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EU JOINT TRANSFER PRICING FORUM

REVISED

Discussion paper on the improvement of the functioning of the Arbitration Convention

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Secretariat's Note

The present discussion paper is a working document which aims to facilitate the discussions of the JTPF on the improvement of the functioning of the Arbitration Convention. The structure and content of this document are therefore functional and do not necessarily represent a template for the final outcome of the monitoring of the Arbitration Convention.

The revised discussion paper reflects the discussion at the November 2013 JTPF meeting and written comments submitted by JTPF Members following the meeting (see text in the boxes marked in grey). Other changes to the original text are in track changes.

It is proposed to JTPF members to discuss all items on the list of items for discussion starting from the beginning. The first 4 items on the list were already initially addressed in November 2013, but it appears pertinent to discuss them in more detail at this stage in light of further information and contributions which became available after the meeting.

For reasons of consistency, terminology and formulations in this discussion paper have been aligned with the terminology and formulations used in the Arbitration Convention and the Code of Conduct (e.g. "taxpayer" has been replaced with "enterprise" and "it is recommended that X […]" has been replaced with "X should […]".

For members' detailed written comments please refer to doc. JTPF/001/2014/EN.

A. Background

1. In accordance with the work programme of the EU Joint Transfer Pricing Forum (JTPF) for 2011-2015 previous achievements are monitored with the aim to establish to what extent earlier work of the JTPF is implemented, to evaluate its effectiveness and to consider how improvements might be made.

2. At its meeting on 25 October 2012 the JTPF formally agreed to start the monitoring of the functioning of the Arbitration Convention (AC) and the revised Code of Conduct (CoC) in 2013, as per the calendar in document JTPF/018/2012/EN ("Monitoring Overview and Proposals").

3. Initial comments by JTPF members on the improvement of the functioning of the AC and its CoC were collected in 2012. These were included in document JTPF/020/REV1/2012/EN. Member States (MS) also carried out a qualitative analysis of their pending cases to find out the concrete reasons why cases have lasted more than two years. The responses were summarized in document JTPF/003/2013/EN. Contributions received from JTPF members informed the preparation of a discussion paper on ways to improve the functioning of the Arbitration Convention (JTPF/002/2013/EN) presented at the JTPF meeting on 14 February 2013. Following the meeting MS were asked to clarify some additional issues listed in document JTPF/002/2013/EN and/or identified during the discussions.

4. In preparation for the June 2013 meeting members of advisory commissions were asked to contribute to the monitoring of the functioning of the AC by sharing their experiences in arbitration panels. Their comments were summarized in document JTPF/010/2013 and were discussed at the meeting in June 2013.

5. The present revised discussion paper builds on the contributions of JTPF members and members of advisory commissions, as well as on the discussions held at the JTPF meetings in June 2013 and November 2013.

6. The approach taken in this discussion paper focusses on addressing the issues by way of amending the CoC. Some issues, for example the implications of the new Article 7 OECD Model Tax Convention ('OECD MTC', see item 12) may require thoughts beyond the CoC, i.e. on the AC itself. However, the work of the JTPF with respect to the AC as a multilateral convention between the MS would be limited to a technical discussion.

B. Issues for discussion

1. Flexible interpretation of time limits (item 1.4, Q 2 doc JTPF/002/2013/EN)

7. With respect to time limits, Best Practice No. 9 of the OECD MEMAP advocates for a flexible approach giving the enterprise the benefit of the doubt in borderline cases and for informing the enterprise of their rights under the AC in case of an adjustment.

For discussion:

The JTPF may discuss a recommendation along the following lines (based on MEMAP): *Balancing a tax administration's need for reasonable time limits with the necessity of providing MAP assistance to those entitled to benefits from the Arbitration Convention can be a difficult issue. Keeping in mind the spirit and objectives of the Arbitration Convention, however, enterprises should not be unduly prevented from obtaining assistance via MAP due to overly strict interpretations of the Arbitration Convention's time limitation for requesting MAP. Enterprises should receive the benefit of the doubt in borderline cases.*

While the onus for making a timely request in order to preserve access to the MAP rests with the enterprise and enterprises should take all reasonable steps to ensure that time limits do not expire, it would be helpful for a tax administration making an adjustment to inform the enterprise of their rights under the Arbitration Convention, including information about any time limits in the Convention for initiating MAP. This written notice or advice could be included at the time of formal notification of a proposed adjustment and could include general guidance on the availability of MAP and how to go about protecting the availability of 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 feedback and results.

Do you agree with making a recommendation in this respect? It could be added after the first paragraph in point 4 of the CoC?

Note from the Secretariat

At the November 2013 meeting and in written comments received, a recommendation to inform enterprises of their rights under the AC received support. One NGM submitted written comments after the meeting in which she supports a best practice approach for advising enterprises on their rights under the AC.

As regards the flexible interpretation of time limits MS had concerns over the so-called "borderline cases". Two scenarios of "borderline cases" were identified, i.e. (i) a short exceeding of the timeline and (ii) differences in the determination of the 3 year period under Article 6 (1) AC. On the second point, previous work of the Forum was recalled: in 2003 the starting point of the three-year period (deadline for submitting a request according to Article 6 (1) of the AC) in the then 15 MS and 4 candidate countries was surveyed by the JTPF. This overview reveals that there are different interpretations (see ANNEX 1A). For example, for some MS the three-year period starts at the date when the assessment is sent by the tax administration while for others this is when the final assessment is received by the enterprise. It was concluded that this work should be used as basis in identifying issues that need to be addressed and in deciding how best to address them.

The NGM indicates uncertainty around the definition and local interpretation of the term "first notification".

Two options seem possible to address the issues outlined above:

a) a common definition of the starting point, i.e. the term "first notification"

b) include a clarification in the CoC that the initiating State's determination of the starting point is decisive and add an update of the list contained in Annex 1A, Information on the starting point of the three-year period in each MS, to the individual MS TP profiles foreseen for publication on the JTPF website (under Point 8, see template in ANNEX 1)

Which option do you prefer?

The NGM who commented after the November 2013 meeting noticed that in practice, when it comes to the determination of the starting point for the three-year period, there is some inconsistency in the approaches of CAs as regards the notion of "double taxation". This is particularly the case where the entity subject to the transfer pricing adjustment has losses carried forward against which an upward adjustment could be offset. Some CAs take the stance that double taxation only actually occurs once a cash tax payment would become due.

Do you support supplementing the CoC by a definition of the term "double taxation"?

2. Denying access to the AC (items 1.4 Q1 and 1.9, doc JTPF/002/2013/EN)

8. The statistics on pending Mutual Agreement Procedures (MAPs) under the Arbitration Convention at the end of 2012[1] contain information on the number of requests for MAP rejected by competent authorities and on the reasons for rejection (Table 3 of the statistics). The responses received indicate that in 2012 only very few requests were rejected by the reporting CA. Nevertheless it might be useful to consider this issue.

9. Access to the AC (MAP or arbitration) may be denied if:

    a. the request does not appear to be covered by the AC, i.e. is considered as not being an issue in the meaning of Article 4 AC or

    b. one of the enterprises involved is liable for a serious penalty (for the adjustment under review), or

    c. under national law the contracting state involved is not allowed to derogate from judicial decisions and the enterprise involved does not waive domestic judicial review.

[1] Data is collected from MS on an annual basis. The latest statistics from 2012 are available at: http://ec.europa.eu/taxation_customs/resources/documents/taxation/company_tax/transfer_pricing/forum/jtpf/2013/jtpf_012_2013_en.pdf.

10. Article 4 of the AC reflects the formulations in Articles 7 and 9 OECD MTC. The comments received do not indicate that the provision itself is unclear (on the implications of the new Article 7 see section 12 below) and the problems reported do not relate to issues arising from the provisions themselves, but rather to the interaction with other Articles, e.g. Article 5 OECD MTC (see e.g. case study 2 in doc. JTPF/020/REV1/2012/EN). According to this contribution, an issue arising with respect to the attribution of profits would not be referred to the AC as long as it is unclear whether Article 4 (1) or Article 4 (2) of the AC applies. If a Double Taxation Convention (DTC) is available the issue could be referred to the MAP available under the respective DTC, but in case it does not contain an arbitration clause, the enterprise might find itself in an adverse position compared to the AC.

11. The problem would be avoided in cases where the applicable DTC would contain an arbitration clause, or if general arbitration, including for disputes on the application of Article 5, would be available within the EU[2]. Alternatively, in case a revision of the AC is envisaged, extending its scope to all issues of double taxation would also solve the problem.

12. In the absence of either one of the possibilities described in paragraph 11, the issue may be addressed by recommending to the enterprise to prepare an application for a MAP under the DTC for the issues not covered by the AC and in parallel an application for a MAP under the AC for the issue covered by Article 4(1) or 4(2) AC to ensure that the deadline under Article 6(1) AC does not expire. The 2-year period of Article 7(1) AC may then have to be extended accordingly.

For discussion:

Do you think that a recommendation to this effect after paragraph 6.1 (b) CoC would be useful?

