform the other competent authority(ies) when access to the Arbitration Convention is denied and provide them with the reasons for the denial. The competent authorities involved should endeavour to reach mutual agreement [exchange their views] on whether the denial of access to the Arbitration Convention is justified.

(f) If the competent authority believes that the enterprise has not submitted the minimum information necessary for the initiation of a mutual agreement procedure as stated under point 7.6(a), it will invite the enterprise, within two months upon receipt of the request, to provide it with the specific additional information it needs.

(g) Member States undertake that the competent authority will respond to the enterprise making the request in one of the following forms:

(i) if the competent authority does not believe that profits of the enterprise are included, or are likely to be included, in the profits of an enterprise of another Member State, it will inform the enterprise of its doubts and invite it to make any further comments;

(ii) if the request appears to the competent authority to be well-founded and it can itself arrive at a satisfactory solution, it will inform the enterprise accordingly and make as quickly as possible such adjustments or allow such reliefs as are justified;

(iii) if the request appears to the competent authority to be well-founded but it is not itself able to arrive at a satisfactory solution, it will inform the enterprise that it will endeavour to resolve the case by mutual agreement with the competent authority of any other Member State concerned.

(h) If a competent authority considers a case to be well-founded, it should initiate a mutual agreement procedure by informing the competent authority(ies) of the other Member State(s) of its decision and attach a copy of the information as specified under point

7.6(a) of this Code of Conduct. At the same time it will inform the person invoking the Arbitration Convention that it has initiated the mutual agreement procedure. The competent authority initiating the mutual agreement procedure will also inform — on the basis of information available to it — the competent authority(ies) of the other Member State(s) and the person making the request whether the case was presented within the time limits provided for in Article 6(1) of the Arbitration Convention and of the starting point for the two-year period of Article 7(1) of the Arbitration Convention.

(i) *[addition, report item 2.9]*

Where a new request by an enterprise for a mutual agreement procedure is linked to issues which are already covered by an ongoing mutual agreement procedure with the same enterprise, competent authorities should, where appropriate, consider treating the new request together with the ongoing mutual agreement procedure. Where a request for a mutual agreement procedure is linked to issues which have already been covered in another mutual agreement procedure, competent authorities should typically consider applying the outcome in the earlier mutual agreement procedure to the new request and where appropriate, to apply that outcome.

7.4 *[former point 6.4 CoC, amended based on report item 2.11]****Exchange of position papers***

(a) Member States undertake that when a mutual agreement procedure has been initiated, the competent authority of the country in which a tax assessment, i.e. a final decision of the tax administration on the income, or equivalent has been made, or is intended to be made, which contains an adjustment that results, or is likely to result, in double taxation within the meaning of Article 1 of the Arbitration Convention, will send a position paper to the competent authority(ies) of the other Member State(s) involved in the case. The position paper will contain the information relevant for understanding the case under consideration. Depending on the facts and circumstances of the case the position paper may set out (for illustration only):

(i) General information:

- legal name, address and taxpayer identification number of the person requesting assistance, its related persons in the other country, if applicable, and the basis for determining the association;
- the contact details of the competent authority official in charge of the case
- broad overview of the issue, transactions, business, and basis for the adjustment
- the tax years affected
- amount of income and tax adjusted in each tax year, if applicable
- summary of relevant information from the original tax return

(ii) the case made by the person making the request;

- description of the exact nature of the issue or adjustment

- if relevant, calculations with supporting data (these may include financial and economic data and reports relied upon, explanatory narratives as well as taxpayer documents and records where relevant and appropriate).

(iii) its view of the merits of the case, e.g. why it believes that double taxation has occurred or is likely to occur;

(iv) how the case might be resolved with a view to the elimination of double taxation together with a full explanation of the proposal.

(b) The position paper will contain a full justification of the assessment or adjustment and will be accompanied by basic documentation supporting the competent authority's position and a list of all other documents used for the adjustment, e.g.

- outline of comparable transactions and comparability adjustments;

- description of the methodology employed for the adjustment; and

- an explanation of the appropriateness of the transfer pricing methodology employed for the adjustment (i.e. an explanation why it believes the adjustment achieves an arm's length outcome; identification of tested party, if applicable; industry and functional analysis, if a relevant study is not already included elsewhere in the taxpayer's submission).

(c) The position paper will be sent to the competent authority(ies) of the other Member State(s) involved in the case as quickly as possible taking account of the complexity of the particular case and no later than four months from the latest of the following dates:

(i) the date of the tax assessment notice, i.e. final decision of the tax administration on the additional income, or equivalent;

(ii) the date on which the competent authority receives the request and the minimum information as stated under point 7.6(a).

(d) Member States undertake that, where a competent authority of a country in which no tax assessment or equivalent has been made, or is not intended to be made, which results, or is likely to result, in double taxation within the meaning of Article 1 of the Arbitration Convention, e.g. due to a transfer pricing adjustment, receives a position paper from another competent authority, it will respond as quickly as possible taking account of the complexity of the particular case and no later than six months after receipt of the position paper

(e) The response should take one of the following two forms:

(i) if the competent authority believes that double taxation has occurred, or is likely to occur, and agrees with the remedy proposed in the position paper, it will inform the other competent authority(ies) accordingly and make such adjustments or allow such relief as quickly as possible;

(ii) if the competent authority does not believe that double taxation has occurred, or is likely to occur, or does not agree with the remedy proposed in the position paper, it will send a responding position paper to the other competent authority(ies)

setting out its reasons and proposing an indicative time scale for dealing with the case taking into account its complexity. To enable the competent authorities to identify the areas of disagreement and to understand the position of the responding competent authority, a rebuttal or response paper could include the following:

- indication of the areas or issues where the competent authorities are in agreement or disagreement;

- requests for additional information and explanations necessary to clarify particular issues;

- presentation of other or additional information considered pertinent to the case, but not raised in the initial position paper; and

- submission of proposals or views to resolve the issue.

The proposal will include, whenever appropriate, a date for a face-to-face meeting, which should take place no later than 18 months from the latest of the following dates:

(aa) the date of the tax assessment notice, i.e. final decision of the tax administration on the additional income, or equivalent;

(bb) the date on which the competent authority receives the request and the minimum information as stated under point 7.6(a).

(f) Member States will further undertake any appropriate steps to speed up all procedures wherever possible. In this respect, Member States should envisage to organise regularly, and at least once a year, face-to-face-meetings between their competent authorities to discuss pending mutual agreement procedures (provided that the number of cases justifies such regular meetings)."

7.5** [former point 6.2 CoC]* ***EU triangular transfer pricing cases

(a) As soon as the competent authorities of the Member States have agreed that the case under discussion is to be considered a EU triangular case, they should immediately invite the other EU competent authority(ies) to take part in the proceedings and discussions as (an) observer(s) or as (an) active stakeholder(s) and decide together which is their favoured approach. Accordingly, all information should be shared with the other EU competent authority(ies) through for example exchanges of information. The other competent authority(ies) should be invited to acknowledge the actual or possible involvement of 'their' taxpayer(s).

(b) One of the following approaches may be adopted by the competent authorities involved to resolve double taxation arising from EU triangular cases under the Arbitration Convention:

(i) the competent authorities can decide to take a multilateral approach (immediate and full participation of all the competent authorities concerned); or

(ii) the competent authorities can decide to start a bilateral procedure, whereby the two parties to the bilateral procedure are the competent authorities that identified

(based on a comparability analysis including a functional analysis and other related factual elements) the associated enterprise situated in another Member State that had a significant influence in contributing to a non-arm's length result in the chain of relevant transactions or commercial/financial relations, and should invite the other EU competent authority(ies) to participate as (an) observer(s) in the mutual agreement procedure discussions; or

(iii) the competent authorities can decide to start more than one bilateral procedure in parallel and should invite the other EU competent authority(ies) to participate as (an) observer(s) in the respective mutual agreement procedure discussions.

Member States are recommended to apply a multilateral procedure to resolve such double taxation cases. However this should always be agreed by all the competent authorities, based on the specific facts and circumstances of the case. If a multilateral approach is not possible and a two or more parallel bilateral procedures are started, all relevant competent authorities should be involved in the first stage of the Arbitration Convention procedure either as Contracting States in the initial Arbitration Convention application or as observers.

(c) The status of observer may change to that of stakeholder depending on the development of the discussions and evidence presented. If the other competent authority(ies) want(s) to participate in the second stage (arbitration), it (they) has (have) to become (a) stakeholder(s).

The fact that the other EU competent authority(ies) remain(s) throughout as (a) party(ies) to the discussions as (an) observer(s) only has no consequences for the application of the provisions of the Arbitration Convention (e.g. timing issues and procedural issues).

Participation as (an) observer(s) does not bind the other competent authority(ies) to the final outcome of the Arbitration Convention procedure.

In the procedure, any exchange of information must comply with the normal legal and administrative requirements and procedures.

(d) The taxpayer(s) should, as soon as possible, inform the tax administration(s) involved that (an)other party(ies), in (an)other Member State(s), could be involved in the case. That notification should be followed in a timely manner by the presentation of all relevant facts and supporting documentation. Such an approach will not only lead to quicker resolution but also guard against the failure to resolve double taxation issues due to differing procedural deadlines in the Member States.

7.6 [former point 5 CoC] ***The starting point of the two-year period (Article 7(1) of the Arbitration Convention)***

(a) For the purpose of Article 7(1) of the Arbitration Convention, a case will be regarded as having been submitted according to Article 6(1) when the taxpayer provides the following:

(i) identification (such as name, address, tax identification number) of the enterprise

of the Member State that presents its request and of the other parties to the relevant transactions;

(ii) details of the relevant facts and circumstances of the case (including details of the relations between the enterprise and the other parties to the relevant transactions);

(iii) identification of the tax periods concerned;

(iv) copies of the tax assessment notices, tax audit report or equivalent leading to the alleged double taxation;

(v) details of any appeals and litigation procedures initiated by the enterprise or the other parties to the relevant transactions and any court decisions concerning the case;

(vi) an explanation by the enterprise of why it considers that the principles set out in Article 4 of the Arbitration Convention have not been observed;

(vii) an undertaking that the enterprise shall respond as completely and quickly as possible to all reasonable and appropriate requests made by a competent authority and have documentation at the disposal of the competent authorities; and

(viii) any specific additional information requested by the competent authority within two months upon receipt of the taxpayer's request. Requests for additional information and responses to those requests should be complete, well-targeted and submitted without unnecessary delay. A competent authority should inform the other competent authority(ies) about additional information requested.