Proposed text:

If the access to AC or the treatment of cases under the AC directly depends on the result of a MAP under an applicable Double Taxation Convention, a separate request under the AC should be filed to ensure that the deadline under Article 6(1) AC does not expire. []

Note from the Secretariat:

At the November meeting it was suggested to elaborate in the next discussion draft on possible alternatives on how the requests may be made. In their written comment, the UK suggests deleting the second sentence (in brackets [ ] above).

The UK further suggests combining the requests. For example, where there is a dispute on the existence of a PE (see par. 10 above) it may be recommended that the position paper on the existence of a PE is provided by the State making the adjustment within the same (4-month) period the Code of Conduct provides for and that discussion of the case is prioritised over others until that issue is agreed. If agreement cannot reasonably be reached the Competent

[2] Further to its Communication on Double Taxation in the Single Market, COM(2011) 712 final, the Commission is currently exploring the possibilities to establish a mechanism to effectively and swiftly resolve disputes in all areas of direct taxation within the EU.

Authorities and enterprise can agree under Article 7(4) to extend the time-limit. The UK would not favour giving the States the power to do so without the enterprise's permission as being contrary to the spirit of the Arbitration Convention and, in their view a backwards step.

Drafting suggestion from the Secretariat:

If the access to AC or the treatment of cases under the AC directly depends on the result of a MAP under an applicable Double Taxation Convention (DTC), it should be ensured that the deadline under Article 6(1) AC does not expire. The enterprise may combine the respective requests for a MAP under the AC and under an applicable DTC. The enterprise should receive the benefit of the doubt in cases where it is not entirely clear which procedure is applicable. Competent Authorities shall consider the MAP under the DTC with priority and if possible commence the procedure under the DTC without delay.

Do you agree to this recommendation?

The NGM who commented after the November 2013 meeting suggested discussing the extension of the AC to Article 5 issues and doing additional work to ensure the avoidance of double taxation with respect to thin cap issues and other financial transactions.

Do you agree with extending the discussion on revising the AC noting that the work of the JTPF with respect to the AC as a multilateral convention between the MS would be limited to a technical discussion?

13. In case of denied access to the AC, disputes may arise about whether the denial was justified or not.

For discussion:

Is it possible in your MS for the enterprise to appeal against denied access to the AC. If so, do you regard this as sufficient?

Do you think procedures (e.g. arbitration) can and should be implemented in the CoC for addressing denied access to the AC?

Note from the Secretariat:

In MS who commented on this question (DK, FR, UK) there is a possibility to appeal against denied access to the AC. These MS regard this as being sufficient. For the NGM who commented after the November 2013 meeting a separate procedure (possibly in the form of a permanent panel) should be established to address issues of denied access to the AC.

Do you think that further work on this issue is needed?

3. Cases not 'ripe' for the AC, disputes likely to arise (item 2.3, doc JTPF/002/2013/EN)

14. Under item 2.3 of doc JTPF/002/2013/EN the issue was raised that the final tax assessment may be deferred by a MS and as a result the case would not be submitted to MAP.

15. 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, however, be

evaluated from two angles. On the one hand it may be regarded as providing the advantage to address disputes at an early point in time; on the other hand an early submission to MAP may be regarded as impeding efforts to solve the issue before MAP. As a further point it should be taken into account that the burden for CAs in dealing with cases where double taxation did actually arise is already quite high.

For discussion:

In light of the considerations described above, is it desirable to make a recommendation for an early submission?

Note from the Secretariat:

At the November 2013 meeting the Forum concluded that before deciding about a recommendation, it would be important to take stock of the tools already available for dealing with disputes likely to arise. The Secretariat identified the following tools available for dealing with disputes likely to arise:

a) For a situation where certainty is sought for **future transactions,** the APA procedure is available[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 MAP under the AC is already available. In this context it may be discussed whether it is worth doing further work on the distinction between cases where there is the intention to make an adjustment (Article 5 AC) and those where double taxation is likely to arise (Article 6 (1) AC),

e) For situations where the action of a Contracting State **did result in double taxation** the MAP procedure of the AC is available.

DK, SE are not in favour of a recommendation for early submission. The UK sees merits in a submission as early as possible after the relevant accounting period and in the fact that an early submission may provide TAs with additional time for considering the case[5]. For The

[3] Guidelines for Advance Pricing Agreements in the EU, Annex to Commission Communication from 26.02.2007, COM(2007) 71 final

[4] Doc. JTPF/007/FINAL/EN

[5] Time is gained by the fact that even if a case is submitted and discussed before the tax assessment the starting point of the 2 year period is determined by No. 5 (b) CoC AC.

NGM who commented after the November 2013 meeting the claim would generally be made after the final assessment and early submission should be left to certain cases.

Do you think an explicit recommendation for an early submission should be made or would it be sufficient to mention the various possibilities available in the EU e.g. in a future report?

The Code of Conduct does not contain much guidance on the procedure under Article 5 AC. If the procedure is regarded as appropriate for addressing the issue, the Forum may consider clarifying some aspects of the procedure under Article 5 AC For example, the following aspects may be discussed:

- should when applying Article 5 AC, the involvement of the Competent Authority be recommended?

- may tax administrations achieve a mutual solution for a case by this 'negotiating via the enterprise'?

Do you think more guidance on Article 5 AC should be developed?

4. Implications of MAP results for other years (item 1.8, doc JTPF/002/2013/EN)

16. The following questions were raised and the JTPF considered that the item should be explored further.

    - Should a simplified MAP be applied for adjustments or assessments of transactions in the period after the years covered by the initial MAP/adjustment when the facts are similar to the ones being subject to the initial MAP?

    - Should issues already covered by a MAP in future periods be regarded as low risk areas for purposes of risk management, provided the facts and circumstances are unchanged?

17. Audit procedures and adjustments relate to certain limited tax periods. In cases where a dispute arises (e.g. which functions or risks are assumed, which is the most appropriate method etc.) both sides often stick to their positions until a final decision is reached (through MAP or court decision) and new audit/tax adjustments are made for years not covered by the initial MAP. This then results in further MAP requests. It might be worthwhile for CAs to consider simplifying/streamlining the procedure for MAP requests which are linked to a former MAP.

18. A further aspect that may be considered relates to the implications a MAP agreement may have for future tax periods in general. Provided the facts and circumstances are the same as in the period covered by a MAP decision and the enterprise follows what has been agreed, the respective items may be regarded as low risk areas and the task of a reviewer would be limited to the evaluation whether the facts and circumstances are still the same as in the period covered by the earlier MAP.

For discussion:

The JTPF may discuss a recommendation along the following lines:

CAs should simplify/streamline the procedure for MAP requests linked to issues which are already covered by an ongoing MAP. This simplified approach might consist of treating the new MAP request in the ongoing MAP procedure or to apply immediately the initial MAP outcomes to the new request.

Where appropriate, enterprises may initiate an APA procedure after the adjustment (if possible with a 'rollback' for earlier tax periods).

[If the facts and circumstances in future tax periods are the same as in the period covered by a MAP decision and the enterprise follows what has been agreed, the respective items may be regarded as low risk areas and the task of a reviewer would be limited to the evaluation whether the facts and circumstances are still the same as in the period covered by the earlier MAP.]

Do you agree with this recommendation which could then be added after 6.1 (b) of the CoC?

Note from the Secretariat:

At the November 2013 meeting, some MS expressed their reluctance with respect to this recommendation.

The UK would not welcome a recommendation which could implicitly limit the ability of a tax administration to take a different view in later years. They have no objection to the first two paragraphs, but suggest deleting the third paragraph as it is covered by risk management. The NGM who commented after the November 2013 meeting supports the recommendation and simplifying/streamlining the procedure. For this purpose and as a starting point the NGM suggests collecting bilateral Codes of Conduct for MAP treatment between MS/non MS. For instance the bilateral CoC on the DTC between France and the Netherlands foresees an accelerated procedure in case a MAP is already ongoing[6].

Ireland suggests the following wording (wording aligned by the Secretariat with the language in the CoC):

"Where a new MAP request is linked to issues which are already covered by an ongoing MAP from the same enterprise, CAs should consider treating the new MAP request as part of the ongoing MAP.

Where a MAP request is linked to issues which have already been covered in another MAP, CAs should consider whether it is appropriate to apply the outcome in the earlier MAP to the new request and where appropriate, to apply that outcome".

[6] (Non-official translation of the F-NL Code of Conduct by the Secretariat): Where a taxpayer believes that they have not been taxed in accordance with the provisions of the Convention and as a result requests the opening of a MAP for a period subsequent to a period already the subject of an earlier MAP covering similar matters of law and fact, the competent authorities of the Contracting States should endeavour to resolve it simultaneously for all periods concerned.

Do you agree to replace the first paragraph with the wording suggested by Ireland?
Do you think the third paragraph should be deleted?
For further discussion, can you provide the Forum with bilaterally concluded Codes of Conduct on MAP?