(b) The two-year period starts on the latest of the following dates:

(i) the date of the tax assessment notice, i.e. a final decision of the tax administration on the additional income, or equivalent;

(ii) the date on which the competent authority receives the request and the minimum information as stated under point 7.6(a).

7.7 *[addition, report item 2.12]* ***Domestic remedies***

If the terms and conditions of an agreement reached in a mutual agreement procedure are not satisfactory to the enterprise, the enterprise may withdraw its request for a mutual agreement procedure under the Arbitration Convention.

When at the time an agreement is reached under the procedure of Article 6(2) of the Arbitration Convention, domestic remedies are still pending, the implementation of this agreement should be subject to its acceptance by the enterprise and the enterprise's withdrawal from domestic remedies such as appeals concerning the issues settled in a mutual agreement procedure under the Arbitration Convention.

8. *[former point 3 CoC]* Serious Penalties (Article 8 AC)

As Article 8(1) provides for flexibility in refusing to give access to the Arbitration Convention due to the imposition of a serious penalty, and considering the practical experience acquired since 1995, Member States are recommended to clarify or revise their unilateral declarations in the Annex to the Arbitration Convention in order to better reflect that a serious penalty should only be applied in exceptional cases like fraud. *[addition, report item 2.13]* .

Tax fraud is a form of deliberate evasion of tax which is generally punishable under criminal

law. The term includes situations in which deliberately false statements are submitted or fake documents are produced.[11]"[This applies not only to cases where the aforementioned situations arise because of deliberate action but also in cases where there is a failure to take reasonable care, e.g. gross negligence[12] [which results in criminal law sanctions.]].

9. *[former point 7 CoC]* Proceedings during the second phase of the Arbitration Convention (Articles 9-12 AC)

9.1 [former point 7.1 CoC] List of independent persons

(a) Member States commit themselves to inform without any further delay the Secretary-General of the Council of the names of the five independent persons of standing, eligible to become a member of the advisory commission as referred to in Article 7(1) of the Arbitration Convention and inform, under the same conditions, of any alteration of the list.

(b) When transmitting the names of their independent persons of standing to the Secretary-General of the Council, Member States will join a curriculum vitae of those persons, which should, among other things, describe their legal, tax and especially transfer pricing experience.

(c) Member States may also indicate on their list those independent persons of standing who fulfil the requirements to be elected as Chairman.

(d) The Secretary General of the Council will address every year a request to Member States to confirm the names of their independent persons of standing or give the names of their replacements.

(e) The aggregate list of all independent persons of standing will be published on the Council's website.

(f) Independent persons of standing do not have to be nationals of or resident in the nominating State, but do have to be nationals of a Member State and resident within the territory to which the Arbitration Convention applies.

(g) Competent authorities are recommended to draw up an agreed declaration of acceptance and a statement of independence for the particular case, to be signed by the selected independent persons of standing.

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11 Communication from the Commission to the European Parliament and the Council on concrete ways to reinforce the fight against tax fraud and tax evasion including in relation to third countries, COM (2012) 351, 27.06.2012

12 Acting with gross negligence is understood as being aware that an offense might be committed but to carelessly assume that it will not occur or that it can be prevented from occurring

9.2 [former point 7.2 CoC]Establishment of the advisory commission

(a) Unless otherwise agreed between the Member States concerned, the Member State that issued the first tax assessment notice, i.e. final decision of the tax administration on the additional income, or equivalent which results, or is likely to result, in double taxation within the meaning of Article 1 of the Arbitration Convention, takes the initiative for the establishment of the advisory commission and arranges for its meetings, in agreement with the other Member State(s).

(b) Competent authorities should establish the advisory commission no later than six months following expiry of the period referred to in Article 7 of the Arbitration Convention. Where one competent authority does not do this, another competent authority involved is entitled to take the initiative.

(c) *[addition, report item 2.14 a)]* The advisory commission will normally consist of two independent persons of standing in addition to its Chairman and one or two representatives of each competent authority. For triangular cases, where an advisory commission is to be set up under the multilateral approach, Member States will have regard to the requirements of Article 11 (2) of the Arbitration Convention, introducing as necessary additional rules of procedure, to ensure that the advisory commission, including its Chairman, is able to adopt its opinion by a simple majority of its members.

(d) The advisory commission will be assisted by a secretariat for which the facilities will be provided by the Member State that initiated the establishment of the advisory commission unless otherwise agreed by the Member States concerned. For reasons of independence, this secretariat will function under the supervision of the Chairman of the advisory commission. Members of the secretariat will be bound by the secrecy provisions as stated in Article 9(6) of the Arbitration Convention.

(e) 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 Member States concerned.

(f) *[addition, report item 2.14 c)]* Member States will provide the advisory commission before its first meeting, with all relevant documentation and information and in particular all documents, reports, correspondence and conclusions used during the mutual agreement procedure. To assist the advisory commission in completing its work in a timely and efficient manner, the competent authorities will use the time period needed to establish the advisory commission to collect and prepare all necessary information, so that it is already available at the outset of the procedure.

9.3** [former point 7.3 CoC]* ***Functioning of the advisory commission

(a) A case is considered to be referred to the advisory commission on the date when the Chairman confirms that its members have received all relevant documentation and information as specified in point 9.2(f).