5. Webpage with MS information on MAP (item 2.1, doc JTPF/002/2013/EN)

19. At its meeting in February 2013 the JTPF saw a benefit in publishing on the Commission website the country specific information available on the OECD website for all EU MS, including those which are not members of the OECD[7]. A compilation of the respective MS TP legislation on the JTPF website would especially be useful as some JTPF reports refer to domestic legislation and practices and provide guidance on how to deal with these differences in practice (see e.g. secondary adjustments). The Secretariat has clarified the technical aspects of the publication on the JTPF website. It is possible to create a section "MS TP country profile" (*final title still to be decided)* where for each MS a pdf document containing specific transfer pricing information would be published. The Secretariat has compiled available information for each MS drawing on public sources such as the OECD website and earlier responses to JTPF questionnaires. MS have been asked to review and, if necessary, update and complete this information before its publication. Additional elements may be added to "MS TP country profile" as for example the information on the start of the 3-year period (see options listed in Section 1 above).

6. MAP requests to both CAs (item 2.4, doc JTPF/002/2013/EN)

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

For discussion:

The JTPF may discuss a recommendation along the following lines:

Enterprises should submit a copy of their request for MAP under the AC to the other CA involved at the same time and with the same set of information as to the CA to which the request is addressed in accordance with Article 6 (1) of the AC. Where appropriate and allowed, this might be done through electronic means. The fact that a copy of the request was submitted by the enterprise does not replace the obligation of the CA to inform the other CA about receiving the request under 6.3 (d).

Do you agree with this recommendation which could be added after paragraph 6.3 (d) CoC?

Note from the Secretariat:

[7] See section 6 (2.1) Summary record February 2013, doc JTPF/005/2013/EN

DK and the UK agree to this recommendation. The NGM who commented after the November 2013 meeting supports the recommendation, but suggests that care should be taken not to have it interpreted as hampering the opportunity for a CA to grant unilateral relief.

New drafting suggestion by the Secretariat:

Enterprises should submit a copy of their request for MAP under the AC to the other CA involved at the same time and with the same set of information as to the CA to which the request is addressed in accordance with Article 6 (1) of the AC. Where appropriate and allowed, this might be done through electronic means. The fact that a copy of the request was submitted by the enterprise does not replace the obligation of the CA to inform the other CA about receiving the request under 6.3 (d) nor should it be understood as limiting a CA's efforts to come itself to a satisfactory solution in the meaning of Article 6 (2) AC.

7. Independence of CA from audit (item 2.8, doc JTPF/002/2013/EN)

21. It was suggested to ensure that CAs can decide independently from field auditors. The JTPF agreed that the item should be addressed in line with the MEMAP recommendation, but adapted to the specific structure of some MS.

22. Best Practice No. 23 of the OECD MEMAP recommends that in order to enhance the independence of a subsequent review of a case by a competent authority, it is recommended that CAs maintain a level of autonomy from the audit function of a tax administration.

> *Best Practice Nº23: Independence and resources of a competent authority*
>
> *In order to enhance the independence of a subsequent review of a case by a competent authority, it is recommended that competent authorities maintain a level of autonomy from the audit function of a tax administration. In some cases, the competent authorities may take a different approach from audit to explain an outcome or address an issue. This may be a valid exercise, especially for a transfer pricing case and should not necessarily be considered as "redoing the audit". For example, if a case is without merit and not well substantiated at the audit stage, the competent authority of the state that initiated the adjustment should provide unilateral relief by withdrawing the adjustment without engaging the other competent authority. The guiding principle should be that the competent authority's function is to ensure a fair and appropriate application of the convention, not to seek to uphold all adjustments proposed by the tax authorities of its country.*
>
> *Independent and sufficient funding will also enhance the competent authorities' autonomy and enable it to carry out its mandate without becoming overly reliant upon other areas of a tax administration which do not share the competent authorities' primary objective, namely relieving double taxation. Tax administrations should ensure that the competent authority function is given sufficient resources, including qualified personnel, funding, training, and other program needs, to be able to carry out MAP responsibilities in a timely, effective, and efficient manner.*

For discussion:

The JTPF may discuss a recommendation along the following lines:

In order to ensure the independence of a subsequent review of a case by a competent authority, competent authorities should maintain - as far as possible - a level of autonomy from the audit function of a tax administration. The guiding principle should be that the competent authority's function is to ensure a fair and appropriate application of the AC, not to seek to uphold all adjustments proposed by the tax authorities of its country.

Do you agree with this recommendation which could be added after paragraph 6.1 (a) of the CoC?

The UK and the NGM who commented after the November 2013 meeting support such a recommendation.

IT has suggested a questionnaire on MS' institutional structure, legal framework and relationships between competent authorities, central tax administrations and field tax offices performing audit functions.

Note by the Secretariat:

At the November 2013 meeting and in written comments, MS requested the possibility to discuss the questionnaire suggested by Italy internally before addressing this point in the plenary of the Forum. For the NGM who commented after the November 2013 meeting the questions suggested by Italy address aspects which should be left to the respective MS.

8. No waiver of rights for audit settlement (item 2.10, doc JTPF/002/2013/EN)

23. JTPF members have referred to issues arising when "*very large and rather unsubstantiated tax adjustments are proposed, followed by settlement proposals under substantial pressure for a significantly lower amount, subject to the condition that no access to the MAP is available*" .

24. The JTPF considered that the issue should be explored further and that a recommendation along the lines of Best practice No. 19 of the MEMAP may be considered.

    Best Practice Nº19: Avoid blocking MAP access via audit settlements or unilateral APAs

    It is a best practice for both enterprises and tax administrations to avoid the inclusion of a waiver of access to MAP in audit settlements. Since MAP involves bilateral issues it is inappropriate to have two parties (the enterprise and one tax administration) not include a third involved party (the other tax administration) in the final resolution of a file.

    First of all, enterprises may not realize the potential implications of double taxation and the fact that an adjustment by the other tax administration may complicate the issue. Secondly, tax administrations should consider the issues of cooperation and reciprocity as well as the fact that one-sided settlements will not serve tax administrations well in the long run.

As for unilateral APAs, if a foreign adjustment is raised against a transaction or issue covered by a unilateral APA, the unilateral APA should be treated as the enterprise's filing and therefore eligible for MAP and adjustable, as opposed to an irreversible settlement.

For discussion:

The JTPF may discuss a recommendation along the lines of the MEMAP.

Do you agree with issuing a recommendation which could be added after paragraph 6.1 (a) of the CoC?

Poland emphasized the importance of the issue which needs further discussion in order to develop a strong recommendation denying the blocking of a MAP access via audit settlements and unilateral APAs. Thus, they propose further developments with regard to No. 19 of the MEMAP. Some practical solutions should be developed which could help monitoring how countries will actually apply this recommendation, e.g. based on tax adjustment statistics. It should be noticed, that independence of CAs from audit may in some countries, including Poland, result in situation in which CAs are not aware that a tax adjustment has been done, thus some kind of reporting is needed to evaluate the effectiveness of such a recommendation.

Alternatively, a recommendation should require MS to monitor the application of this recommendation by auditors.

DK and the NGM who commented after the November 2013 meeting support such a recommendation, while the UK suggests going even beyond the best practice language of the MEMAP.

Drafting suggestion from the Secretariat:

Enterprises and tax administrations should avoid the inclusion of a waiver of access to MAP in audit settlements, as it would be inappropriate for two parties (the enterprise and one tax administration) to exclude a third involved party (the other tax administration) from the final resolution of a file. As for unilateral APAs, if a foreign adjustment is raised against a transaction or issue covered by a unilateral APA, the unilateral APA should be treated as the enterprise's filing and therefore eligible for MAP and adjustable, as opposed to an irreversible settlement.

Do you agree with a recommendation along those lines?

9. Guidance on position papers (item 3.2, doc JTPF/002/2013/EN)

25. At the meeting in February 2013 the JTPF agreed that further guidance on position papers may be useful and the guidance given in the OECD MEMAP was considered as being a useful starting point. Annex 2 to this document contains the current guidance on position papers in section 6.4 CoC, supplemented with additional items taken from the OECD MEMAP.

For discussion:

Do you agree with supplementing the current guidance on position papers in section 6.4 CoC with additional items from the OECD MEMAP as elaborated in Annex 2 of this document?

Do you have further suggestions?

Note from the Secretariat:

The NGM who commented after the November 2013 meeting supports a recommendation and suggest recommending the use of a common working language to analyze and exchange correspondence and position papers between CAs. The UK suggests developing further guidance which is going beyond replicating the MEMAP.

10. Improving the 'second phase' based on suggestions by members of advisory commissions (item 4, doc JTPF/002/2013/EN)

26. The "second phase" of the AC was monitored in 2013[8]. The number of cases reported by MS to have been referred to an advisory commission within the EU for the whole period since the AC came into force is 5. Three chairpersons and one member of advisory commissions were asked for comments on the functioning of the "second phase". Their comments (included in document JTPF/010/2013/EN) were discussed at the JTPF meeting on 6 June 2013. The JTPF agreed that the following items would need further consideration;

- *Composition and functioning of advisory commissions*

27. The composition of an advisory commission is governed by the AC. One suggestion discussed in June 2013 was to consider a recommendation to appoint no more than 1 member per tax administration to the advisory commission as this would ensure that the independent persons of standing and the Chair could decide independently from MS. The possibility to appoint only one representative is already foreseen in Article 9(1) AC.

For discussion:

A recommendation to appoint only one representative from the respective competent authority may be added to paragraph 7.2 (c) CoC after the first sentence.

Proposed text:

It is recommended that competent authorities appoint only one representative of their competent authorities.

Do you agree with this recommendation?

Note from the Secretariat:

DK and SE are not in favour of the recommendation. The UK regards the proposed recommendation as uncontroversial. The NGM who commented after the November 2013 meeting suggests rewording it along the following lines:

"Only one representative per competent Authority should be appointed."

[8] 25 out of 27 MS have so far responded to the request for information on the number of cases referred to an advisory commission, i.e. cases in the "second phase".

The NGM suggests launching a survey on the practical experience of CAs and problems encountered when setting up an advisory commission.

Do you agree with such a survey which may form the starting point for developing best practices for setting up an advisory commission?

- *Opening statement by the enterprise and auditor(s)*

28. Although the option to invite a enterprise to present its case before the advisory commission already exists, the Forum agreed at the June 2013 meeting to discuss a recommendation on hearing the enterprise and the auditor at the outset of the procedure ('opening statements'). Regarding the suggestion for guidance on the content and the format of the information to be provided to the advisory commission, the Forum considered that - given the fact-specific nature of each case in transfer pricing - it may be difficult to provide detailed guidance.

For discussion:

A recommendation that the advisory commission may in appropriate cases consider to hear the views of the enterprise and the auditor(s) may be added at the end of paragraph 7.3 (d) CoC.

Proposed text:

The advisory commission may request the enterprise and/ or representatives of the Member States who were in charge of the adjustment (e.g. the auditors) to state at the outset of the procedure their opinion and to appear before the advisory commission (opening statement).

Do you agree with this recommendation?

Note from the Secretariat:

Although the proposed text seems uncontroversial, the UK is not sure whether further guidance is actually needed. The NGM who commented after the November 2013 meeting considers that it should be made sure that this measure does not prolong the procedure. The NGM more generally suggests considering as a good practice establishing a kind of "pre-filing" meeting before a MAP procedure.

Do you consider that a "MAP pre-filing" meeting would be beneficial for the procedure?

- *Timing of the arbitration procedure*

29. At the meeting in June, the Forum regarded the 6-month period envisaged under the AC for an advisory commission to deliver an opinion as generally appropriate. It should, however, be ensured that at the beginning of this time period sufficient information is already available to the advisory commission. Although this is in principle already foreseen in paragraphs 7.2 (f) and 7.3 (a) CoC, a statement may be added that the time until the advisory commission is established may be used by the competent authorities to collect and prepare this information.

For discussion:

The following sentence may be added to paragraph 7.2 (f);

"To ensure that the advisory commission can start its work in a timely manner, the time period needed to establish the advisory commission may already be used by the competent authorities to collect and prepare this information."

Do you agree with this recommendation?

- *Remuneration of chairmen and independent members of advisory commissions*

30. At the June meeting the Forum agreed that it is worth discussing how to appropriately adjust the remuneration of the members of advisory commissions. Members were invited to send their ideas and suggestions. The comments received are included in ANNEX 3. One suggestion is for a minimal increase of the remuneration to account for the inflation rate in the Eurozone. Assuming that the amount of 1000 EUR foreseen in paragraph 7.3 (f) (ii) CoC was agreed in 2003 (first published in 2004[9]), the amount adjusted in relation to the inflation rate in the Eurozone would result in 1.177,57 EUR in 2013. Further some comments indicate reluctance to put further work in defining a "meeting day".

For discussion:

Trying to capture also future inflation may result in an increase of the remuneration to 1.250,00 Euro.

Do you agree with this proposal or would you prefer a higher/lower amount?

Do you think the term "meeting day" as used in the CoC needs to be more clearly defined?

The **UK** sees this as a minor issue and does not think that the term 'meeting day' needs to be further defined.

- *Remit of and follow-up to advisory commissions' deliberations and opinions*

31. On the question whether or not agreements resulting from the arbitration procedure are/should be always subject to the approval of the enterprise, Members were invited to send their views.

32. The responses received (ANNEX 4) indicate that there should generally not be a difference between situations where the agreement was reached in the first or in the second phase of the AC. In principle, acceptance by the enterprise is not formally required under the AC and the agreement reached may therefore be implemented without the enterprise's agreement. However, the relation between the AC and domestic remedies needs to be considered. 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 the Contracting 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 appeal did expire or the right for an appeal was withdrawn. A problematic situation

[9] 23.04.2004 COM(2004) 297 final

may therefore arise in cases where the enterprise initiates a domestic remedy against the tax assessment which implements an agreement reached under the AC.

33. As already stated in paragraph 45 of the Commentary on Article 25 of the OECD MTC and paragraph 38 of the MEMAP, the concern of a particular competent authority to avoid any divergence or contradictions between the decision of the court and the MAP and the risks of abuse that these could entail should be taken into account. As a result the OECD recommends that the implementation of an agreement should be made subject to

    - the acceptance of the agreement by the enterprise and
    - the enterprise's withdrawal of domestic remedies and court proceedings concerning those points settled in MAP under the AC.

For discussion:

A new section 8 may be added after section 7 of the CoC which could be drafted along the lines of the OECD. The numbering of the following sections would change accordingly:

8. Implementation of the agreement:

If the terms and conditions of an agreement reached in the first phase of the AC are not satisfactory to the enterprise, the enterprise may withdraw from the MAP process under the AC and pursue those remedies which are still available under domestic law.

The implementation of an agreement reached in the first or second phase of the AC should be subject to the acceptance of the agreement by the enterprise and the enterprise's withdrawal from domestic remedies and appeals concerning the issues settled in MAP under the AC.

Do you agree to this recommendation?

In case the enterprise does not give their agreement in the aforementioned manner, do you think MS have the possibility not to implement the agreement? If so, would the enterprise have the possibility to appeal against the non-implementation?

For further information, MS responses to the 2009 Questionnaire on the interaction between judicial appeals and the AC[10] may be added to MSs' TP profile on the JTPF website.

For the UK there is no discretion under the AC for CAs not to implement the Advisory Commission's decision and therefore the second paragraph cannot be agreed. The NGM who commented after the November 2013 meeting is supportive to this recommendation.

11. Serious penalties (item 5, doc JTPF/002/2013/EN)

34. MS have made unilateral declarations to the AC on what they consider a serious penalty in the meaning of Article 8 (1) AC. In its summary report on penalties[11] the JTPF concluded that the current situation under the AC, where 27 (soon 28) different definitions of a serious penalty exist does not sit easily with the idea of a single market. Therefore it was agreed that the JTPF will in the future look at what precisely a serious penalty should be for the purposes of the AC. The idea behind

[10] See Annex VII of document SEC(2009)1169 final
[11] Document JTPF/002/2007/EN

this work would be to clarify what a serious penalty is in terms of transfer pricing, so that enterprises would not be disadvantaged by the existence of different definitions within the EU. However, as the AC is a multilateral convention between MS a common definition could only be recommended to MS for adoption in their unilateral declaration.

35. In the context of revising the CoC in 2009, MS were invited to inform the JTPF on the number of cases where access to the AC was denied because a serious penalty had been applied. At that time only two MS had denied access to the AC. The 2012 statistics on pending MAP cases under the AC also revealed that access to the AC due to serious penalties was denied only in one case. However the NGMs in 2009 expressed their concerns that the outcome did not reflect the pressure that this provision of the AC can put on enterprises to agree with a non-arm's length adjustment.

36. In 2009, the JTPF recognised that several MS having reflected on their individual declarations had in fact described penalties that should probably not be considered as "serious" within the context of Article 8. Therefore MS were recommended in Section 3 of the CoC to clarify or revise their unilateral declarations in the Annex to the AC in order to better reflect that a serious penalty should only be applied in exceptional cases like fraud.

37. Annex 5 of this document contains a list of these unilateral declarations as they stand now. The existing unilateral declarations are included in the MS country profiles intended for publication on the JTPF website.

For discussion:

Would it be desirable to establish a common definition, common criteria or a minimum standard on what constitutes a serious penalty in the meaning of Article 8 (1)?

If so, what should be the key aspects for considering a penalty as serious?

Note from the Secretariat:

Although a common definition may be desirable the **UK** believes that this is outside the remit of the JTPF. The NGM who commented after the November 2013 meeting indicated that she would support a consistent approach and suggest to clarify that denying access to the AC should only be possible in cases of penalties resulting from criminal provisions.

The Secretariat agrees with the UK that adopting a common definition on serious penalties would be outside the remit of the JTPF as the AC is a multilateral convention between MS, but considers that the JTPF could nevertheless elaborate a mutually agreeable definition that may be recommended to MS for adoption (i.e. revision of MS' existing unilateral declarations on Article 8 AC).

12. Implications of the new Article 7 (item 6, doc JTPF/002/2013/EN)

38. 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 Model Tax Convention in two stages.

39. 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.

40. The issue arising from this is whether and if so what implications these developments have on the interpretation of Article 4 (2) of the AC which mirrors the language of Article 7 (OECD MTC) before 22 July 2010.