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

(c) The advisory commission may request from the party from which a statement or document emanates to arrange for a translation into the language or languages in which the proceedings are conducted.

(d) *[addition, report item 2.14 b)]* Whilst respecting Article 10 of the Arbitration Convention, the advisory commission may request Member States and in particular the Member State that issued the first tax assessment notice, i.e. final decision of the tax administration on the additional income, or equivalent, which resulted, or may result, in double taxation within the meaning of Article 1 of the Arbitration Convention, to appear before the advisory commission. At the outset of the arbitration procedure each of the enterprises involved should be informed by their respective competent authorities of their right to make a statement before the advisory commission.

(e) The costs of the advisory commission procedure, which will be shared equally by the Member States concerned, will be the administrative costs of the advisory commission and the fees and expenses of the independent persons of standing.

(f) Unless the competent authorities of the Member States concerned agree otherwise:

  (i) the reimbursement of the expenses of the independent persons of standing will be limited to the reimbursement usual for high ranking civil servants of the Member State which has taken the initiative to establish the advisory commission;

  (ii) the fees of the independent persons of standing will be fixed at EUR 1 000 per person per meeting day of the advisory commission, and the Chairman will receive a fee higher by 10 % than that of the other independent persons of standing.

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

(h) *[addition, report item 2.14 a)]*

The Chairmen and the independent persons of standing will be able to hold separate deliberations in order to discuss and formulate the opinion of the advisory commission which will then be agreed with the representatives of competent authorities.

9.4** [former point 7.4 CoC]* ***Opinion of the advisory commission

Member States would expect the opinion to contain:

(a) the names of the members of the advisory commission;

(b) the request; the request contains:

  (i) the names and addresses of the enterprises involved;

  (ii) the competent authorities involved;

  (iii) a description of the facts and circumstances of the dispute;

  (iv) 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.

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

(i) Once the decision has been taken, the competent authority to which the case was presented will send a copy of the decision of the competent authorities and the opinion of the advisory commission to each of the enterprises involved.

(ii) The competent authorities of the Member States can agree that the decision and the opinion may be published in full. They 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. In both cases, the enterprises' consent is required and prior to any publication the enterprises involved must have communicated in writing to the competent authority to which the case was presented that they do not have objections to publication of the decision and the opinion.

(iii) The opinion of the advisory commission will be drafted in three (or more in the case of triangular cases) original copies, one to be sent to each competent authority of the Member States involved and one to be transmitted to the Secretariat-General of the Council for archiving. If there is agreement on the publication of the opinion, the latter will be rendered public in the original language(s) on the website of the Commission.

10. *[former point 8 CoC, amended based on report item 2.15]* **Tax collection and interest charges during cross-border dispute resolution procedures**

(a) Member States are recommended to take all necessary measures to ensure that during cross-border dispute resolution procedures under the Arbitration Convention enterprises engaged in such procedures can benefit from suspension of tax collection under the same conditions as those engaged in a domestic appeals or 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 taxation treaties between Member States.

(b) Considering that, during mutual agreement procedure negotiations, a taxpayer should not be adversely affected by the existence of different approaches to interest charges and refunds during the time it takes to complete the mutual agreement procedure, Member States are recommended to apply one of the following approaches:

(i) tax to be released for collection and repaid without attracting any interest; or

(ii) tax to be released for collection and repaid with interest; or

(iii) each case to be dealt with on its merits in terms of charging or repaying interest (possibly during the mutual agreement procedure).

FINAL PROVISIONS (Chapter III, Articles 15 to 22)

11. *[former point 6.5 CoC]* **Double taxation treaties between MS (Article 15 AC)**

As far as transfer pricing cases are concerned, Member States are recommended to apply the provisions of points 1, 2 and 3 also to mutual agreement procedures initiated in accordance with Article 25(1) of the OECD Model Convention on Income and on Capital, implemented in the double taxation treaties between Member States.

12. *[former point 2 CoC]* **Admissibility of a case**

On the basis of Article 18 of the Arbitration Convention, Member States are recommended to consider that a case is covered by the Arbitration Convention when the request is presented in due time after the date of entry into force of accession by new Member States to the Arbitration Convention, even if the adjustment applies to earlier fiscal years.

13. *[former point 10 CoC]* **Monitoring**

In order to ensure the even and effective application of this Code of Conduct, Member States are invited to report to the Commission on its practical functioning every two years. On the basis of these reports, the Commission intends to report to the Council and may propose a review of the provisions of this Code of Conduct.

ANNEX 2

The starting point of the three-year period (deadline for submitting the request according to Article 6 (1) of the Arbitration Convention)