41. At the meeting in February 2013 the JTPF concluded that this item should be explored further. It is suggested that this work would start with a discussion of document JTPF/006/BACK/2011/EN – Belgian contribution on the interaction between Article 7 (OECD MTC) and the AC (ANNEX 6).

For discussion:

Do you agree with the analysis provided in document JTPF/006/BACK/2011/EN?

If so, which of the options listed do you prefer?

Note from the Secretariat:

The UK supports option 1 and the NGM who commented after the November 2013 meeting sees need for an in-depth discussion of the topic.

13. Guidance on multilateral MAP (OECD) (item 2.5, doc JTPF/002/2013/EN)

42. The OECD is currently working on multilateral approaches in the context of MAP. This work started on the basis of the JTPF conclusions on triangular cases. Further work on this issue by the JTPF may be postponed until first results of the project from the OECD are publicly available. Based on this outcome it will be discussed 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.

Note from the Secretariat:

The **UK** suggests postponing the discussion

For discussion:

Do you agree with postponing the discussion of this item until the first results of the OECD project are available?

14. Information not sufficient for MAP (item 3.1 doc JTPF/002/2013/EN)

43. NGMs and MS encountered problems with respect to the question when the 2-year period under Article 7 AC starts. NGMs reported instances where tax authorities, long time after the MAP request has been filed under the AC, maintain that they did not receive sufficient information to have the 2-year term commence. A MS suggested that a manual could be developed which describes the minimum information needed.

For discussion:

MS responses why cases take longer than 2 years showed that often the reasons for a long duration is routed in legitimate reasons foreseen in the AC, such as pending court cases, the fact that a final tax assessment note has not yet been issued or arbitration is still pending.

Another reason for duration beyond 2 years is the fact that specific information requested under point 5 (a) (vii) CoC, is considered by a CA as not having been submitted by the enterprise in a sufficient manner. Consequently, the 2 year period is considered as not having started.

The NGM who commented after the November 2013 meeting suggests (i) making it clearer for a cooperative enterprise when sufficient information can be deemed to have been submitted and (ii) creating a clear framework in terms of timing and frequency of requests for additional information CAs may impose on enterprises before the 2-year term starts running.

Based on this it may be discussed whether recommendations can be made which ensure that all MS apply the same approach. It seems that mainly points 5 (a) (vii) and (viii) CoC cause the problems.

This discussion may result in:

a) amending points 5 (a) (vii)/(viii) and 5 (b) (ii) or

b) providing additional guidance (or a manual as suggested by a MS) on what kind of additional information should be provided (bearing in mind point 6.1 (e) of the CoC relating to compliance costs). In this context the wording of the AC ("well founded") may be better linked to the CoC, i.e. make sure that the information required aims to demonstrate that the case is well founded, or

c) developing further procedural rules, e.g. new time limits in relation to the requirement stated in point 6.3 (e) CoC.

Do you think a list of additional information items could/should be developed?

Do you think a certain procedure for requesting specific additional information including, e.g. certain timelines should be developed?

15. Cancelling MAP (item 3.4 doc JTPF/002/2013/EN)

44. A MS raised the question whether the MAP procedure can be finalised if an enterprise does not provide the necessary information. It should be noted that the AC does not include a provision explicitly allowing the finalisation of a case without coming to a mutual agreement which eliminates taxation not in accordance with Article 4 AC.

For discussion:

Do you think tax authorities should have the possibility to jointly or individually decide to finalise a MAP if information is not provided by the enterprise within reasonable time limits?

If so, do you think it is possible to implement such an approach under the AC?

16. Information submitted in MAP, but not in audit (item 2.6, doc JTPF/002/2013/EN)

45. One question which was raised is whether a MAP can be considered a "second review". The AC and the CoC[12] seem not to provide explicit guidance on the possibility of further requests from CAs or members of advisory commissions for additional information during a MAP procedure and how to deal with information submitted by the enterprise after initiation of the MAP. The OECD MEMAP[13], however, indicates that CAs can make further requests during the procedure and that the enterprise should have an interest in providing CAs with updated information or new information or documentation relevant to the issues under consideration.

46. Another question in this context may be how to do deal with a situation where a enterprise voluntarily provides relevant information at a later stage, e.g. to put CAs or a certain CA in a better position.

Note from the Secretariat:

The **UK** supports developing further guidance**.**

For discussion:

Do you agree that CAs or the advisory commission have the possibility to request further information after the MAP request was considered as well founded in the meaning of Article 6 and 7 AC?

[12] See Number 5 (a) vi, vii, viii CoC

[13] See Best practice No. 5 and par 3.3.1

If so, do you think this possibility or the scope for requesting further information should be limited?

Should the CoC be supplemented with a recommendation that new information should/could be submitted by the enterprise as soon as it is available?

What do you think would be appropriate to do in situations where an enterprise voluntarily provides certain information at a late stage of a MAP and not at the stage of audit and there is evidence that the information could have been delivered earlier?

17. MS practices on suspension of tax collection ***(item 2.11, doc JTPF/002/2013/EN)***

47. NGMs reported difficulties in getting access to extensions for payments for adjustments when filing for a MAP procedure under the AC. Point 8 of the Code of Conduct contains a recommendation to take measures which ensure the same conditions as those available for domestic appeals or litigation procedures. Best practice No. 21 of the OECD MEMAP provides a more direct and concrete recommendation for the suspension of tax collection by saying:

"The collection of tax as a condition to entering a program to relieve that very tax is generally considered to be unreasonable. Thus, it is a best practice and goal for tax administrations to provide a procedure for suspension or deferral of the requirement to pay a tax liability (including interest thereon) or the collection action of a tax administration on income tax that is the subject of the request for competent authority assistance. The decision to suspend or defer collection could be made after a risk assessment has been conducted by the tax administration to determine ability to pay or the creditworthiness of the enterprise. The suspension/deferral could begin at the time of application and remain in place until the resolution of the case by the competent authorities. In some countries suspension or deferral of collection actions is not possible due to various reasons beyond a policy determination. In these cases, the acceptance of security in lieu of payment during competent authority proceedings may be an opportunity to lessen the effect of double taxation"

For discussion

How is point 8 of the CoC implemented in your MS?

Do you think it is useful to collect this information and add it to the MS TP profile on the JTPF webpage?

Do you think the recommendation in point 8 of the CoC should be improved along the lines of the guidance contained in the MEMAP?

18. Informing the enterprise during a MAP (item 2.13 doc JTPF/002/2013/EN)

48. It was noted that there is a need for informing the enterprises during the MAP procedure and the JTPF concluded to explore this item further.

49. Point 6.3 (b), (f) and (g) CoC already states 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.

For discussion:

Do you think more can be done on the level of the Code of Conduct?

19. Change to baseball arbitration (item 7 doc JTPF/002/2013/EN)

50. Two MS suggested considering to change the EU AC into a "Baseball Arbitration" system. In the OECD Model Tax Convention the term "last best offer" or "final offer" approach is used for this system which foresees that each Competent Authority would be required to give to the arbitration panel a proposed resolution of the issue involved and the arbitration panel would have to choose between the two proposals which were presented to it[14].

Note from the Secretariat:

For the **UK** it seems not possible to implement baseball Arbitration without changing the AC.

For discussion:

Do you regard a "last best offer" approach as being more appropriate than the "independent opinion approach" foreseen in the AC?

Do you think there are ways to voluntarily apply this approach under the AC, for example if all parties (the members of the advisory commission, the CAs and the enterprises) would mutually agree to it?

20. AC and Arbitration under Double Taxation Agreements

(item 8, doc JTPF/002/2013/EN)

51. A MS suggests clarifying the relation between the AC and arbitration clauses contained in DTC.

For discussion: Issues may arise in situations where an arbitration procedure in a DTC exists in parallel to arbitration available under the AC and in multilateral cases where procedures

[14] Paragraph 2 of the ANNEX to the commentary on Article 25 OECD MTC

under the DTC and the AC are being followed in parallel. However, the situation of two procedures available for addressing TP disputes already exists with respect to the general MAP.

- Bilateral situations

In practice the AC, due to the availability of an arbitration phase is often more beneficial than a MAP without an arbitration clause under the applicable DTC. Two proposals in this paper address this issue:

(i) the recommendation to inform enterprises about their rights under the AC (Section 1)

(ii) the recommendation that the enterprise should receive the benefit of the doubt (Section 2) which may be applied more generally in a sense that requests should be interpreted in a way that the most beneficial procedure should be taken.

Paragraph 67 of the Commentary on Article 25 OECD MTC provides that States which are members of the European Union must coordinate the scope of an arbitration clause with their obligations under the AC. This coordination may generally be achieved by:

- excluding cases covered by the AC from MAP and arbitration in DTC between MS or

- by agreeing in DTCs between MS to a procedure which corresponds to the AC and its CoC.

Do you think a recommendation along these lines would fit in the CoC on the application of the AC?

- Multilateral situations

A multilateral approach may become difficult to follow for TAs and enterprises if the respective DTC procedures differ between each other and the AC. It may therefore be advisable to generally address transfer pricing cases under the AC.