Member State	Implementation of the definition in national legislation	Member States' translation in EN of their implementation of the definition in national legislation
AT	Die Zustellung des Steuerbescheides [*der zu einer Doppelbesteuerung, z.B. aufgrund einer Verrechnungspreiskorrektur, führt*]	The date on which the taxpayer receives the tax assessment notice or equivalent [*that results in double taxation, e.g. due to a transfer pricing adjustment*]
BE	La date d'envoi de l'avertissement-extrait de rôle comportant l'imposition ou le supplément d'imposition /en Nl. : de verzendingsdatum van het aanslagbiljet dat de aanslag of de aanvullende aanslag omvat	The date on which the notice of assessment is sent containing the assessment or the supplementary assessment
BG	Дата на връчване на акта, с който се определят задължения, произтичащи от корекция на трансферните цени.	The date of service (receipt) of the tax assessment notice containing a transfer pricing adjustment.
CY	Η ημερομηνία επίδοσης της ειδοποίησης επιβολής φορολογίας [που αντανακλά τις τροποποιήσεις για τις τιμές μεταβίβασης].	The date of service (receipt) of the tax assessment notice [that reflects the transfer pricing adjustment].
CZ	Doručení prvního platebního výměru nebo jiného rozhodnutí, které vede ke dvojímu zdanění.	The date on which the taxpayer receives the first tax assessment notice or equivalent that results in double taxation
DE	Die Bekanntgabe des ersten Bescheides, der zu einer Doppelbesteuerung führt	The date on which the taxpayer receives the first tax assessment notice or equivalent that results in double taxation
DK	Såfremt skattemyndighederne agter at foretage en skatteansættelse på et andet grundlag end det, der er selvangivet, skal den skattepligtige underrettes skriftlig herom. Det skal samtidig underrettes om, at skatteyder har en frist på mindst 15 dage regnet fra skrivelsens datering, til at fremkomme med en udtalelse imod den foreslåede ændring af skatteansættelsen, jf. Skatteforvaltningslovens § 20. Har den skattepligtige udtalt sig inden fristens udløb, skal skattemyndighederne give skriftlig underretning om skatteansættelsen (kendelse). I Danmark vil den første endelige underretning fra skattemyndighederne om	The date on which the taxpayer receives the final assessment from the tax authorities [*If the tax authorities intend to make an assessment not in accordance with a tax return, a notice specifying the amendment and the reason for it must be sent to the taxpayer. The taxpayer must be given a period of at least 15 days from the date of the notice to submit its comments on the amendment. Hereafter the tax authorities send the final assessment to the taxpayer.*]

	armslængde reguleringen blive givet ved modtagelsen af kendelsen, hvorfor treårsfristen i henhold til Voldgiftskonventionens art. 6.1 begynder at løbe fra dette tidspunkt.	
EE	"arvates haldusakti teatavaks tegemise või kättetoimetamise päevast"	According to the Estonian domestic law, the date of notification of or delivery of the administrative act is decisive in case of similar procedure for appeals. Thus, the starting point of the 3 year period in the meaning of the article 6(1) AC would be the date on which the taxpayer receives the tax assessment notice or equivalent.
FI	Päivä, jona verovelvollinen on saanut tiedon ensimmäisestä verotuspäätöksestä tai vastaavasta toimenpiteestä, jolla siirtohinnoittelua on oikaistu. på svenska: Dagen då den skattskyldige fått kännedom om det första skattebeslutet eller den motsvarande åtgärden, genom vilken den interna prissättningen har korrigerats.	The date on which the taxpayer receives the first tax assessment notice or equivalent decision resulting in a transfer pricing adjustment.
FR	La date de réception de la proposition de rectification en cas de procédure contradictoire, La date de réception de la notification des bases ou éléments d'imposition en cas de procédure d'office	The date of receipt of the notification of adjustments or the notification of basis of elements of assessments in case of estimated assessment
EL	από την ημερομηνία επίδοσης του φύλλου ελέγχου	From the date of service (receipt) of the tax assessment notice
ES	La fecha de la recepcion de la notificacion del acto de liquidación	The date on which the taxpayer receives the tax assessment notice or equivalent [that reflects the transfer pricing adjustment]
HR	Dan primitka poreznog akta koji za posljedicu može imati dvostruko oporezivanje	The date on which the taxpayer receives the tax assessment notice or equivalent that results in double taxation
HU		
IE	The date of the issue to the taxpayer of a notice of an assessment, or of an amended assessment [*reflecting the determination by an inspector of taxes of a transfer pricing*	

	issue]	
IT[13]	"Avviso di accertamento" Per avviso di accertamento si intende l'atto scritto con il quale l'Amministrazione fiscale comunica al contribuente di aver accertato un reddito imponibile maggiore del reddito dichiarato oppure un reddito imponibile non dichiarato.	The date on which the taxpayer receives the notice of assessment that reflects the transfer pricing adjustment [*«Avviso d'accertamento» means a formal written act through which the tax administration notifies the taxpayer to have assessed taxable income that resulted to be higher than the declared income or that was not declared at all.*] La date d'envoi de l'avis d'évaluation de l'assiette incorporant l'ajustement du prix de transfert [*Par «avviso d'accertamento» on entend un act écrit formel par lequel l'Administration fiscale notifie au contribuable d'avoir évalué un revenu imposable qui est plus grand que le revenu déclaré ou qui n'a pas été déclaré.*] Zugangsdatum des Bescheids über die Feststellung von Besteue-rungsgrundlagen, mit dem die Verrechnungspreiskorrekturen durchgeführt werden [*Unter „avviso d'accertamento" versteht man ein formales schriftliches Dokument, mit dem die Finanzbehörde dem Steuerpflichtigen mitteilt, einen zu versteuernden Einkommensbetrag ermittelt zu haben, der höher als der erklärte Einkommensteuerbetrag ist oder der nicht erklärt worden war*]
LU	« Bulletin », effet: le troisième jour ouvrable qui suit la remise de l'envoi à la poste [*Les différents bulletins (bulletin d'impôt, bulletin de fixation, bulletin d'établissement séparé, bulletin provisoire, définitif, rectificatif…..) émis par l'administration des contributions du*	The date of the third working day following the sending of the assessment Das Datum des dritten Arbeitstages nach Absendung des Bescheids

[13] The definition does not apply to requests according to Article 25 (1) of the OECD Model Tax Convention, as the relevant "action" triggering the starting point of the three-year period could be other than a transfer pricing adjustment

	Luxembourg peuvent être désignés dans le contexte de la convention d'arbitrage par le mot « bulletin », en anglais « assessment », en allemand « Bescheid ».]	
LT	Data, kurią kompetentinga institucija pranešė asmeniui apie priimtą sprendimą. Pranešimo data suprantama kaip dokumento įteikimo data pagal Mokesčių administravimo įstatymo 164 straipsnį: 1. Dokumentai mokesčių mokėtojui gali būti įteikiami tokiais būdais: 1) tiesiogiai įteikiant; 2) siunčiant registruotu laišku; 3) telekomunikacijų galiniais įrenginiais; 4) viešai paskelbiant.	There is no specific provision embedded in national legislation, thus, the general rules applied: it is a date, when competent authority informed the taxpayer of the decision adopted. In practice date of informing means the date when document is delivered, i. e. the starting point of the three-year period is the date on which the taxpayer receives (is recognised to have received) the final tax assessment note from the tax authorities. The date of receipt depends on the way of communication and is governed by general rules provided in 164 Article of Law on Tax Administration: Documents may be communicated to the taxpayer in the following manner: 1) personally; 2) by registered mail; 3) by telecommunications terminal equipment; 4) by publishing.
LV	Diena, kad nodokļu maksātājam paziņots lēmums par audita rezultātiem	The date on which the taxpayer is notified on the tax tax assessment
MT	Id-data tan-notifika ta' l-istima.	The date of the service (receipt) of the notice of assessment [reflecting the transfer pricing adjustment]
NL	Navorderingsaanslag, of primaire aanslag indien de verrekenprijscorrectie hierin is begrepen**"**	The date of the tax re-assessment notice, or original assessment [*if it includes the transfer pricing adjustment*]
PL	Bieg okresu trzyletniego rozpoczyna się od pierwszej z następujących dat: daty doręczenia protokołu kontroli albo daty doręczenia decyzji podatkowej.	The three year period starts with the first of the following dates: date of delivery of tax audit report or date of delivery of tax decision.

PT	Data da notificação legal do acto de liquidação efectuado pela Administração Fiscal ou data da liquidação efectuada pelo contribuinte, quando incluir o ajustamento do lucro tributável que origine ou seja susceptível de originar uma dupla tributação. Constitui notificação o recebimento pelo contribuinte de cópia do assento do acto da liquidação	Date of legal notification of the assessment or re-assessment act made by the tax administration or the date of the self-assessment, if it includes the taxable profit adjustment which results or is likely to result in double taxation Notification means the receipt by the taxpayer of the tax assessment or re-assessment notice
RO		
SE	"Grundläggande beslut om årlig taxering" "Omprövningsbeslut" "Eftertaxering"	The date of sending of: • the basic decision on the annual taxation; • the re-assessment decision; or • the additional assessment. [*In Sweden the relevant decision would be the first decision of the tax authorities that results or is likely to result in double taxation, e.g. due to a transfer pricing adjustment]*
SI	Za začetek teka triletnega obdobja se šteje datum vročitve odločbe o davčni odmeri ali enakovreden dokument [ki ima za posledico, dvojno obdavčitev].	The date on which the taxpayer receives the first tax assessment notice or equivalent [that results in double taxation].
SK	Doručenie protokolu o daňovej kontrole sa považuje za úkon smerujúci na vyrubenie dane."	The delivery (receipt) of the record (protocol) from the tax inspection is referred as the action resulting in the tax assessment.
UK	As stated in our Statement of Practice SP01/11 HMRC will regard the first notification as being the finalisation of a transfer pricing enquiry which gives rise to double taxation. This stage will be marked by the determination of the quantum of the additional profits arising from a transfer pricing adjustment such as the issue of a closure notice, or the amendment of a return during an enquiry. The starting point will be the date of issue of the related notice, letter or amendment.	--

ANNEX 3

(former draft template was removed from this document)

Tax collection and interest charges during cross border dispute resolution procedures (point 10 Code of Conduct)