Based on the considerations above, the following recommendations may be considered:

- a recommendation (addressed to enterprises) to apply for MAP under the AC in cases involving MS,

- a recommendation (addressed to TAs) that in cases of doubt the enterprise receives the benefit of the doubt and MAP requests should be interpreted as requests under the AC.

Your views on these recommendations are invited

52. It was suggested to evaluate whether certain aspects of the new Article 25 (5) OECD MTC and the related Commentary may be used to improve the AC.

For Discussion:

Action 14 of the OECD's BEPS Action Plan foresees making the dispute resolution mechanism more effective. It is suggested to postpone the discussion of this item until the first results of this work are publicly available.

Do you agree?

ANNEXES:

ANNEX 1: Template: MS Transfer Pricing Profile

ANNEX 1A: Annex to the draft Code of Conduct (2003)

ANNEX 2: Draft guidance on position papers

ANNEX 3: Compilation of comments received on the remuneration of independent persons of standing and the Chair of an arbitration commission

ANNEX 4: Compilation of comments received on enterprise's approval to an agreement reached under the AC

ANNEX 5: List of unilateral declarations on serious penalties (Article 8)

ANNEX 6: Belgian contribution on the implications of the new Article 7

ANNEX 1

Template: MS Transfer Pricing Profile

1. Reference to the Arm's Length Principle
2. Reference to the OECD Transfer Pricing Guidelines
3. Definition of related parties
4. Transfer pricing methods
5. Transfer pricing documentation requirements
6. Specific transfer pricing audit procedures and / or specific transfer pricing penalties
7. Information for Small and Medium Enterprises on TP
8. Information on dispute resolution
9. Relevant regulations on Advance Pricing Arrangements
10. Links to relevant government websites
11. Other information

ANNEX 1A

ANNEX TO THE DRAFT CODE OF CONDUCT (2003)

The starting point of the three-year period (deadline for submitting the request according to Article 6 (1) of the Arbitration Convention or Article 25 (1) of the OECD Model Tax Convention on Income and Capital)

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		
CY		
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 forelåede ændring af skatteansættelsen, jf. Skattestyrelseslovens §§ 3, stk. 4 og 12A.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 armslængde reguleringen blive givet ved modtagelsen af kendelsen, hvorfor treårsfristen i henhold til Voldgiftskonventionens art. 6.1 begynder at løbe fra dette tidspunkt.	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.*]
EE		
FI	Se päivä, jona verovelvollinen on saanut tiedon verotuspäätöksestä tai vastaavasta toimenpiteestä, jolla siirtohinnoittelua on oikaistu. (Suomessa kysymyksessä voi olla säännönmukainen verotus, oikaisuvaatimuksen johdosta annettu päätös tai jälkiverotuspäätös.) på svenska: Dagen då den skattskyldige fått kännedom om skattebeslutet eller motsvarande åtgärd, genom vilken den interna prissättningen har korrigerats. (I Finland: ordinarie beskattning, beslut om skatterättelse eller beslut om efterbeskattning)	The date on which the taxpayer receives the tax assessment notice or equivalent [*that reflects the transfer pricing adjustment*] *(In Finland: tax decision, notice of tax adjustment or notice of re-assessment)*
FR	La date de réception de la notification de redressements en cas de procédure	The date of receipt of the notification of adjustments or the notification of

	contradictoire, La date de réception de la notification des bases ou éléments d'imposition en cas de procédure d'office	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		
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[15]	"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*

[15] 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

		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 Luxembourg peuvent être désignés dans le contexte de la convention d'arbitrage par le mot « bulletin », en anglais « assessment », en allemand « Bescheid ».*]	The date of the third working day following the sending of the assessment Das Datum des dritten Arbeitstages nach Absendung des Bescheids
LT		
LV		
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	Dzień, w którym podatnik otrzyma decyzję o wymiarze podatku powodującą powstanie podwójnego opodatkowania	The date on which the taxpayer receives the tax assessment notice or equivalent that results in double taxation

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		
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	Whichever is the more appropriate of the date of issue of: a statutory notice required to conclude an assessment and related appeal procedures for the period in question; or a letter of acceptance by an officer of the Board to settlement terms for the period in question	

ANNEX 2

Guidance on position papers

6.4. 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 setting out:

(i) Basic information:

- Legal name and 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 adjustment
- Applicable taxation years
- Amount of income and tax adjusted for each taxable 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, calculation with supporting data (may include financial and economic data and reports relied upon and 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 methods for adjusting differences;

- 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 5(a). EN C 322/6 Official Journal of the European Union

(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 5(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).

ANNEX 3

Compilation of comments received on the remuneration for the independent persons and the Chair of an arbitration commission

Bulgaria

Bulgaria has no any experience with arbitration procedures so the compensation for the members of the advisory commissions has not been an issue yet. One solution could be to agree on a time-based remuneration where each member of a commission could keep time-sheets or similar records providing information on the time spent on a specific case.

Cyprus

As regards remuneration of members of Advisory Commission I fully agree with suggestion made by President for every one day meeting there is one day preparation

Denmark

Ideas on how to adapt the remuneration for members of advisory commissions:

At the meeting it was concluded that it was not the right time for an adjustment exceeding the general raise in prices. A possible solution could be to adjust the prices according to for eg. the Euro Area Inflation Rate.

Germany

The summary of suggestions made by former members of advisory commissions (DOC JTPF/010/2013/EN of May 2013) features, among other suggestions, the suggestion that work outside official meetings (such as reading material, exchanging emails etc.) should be recognized and that remuneration should be fixed by reference to actual time spent on the case and not on the basis of meeting days.

Germany does not support that suggestion.

The current Revised Code of Conduct (as the original Code of Conduct) suggests 1000 EUR per independent person per meeting day (1100 EUR for the chairperson). According to the summary records of those years, this recommendation was developed in 2002 and 2003 after intense discussions (see, in particular, the summary record of the September 2003 JTPF meeting). It is noteworthy that the original proposal (in a working paper of November 2002, DOC JTPF/007/2002/REV1/EN) was a fee of EUR 1000 per person "per full day spent on the case" (with a limit of a total amount of "EUR 100000 per opinion"), and the current wording "per meeting day" was developed later. Unfortunately, the 2002 and 2003 documents do not clearly show the reasons for changing "per full day spent on the case" to "per meeting day". It has to be stressed, however, that it was always clear that the arbitrators would have to spend more days on a case than just the meeting days. However, arguments against a rule that takes into account the actual time spent on the case are fairly obvious: (a) It seems difficult to keep track of the actual time spent on a case; (b) the remuneration, to be paid by the tax administrations involved, can easily reach very high total amounts if 1000 EUR per actual day

spent on the case is used; and (c) taking into account the actual time spent would almost necessarily lead to different remunerations for each member of the advisory commission because the individual time spent on a case will be different.

The lump sum of 1000 EUR per meeting day as agreed in 2003 was never meant to be an incentive for potential members of an advisory commission of standing to make it economically attractive to serve as an independent person of standing in an advisory commission. Rather, it seems that serving as a member of an advisory commission was always understood as an honorary appointment, comparable to serving in a jury in a regular court procedure.

The fee was not calculated on the basis of a fee that the independent person of standing could have earned otherwise spending the same time in the regular work, e.g. as a lawyer in private practice. A different understanding would probably necessitate a totally different approach to establishing the list of potential independent persons and to selecting them for actual advisory commissions. If the idea was to compensate independent persons at their "market prices", e.g. attorney fees, procurement law with all its complexities including mandatory invitations for tenders etc. might apply. Germany does not support such an approach.

The German experience with establishing advisory commissions suggests that persons of standing continue to be interested in being on the list and in serving in actual advisory commissions. Thus, there does not seem to be an actual need to make service as independent person financially more attractive.

In summary, Germany suggests leaving the Code of Conduct's provision on the remuneration of independent members of the advisory commission unchanged

United Kingdom

We agree, in principle, the German proposal to uplift the amount of remuneration by inflation is reasonable. Beyond this we believe there is no need to change the basis for remuneration and that this issue doesn't merit further discussion at this time.

ANNEX 4

Compilation of comments on taxpayer's approval to agreements under the AC

Bulgaria

The arbitration agreements are only presented to the taxpayers involved by the competent authority. According to our law and administrative practice their approval is not needed. The taxpayers involved have other instruments to contest the result of the agreement, i.e. appeals before courts.

Cyprus

As regards last point we have no practice on the matter. We have the confidentiality of taxpayer in the case of a decision of an administrative authority. Court Cases are published. An advisory commission is not an administrative authority. Therefore approval of taxpayer not required and I do not think that it should be required. Taxpayer should know that his case will be published. Therefore with a decision of the Minister of Finance decisions of arbitration commission are published.

Denmark

Views and country practices/legal frameworks on the issue of whether or not agreements resulting from the arbitration procedure are always subject to the approval of the taxpayer:

In Denmark the taxpayer will always be asked to accept the result of a mutual agreement procedure (either after an Article 25-procedure in the OECD Model Tax Convention or after a procedure according to the Arbitration Convention). If the result is not accepted the double taxation is upheld.

Denmark has not had any experience with results from arbitration panels.

In point 45 of the Commentary on Article 25 of the Model Tax Convention it is stated that an acceptance by the taxpayer is normally required, see also point 3.8 of the MEMAP.

Germany

Views and country practices/legal frameworks on the issue of whether or not agreements resulting from arbitration are always subject to the approval of the taxpayer

Germany issued administrative principles in a Federal Ministry of Finance Circular of 13 July 2006 on the application of the Arbitration Convention (available in German and in an unofficial English translation) athttp://www.bzst.de/DE/Steuern_International/Verstaendigungsverfahren/Merkblaetter/BMF_Schreiben_2006_07_13.html

http://www.bzst.de/EN/Steuern_International/Verstaendigungsverfahren/BMF_Schreiben_2006_07_13.html?nn=26140.

Point 13.6.4 of that Circular provides that, with respect to the implementation of CA decisions that implement opinions of advisory commissions, the same rules apply as for the implementation of ordinary mutual agreements. For ordinary mutual agreements, point 4.2 of the circular provides that they will only be implemented if (1) the applicant agrees with the implementation, (2) pending appeals on the issue are withdrawn, and (3) following the tax assessment notice implementing the mutual agreement, the applicant waives any appeal against such tax assessment, provided that the results of the mutual agreement are correctly implemented. In other words, Germany implements decisions following arbitration opinions only subject to the taxpayer's approval.

Concerning the theoretical foundation for requiring the taxpayer's approval, the following arguments can be put forward:

The Arbitration Convention itself is silent on whether implementation of a mutual agreement (be it before or after arbitration) requires the taxpayer's approval.

This is slightly different with respect to Article 25 of the OECD Model Tax Convention (MTC). While Article 25 itself is silent on the necessity of approval for an ordinary mutual agreement between CAs, paragraph 5 of Article 25 on arbitration explicitly provides for implementation of a mutual agreement that implements an arbitration decision only if all persons directly affected by the case accept the mutual agreement. However, even in the absence of an explicit approval rule for ordinary mutual agreements (i.e. agreements without arbitration), the OECD Commentary suggests that normally, implementation of a mutual agreement should be made subject to the acceptance of such mutual agreement by the taxpayer (see paragraphs 45, 76 and 82 of the OECD Commentary on Article 25 of the OECD MTC).

The same reasons as set forth in the OECD Commentary should apply under the EU Arbitration Convention (AC).

In particular, it is worth noting that there may still be pending domestic appeals even if an advisory opinion under the Arbitration Convention has already been rendered. One may argue that the 2-year period of Article 7(1) of the AC (at the end of which arbitration becomes mandatory) does not start in case of pending domestic court procedures, as provided in the second subparagraph of Article 7(1) ("where the case has so been submitted to a court or tribunal, the term of two years … shall be computed from the date on which the judgment of the final court of appeal was given"). However, that sub-paragraph only talks about cases submitted to courts or tribunals. In Germany, it is generally understood that this provision does not cover cases in pending administrative appeals (which may later become court cases). In other words, there can be pending administrative appeals cases, and still the 2-year period may start and eventually end, with the consequence of AC arbitration, while the domestic appeal is still pending.

United Kingdom

There is no requirement in the UK to get the taxpayer's approval to the outcome of the arbitration panel's deliberations, unless the taxpayer has suspended its domestic appeal. If it has done so, paragraph 22 of HMRC's Statement of Practice 1/11 offers the taxpayer the possibility to reject the MAP agreement and pursue the domestic remedies that had been suspended. That paragraph would also apply if the MAP resolution were to be reached by the arbitration panel, rather than by the competent authorities of the member states.

ANNEX 5

Unilateral Declarations on Article 8 of the Convention on the elimination of double taxation in connection with the adjustment of profits of associated enterprises

Declaration by Austria (*Official Journal C 026, 31/01/1996 P. 0001 – 0033)*

An infringement punishable by a 'serious penalty' is constituted by any intentional or negligent evasion of tax or duty that is penalized under the law on tax offences.

Declaration by Belgium (*Official Journal L 225, 20/08/1990 P. 0010 – 0024)*

The term 'serious penalty' means a criminal or administrative penalty in cases:
- either of a common law offence committed with the aim of tax evasion,
- or infringements of the provisions of the Code of income tax or of decisions taken in implementation thereof, committed with fraudulent intention or with the intention of causing injury.

Declaration by Bulgaria (*Official Journal L 174, 03/07/2008 P. 0001 – 0005)*

The term 'serious penalties' means penalties of every kind, imposed for actions constituting administrative or tax infringements, including infringements of procedural law concerning tax assessment and tax collection, as well as for crimes against the tax system. 'Serious penalties' imposed on the enterprise are also deemed to exist when penalties are imposed for offences committed against the tax system on an individual from that enterprise whose actions have influenced the amount of tax liabilities of the enterprise or the collection therewith.

Declaration by Cyprus (*Official Journal C 160, 30/06/2005 P. 0011 – 0022)*

The term 'serious penalty' includes penalties for:
(a) fraudulently or willfully making or submitting a false statement, return, document or declaration in respect of income or claims to any allowances or deductions;
(b) fraudulently or willfully submitting false accounts;
(c) refusing, failing or neglecting to submit a tax return;
(d) refusing, failing or neglecting to keep proper records or to make documents and records available for inspection;
(e) aiding, assisting, counseling, inciting or inducing a person to make, deliver or furnish any return, statement, claim, accounts or document, or to keep or prepare any accounts or documents, which is or are materially false.
The legislative provisions governing the abovementioned penalties are included in the Assessment and Collection of Taxes Laws.

Declaration by the Czech Republic (*Official Journal C 160, 30/06/2005 P. 0011 – 0022)*

An infringement of the tax laws punishable by 'serious penalty' is constituted by any infringement of the tax laws penalised by detention, criminal or administrative fines. For these purposes, by 'infringement of the tax law' is meant:
(a) failing to pay the charged taxes, social insurance taxes, health insurance taxes and fees paid for state policy of employment;
(b) tax or similar payment evasion;
(c) failing in fulfilling notification duty

Declaration by Denmark (*Official Journal L 225, 20/08/1990 P. 0010 – 0024)*

The concept of 'serious penalty' means a penalty for the intentional infringement of provisions of the Criminal Law or of special legislation in cases which cannot be regulated by administrative means.
Cases of infringement of provisions of tax law may, as a general rule, be regulated by administrative means where it is considered that the infringement will not entail a punishment greater than a fine.

Declaration by Estonia (*Official Journal C 160, 30/06/2005 P. 0011 – 0022)*

The term 'serious penalty' will be interpreted as signifying criminal penalties for tax fraud pursuant to Estonian domestic law (Penal Code).

Declaration by Finland (*Official Journal C 026, 31/01/1996 P. 0001 - 0033)*

The term 'serious penalties' includes criminal sanctions and such administrative sanctions which are imposed in respect of the breach of tax laws.

Declaration by France (*Official Journal L 225, 20/08/1990 P. 0010 – 0024)*

The term 'serious penalties' includes criminal penalties and tax penalties such as penalties for failure to make a tax return after receiving a summons, for lack of good faith, for fraudulent practices, for opposition to tax inspection, for secret payments or distribution, or for abuse of rights.

Declaration by Germany (*Official Journal L 225, 20/08/1990 P. 0010 – 0024)*

An infringement of the tax laws punishable by a 'serious penalty' is constituted by any infringement of the tax laws penalized by detention, criminal or administrative fines.

Declaration by Greece (*Official Journal C 160, 30/06/2005 P. 0011 – 0022)*

The term 'serious penalties' includes administrative penalties for serious tax infringements, as well as criminal penalties for offences committed with respect to the tax laws in accordance with the relevant provisions of the Code of Books and Records, of the Income Tax Code, as well as all specific provisions which define the administrative and criminal penalties in tax law.

Declaration by Hungary (*Official Journal C 160, 30/06/2005 P. 0011 – 0022)*

The term ‘serious penalty’ means criminal penalties established in relation to criminal tax offences, or tax penalties in relation to tax defaults in excess of HUF 50 million.

Declaration by Ireland (*Official Journal L 225, 20/08/1990 P. 0010 – 0024)*

‘Serious penalties’ shall include penalties for:
(a) failing to make a return;
(b) fraudulently or negligently making an incorrect return;
(c) failing to keep proper records;
(d) failing to make documents and records available for inspection;
(e) obstructing persons exercising statutory powers;
(f) failing to notify chargeability to tax;
(g) making a false statement to obtain an allowance.

The legislative provisions governing these offences, as at 3 July 1990, are as follows:
- Part XXXV of the Income Tax Act, 1967,
- Section 6 of the Finance Act, 1968,
- Part XIV of the Corporation Tax Act, 1976,
- Section 94 of the Finance Act, 1983.

Any subsequent provisions replacing, amending or updating the penalty code would also be comprehended.

Declaration by Italy (*Official Journal L 225, 20/08/1990 P. 0010 – 0024)*

The term ‘serious penalties’ means penalties laid down for illicit acts, within the meaning of the domestic law, constituting a tax offence.

Declaration by Latvia (*Official Journal C 160, 30/06/2005 P. 0011 – 0022)*

The term ‘serious penalties’ means administrative penalties for serious tax infringements, as well as criminal penalties.