Member State	Member States' information on how the recommendation on suspension of tax collection and on interest charges was implemented
AT	
BE	
BG	
CY	Section 2.15 of the Draft Report: The Code of Conduct (2006/C 176/02) and the Revised Code of Conduct (2009/C 322/01), and the suspension of tax collection, have been implemented in Cyprus by Administrative Regulatory Act No. 87 / 2007 (Official Gazette No.4176, 23.2.2007) and Administrative Regulatory Act No. 463 / 2010 (Official Gazette No.4460, 19.11.2010) respectively. Copies in Greek may be accessed through the Tax Department Website through the following links http://www.mof.gov.cy/mof/ird/ird.nsf/All/F91DCA251742B13EC2257688004577E5/$file/2007%20087%20kdp%20inc%20tax.pdf http://www.mof.gov.cy/mof/ird/ird.nsf/All/3C06F257383E078BC22577F40024BA22/$file/2010%20463.pdf Both the above Administrative Regulatory Acts provide for interpretation of the Arbitration Convention in accordance with the provisions of the respective Codes of Conduct and for suspension of tax collection during dispute resolution procedures under the Arbitration Convention. There is no provision in the Cyprus tax legislation for the interest on unpaid taxes to be waived in case of a Mutual Agreement Procedure(MAP). Normal rules apply in case of interest on unpaid tax and interest on repayment of tax as a result of an adjustment in a MAP, in the same way as for other adjustments
CZ	
DE	**Tax collection during cross-border dispute resolution procedures** Under current German legislation, suspension of tax collection is possible where a domestic administrative appeal has been filed and (1) where either serious doubts exist as to the legality of the tax assessment being disputed or (2) where collection without awaiting the outcome of the appeal would result for the person affected in unreasonable hardship not required by overriding public interests; suspension may be made dependent upon provision of collateral (so-called "*Aussetzung der Vollziehung*", section 361 para. 2 of the Fiscal Code or *Abgabenordnung*). A similar rule on suspension of collection exists where a tax assessment is appealed against in court (section 69 of the Tax Court Code or *Finanzgerichtsordnung*). In situations without pending domestic appeal, collection can be deferred where collection at due date would result in considerable hardship for the debtor and the claim

	does not appear to be endangered by the deferment; such deferment may be granted as a rule only upon application and provision of collateral (so-called *"Stundung"*, section 222 of the Fiscal Code or *Abgabenordnung*). The sections referred to are general rules not specifically addressing cross-border dispute situations. In practice, in most mutual agreement procedure cases involving a German transfer pricing adjustment, the taxpayer also filed a domestic administrative appeal which remains pending during the MAP, and tax collection is suspended in application of the first mentioned rule where the taxpayer requests such suspension. In many of the less frequent MAP cases involving a German adjustment but without pending domestic appeal, deferment under the latter rule is applied. The local tax offices are in charge of granting suspension or deferment. It has not come to the attention of the Federal Ministry of Finance or the Federal Central Tax Office that there would be cases where both suspension and deferment were rejected in a situation with a pending MAP concerning a German adjustment. The Federal Ministry of Finance therefore currently does not see a necessity for proposing specific legislation addressing suspension of collection in case of pending MAPs. **<u>Interest during cross-border dispute resolution procedures</u>** Under current German legislation, interest on taxes for which collection is suspended or deferred is charged at a rate of 6% p.a., to the extent the tax assessment is not eliminated in the domestic appeal or in the MAP. Interest at the same rate is also charged for the time between the tax year and the adjusted assessment (but starting only 15 months after the tax year, and likewise only to the extent the adjusted assessment is not eliminated in a domestic appeal or MAP). Where tax has been collected and the assessment is later reduced in a domestic appeal or MAP, the taxpayer receives 6% interest on the repayment. This is general legislation not specifically addressing cross-border dispute situations. In MAP situations, Germany applies the approach described in point 8(b)(iii) of the Revised Code of Conduct, i.e. any disadvantages a taxpayer may have due to different interest approaches in the other country will be considered when attempting to come to a mutual agreement where the taxpayer so requests. Taxpayers should address any potential interest issues in the MAP request and provide the competent authorities with information on the differences in the interest rules that will likely cause a problem.
DK	In Denmark it is possible to suspend the tax collection during dispute resolution procedures under the AC. The terms for suspension are similar to the terms for suspension in case of a complaint to the National Tax Tribunal. We have no specific provision dealing with interest on unpaid tax in relation to a suspension of the tax collection during dispute resolution procedures under the AC. As in other situations where the tax collection is suspended interest is charged on unpaid tax and interest is included in repayments.
EE	
FI	Tax collection cannot be deferred during dispute resolution under AC in Finland. Interest charges and refunds depend on the applicable article of the domestic

	legislation.
FR	
EL	
ES	As regards suspension and interests, Spain has especial law rules in both cases. Suspension of collection is granted automatically on request of the taxpayer, on the same principles required for suspension in case of domestic appeals and there are no accrued interests during the time of the MAP proceedings, according to the JTPF recommendation 8 (b) (i) of the Code of Conduct. I attached to this e mail the drafting of both provisions, with an unofficial translation in English. *Drafting of both provisions:* **Disposición Adicional Primera de la Ley del Impuesto sobre la renta de no Residentes** **5.** Durante la tramitación de los procedimientos amistosos no se devengarán intereses de demora. **6.** 1.º En los procedimientos amistosos, el ingreso de la deuda quedará suspendido automáticamente a instancias del interesado cuando se garantice su importe y los recargos que pudieran proceder en el momento de la solicitud de la suspensión, en los términos que reglamentariamente se establezcan. No se podrá suspender el ingreso de la deuda, de acuerdo con lo previsto en el párrafo anterior, mientras se pueda solicitar la suspensión en vía administrativa o jurisdiccional. 2.º Las garantías admisibles para obtener la suspensión automática a la que se refiere el número anterior serán exclusivamente las siguientes: a) Depósito de dinero o valores públicos. b) Aval o fianza de carácter solidario de entidad de crédito o sociedad de garantía recíproca o certificado de seguro de caución. 3.º Si los procedimientos amistosos no se refieren a la totalidad de la deuda, la suspensión prevista en este apartado se limitará al importe afectado por los procedimientos amistosos. *[Unofficial Translation]* **First additional Provision of the Amended Text of the Non Residents Income Tax Law (Mutual Agreement Procedure):** **5**. No late payment interests will accrue during mutual agreement procedures. **6.** 1. In mutual agreement procedures, the payment of the tax due will be automatically suspended at the request of the interested party provided that at the time of the request for suspension the amount, including any surcharge payable, is guaranteed under the terms formally provided for. The debt cannot be suspended under the terms of paragraph above while the suspension

	is still available by administrative or jurisdictional procedures. 2. In order to obtain the automatic suspension referred to in paragraph 1 above, only the following guarantees are eligible: a) Deposit of money or government securities. b) Bank surety or guarantee issued by the credit institution or mutual guarantee company, or security insurance certificate. 3. Should the mutual agreement procedure cover only part of the debt, the suspension provided for in this paragraph shall be limited to the amount so covered."
HR	
HU	
IE	Under Irish legislation there is no suspension of tax collection. A taxpayer may not appeal against a Revenue assessment or amended assessment until the return is filed and any tax due paid. The tax payer must pay, at a minimum, the undisputed amount of tax. In order to avoid an interest charge on the disputed portion of the tax, then they must pay the tax per the Revenue assessment or amended assessment. (Section 957AH of the Taxes Consolidation Act, 1997 applies for accounting periods starting on or after 1 January 2013, Section 957 of the same act for earlier periods) Interest charges during MAP – Code of Conduct point 8(b) Where a refund arises from a MAP concluded under the EU Arbitration Convention, then no interest will be payable until 93 days have elapsed from the making of a valid claim. A valid claim is a claim that contains all the information the Revenue Commissioners may reasonably require to determine if and to what extent a repayment is due. A claim for correlative relief is not considered to be a valid claim until the amount or quantum of the claim is agreed in writing between the two competent authorities. As such the opportunity to earn interest on any correlative relief is limited to the time period post competent authority agreement. (Section 865A of the Taxes Consolidation Act, 1997) Ireland adopts the approach as set out in Section 8 (b)(i) of the Code of Conduct e.g. tax is released for collection and repaid without attracting any interest.
IT	
LU	
LT	
LV	
MT	

NL	*8.1 Deferral of tax payment* If the Netherlands is the state causing the double taxation (by, for example, making an adjustment in the income reported by a taxpayer), the Dutch tax administration will, at the taxpayer's request, grant a deferral of payment on that part of the tax charge that relates to the double taxation. It should be noted that in the event of a request for an early mutual agreement procedure, deferral will automatically be granted. In principle, deferral will be granted until 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(2) of the Tax Collection Guidelines *(Leidraad Invordering)* 2008). This means that the taxpayer will not suffer any loss of interest other than the obligatory assessment and collection interest (see section 8.2). This resolves the interest and financing problems that can result from mutual agreement and arbitration procedures. In certain exceptional cases, deferral can also be granted if the other state makes an adjustment (see Article 25(2) referred to above). *8.2 Assessment and collection interest / Penalties* In addition to the actual adjustment or correction discussed in the mutual agreement or arbitration procedures, differences in domestic regulations in respect of the assessment and collection interest charged by states may result in a disproportional increase in the interest payable during the mutual agreement procedure. In some cases, the interest payable may even exceed the amount of the tax. Article 30k of the Dutch State Taxes Act *(Algemene wet inzake rijksbelastingen)* and Article 31a of the Dutch Collection of State Taxes Act *(Invorderingswet)* 1990 allow parties to deviate in certain instances from the provisions in domestic law while they are consulting on a mutual agreement procedure. During the course of mutual agreement and arbitration procedures the Netherlands' competent authority will seek to align the assessment and collection interest charged to the taxpayer in one state with that payable to the taxpayer in the other state. A protocol to this effect has, for example, been agreed with France. lf a mutual agreement procedure being conducted also covers a penalty that has been imposed, the policy applied will be in line with Article 25(2)(4) in conjunction with Article 25(2)(3) of the Tax Collection Guidelines 2008.
PL	
PT	
RO	

SE	8 (a) CoC (suspension of tax collection) According to Swedish law (Skatteförfarandelagen, Chapter 63, Section 4) the competent authority of Sweden may grant a deferral to pay the tax, which is the subject of a competent authority case. This practice is applied fairly generously in Sweden. However, the taxpayer must have been subject to double taxation and the tax must have been paid in the other country in order for the deferral to be granted. Since many years it is the practice of Sweden to grant a deferral with the Swedish tax claim attributed to the disputed income or with an amount corresponding to the foreign tax on that income, whichever is the lowest. 8 (b) CoC (interest charges during MAP) Sweden applies the following approach according to 8 (b) CoC: (ii) tax to be released for collection and repaid with interest
SI	
SK	
UK	In the UK requests to suspend collection of tax when an application is made under the EU AC can be made. Where there is no open appeal, and thus no domestic legal basis for suspension, informal arrangements may be made to not pursue collection pending the outcome of the MAP. There is no provision in UK law for the interest on unpaid tax to be waived because the matter has been subject to MAP. Our normal rules charging interest on unpaid tax, and including interest on repayments, apply in the same way as for any other adjustment formally or informally stoodover.