Declaration by Lithuania (*Official Journal C 160, 30/06/2005 P. 0011 – 0022)*

The term ‘serious penalties’ includes criminal penalties and administrative penalties such as penalties for lack of good faith and for opposition to tax inspection.

Declaration by Luxembourg (*Official Journal L 225, 20/08/1990 P. 0010 – 0024)*

Luxembourg considers to be a ‘serious penalty’ what the other Contracting State considers to be so for the purposes of Article 8.

Declaration by Malta (*Official Journal C 160, 30/06/2005 P. 0011 – 0022)*

The term ‘serious penalty’ means a penalty, whether administrative or criminal, imposed on a person who willfully with intent to evade tax or to assist any other person to evade tax:

(a) omits from a return or any other document or statement made, prepared or submitted for the purposes of or under the Income Tax Acts, any income which should be included therein;
or
(b) makes any false statement or entry in any return or other document or statement prepared or submitted for the purposes of or under the Income Tax Acts;
or
(c) gives any false answer, whether verbally or in writing, to any question or request for information asked or made in accordance with the provisions of the Income Tax Acts;
or
(d) prepares or maintains or authorises the preparation or maintenance of any false books of account or other records or falsifies or authorises the falsification of any books of account or records;
or
(e) makes use of any fraud, art or contrivance whatever or authorises the use of any such fraud, art or contrivance.

Declaration by the Netherlands (*Official Journal C 160, 30/06/2005 P. 0011 – 0022)*

The term 'a serious penalty' means a penalty imposed by a court due to intentionally committing an offence as listed in Article 68(2), or Article 69(1) or (2), of the General Tax Act.

Declaration by Poland (*Official Journal C 160, 30/06/2005, p. 11-22*)

The term 'serious penalty' means penalty of fine, penalty of imprisonment or both of them imposed jointly, or penalty of deprivation of liberty for culpable infringement of tax law provisions by a taxpayer

Declaration by Portugal (*Official Journal C 160, 30/06/2005 P. 0011 – 0022)*

The term 'serious penalties' includes criminal penalties as well as administrative penalties applicable to tax infringements defined by law as serious or committed with intent to defraud.

Declaration by Romania (*Official Journal L 174, 03/07/2008 P. 0001 – 0005)*

The term 'serious penalty' includes the commission of any criminal act provided by the tax evasion law or the accountancy law or the company law or the tax legislation. It also includes administrative penalties in regard to:
- refusal to submit the tax statements (declarations) or the informative statements at the request of the tax bodies,
- refusal to supply documents and records requested by the tax inspection authorities,
- failing to submit the periodical financial documents and the accounting reports or, submitting such documents or reports which include incorrect data,
- actions included in the tax record, according to the legislation in force.

Declaration by Slovakia *(Official Journal L 174, 03/07/2008 P. 0001 – 0005)*

The term 'serious penalty' means a penalty imposed according to the Criminal Code for criminal offences committed with respect to the infringement of the pertinent tax laws, Tax Administration Act or Act on Accounting.

Declaration by Slovenia (*Official Journal C 160, 30/06/2005 P. 0011 – 0022)*

The concept of 'serious penalty' means a penalty for any infringement of tax law.

Declaration by Spain (*Official Journal L 174, 03/07/2008 P. 0001 – 0005)*

'Serious penalties' shall include administrative penalties for serious and very serious tax infringements, as well as sentences for offences affecting public finances.

Declaration by Sweden (*Official Journal C 026, 31/01/1996 P. 0001 - 0033)*

An infringement of the tax laws punishable by a 'serious penalty' is constituted by an infringement of the tax laws penalized by detention, criminal or administrative fines.

Declaration by the United Kingdom (*Official Journal L 225, 20/08/1990 P. 0010 – 0024)*

The United Kingdom will interpret the term 'serious penalty' as comprising criminal sanctions and administrative sanctions in respect of the fraudulent or negligent delivery of incorrect accounts, claims or returns for tax purposes.

ANNEX 6

Belgian contributions on the new Article 7 and the AC

A. Interaction between Article 4(2) of the EU Arbitration Convention and Article 7 of the Double Tax Agreements concluded between EU Member States

The EU Arbitration Convention establishes rules to resolve disputes where double taxation occurs between associated enterprises of different EU Contracting States as a result of an adjustment of the profits of one of those enterprises. The EU Arbitration Convention is a multilateral treaty concluded between the EU member states (Convention on the elimination of double taxation in connection with the adjustment of profits of associated enterprises). For the purposes of the Convention, Article 1(2) deems a permanent establishment of an enterprise of a Contracting State situated in another Contracting State to be an enterprise of the State in which it is situated.

1. Article 4(2) of the EU Arbitration Convention

Article 4 of the Convention states the principles that must be observed in the application of the Arbitration Convention. According to Article 4(2):

"Where an enterprise of a Contracting State carries on business in another Contracting State through a permanent establishment situated therein, there shall be attributed to that permanent establishment the profits which it might be expected to make if it were a distinct and separate enterprise engaged in the same or similar activities under the same or similar conditions and dealing wholly independently with the enterprise of which it is a permanent establishment."

On the basis of the Arbitration Convention:

- A Contracting State may adjust the profits attributable to a permanent establishment according to the principles of Article 4(2).
- Under Article 6 an enterprise may present a case to the competent authority of the Contracting State in which its permanent establishment is situated where it considers that those principles are not observed by a Contracting State having adjusted the profits attributable to that permanent establishment.
- Article 6 commits the concerned competent authorities to endeavour to resolve the case by mutual agreement on the basis of the same principles.
- According to Article 11, the advisory commission must base its opinion on Article 4(2).
- Finally, the concerned competent authorities must, on the basis of the principles of Article 4(2), take a decision which will eliminate the double taxation.

The principles set out in Article 4(2) condition the application of the Convention at each level as of the taxation by a Contracting State until the final decision eliminating double taxation.

2. Principles applicable under bilateral tax treaties containing an Article 7 similar to Article 7 of the OECD Model Tax Convention as it reads before 22 July 2010

The text of Article 4(2) reproduces almost wholly the text of Article 7(2) of the OECD Model Tax Convention as it reads before 22 July 2010 (such text is included in most of the bilateral tax treaties concluded between the EU member States):

"2. Subject to the provisions of paragraph 3, where an enterprise of a Contracting State carries on business in the other Contracting State through a permanent establishment situated therein, there shall in each Contracting State be attributed to that permanent establishment the profits which it might be expected to make if it were a distinct and separate enterprise engaged in the same or similar activities under the same or similar conditions and dealing wholly independently with the enterprise of which it is a permanent establishment."

Article 4 does not contain the text of Article 7(3) of the OECD Model.

"3. In determining the profits of a permanent establishment, there shall be allowed as deductions expenses which are incurred for the purposes of the permanent establishment, including executive and general administrative expenses so incurred, whether in the State in which the permanent establishment is situated or elsewhere."

OECD has fundamentally changed the principle governing the attribution of profits to a permanent establishment in the Report entitled *"Attribution of Profits to Permanent establishments"*, which was 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 Model Tax Convention in two stages.

The first stage was the revision of the Commentary on Article 7 as Article 7 reads before 22 July 2010. This stage was completed in the 2008 Update of the OECD Model. 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.

Under the OECD Commentary on Article 7(2) updated in 2008, Sections D2 and D3 of Part I of the Report *"Attribution of Profits to Permanent establishments"* is applicable in order to determine the profits attributable to a permanent establishment, including the profits attributable to dealings with other parts of the enterprise (see especially paragraph 17 of thisCommentary).

The OECD Commentary on Article 7(3) updated in 2008 has clarified the general directive in relation to the expenses of a permanent establishment laid down in paragraph 2. It has endorsed the previous OECD Commentary with respect to intangible rights, services and

interest charges departing from the authorised OECD approach provided for in the Report *"Attribution of Profits to Permanent establishments"* (e.g. presumption that services which are related to the general management activity of the enterprise should normally be allocated at cost, no internal interest dealings in non-financial enterprises, no internal royalty dealings). To the extent that the Report contains some departures from what was previously said in the Commentary on Article 7(3), there was indeed a risk that Courts express doubts about the validity to interpret Article 7 on the basis of the whole Report, including those departures[16]

The second stage was the finalization of a completely new article 7 with related Commentary changes in the 2010 Update of the OECD Model.

3. Principles applicable under bilateral tax treaties containing an Article 7 similar to Article 7 of the 2010 Update of the OECD Model Tax Convention

The text of Article 7(2) of the OECD Model Tax Convention as changed on 22 July 2010 reads as follows:

"For the purposes of this Article and Article [23 A] and [23 B], the profits that are attributable in each Contracting State to that permanent establishment referred to in paragraph 1 are the profits it might be expected to make, in particular in its dealings with other parts of the enterprise, if it were a separate and independent enterprise engaged in the same or similar activities under the same or similar conditions, taking into account the functions performed, assets used and risks assumed by the enterprise through the permanent establishment and through the other parts of the enterprise."

The text of previous Article 7(3) is considered useless and is deleted.

The Report *"Attribution of Profits to Permanent establishments"* is wholly applicable under the new Article 7. The new Article goes further than before in treating the permanent establishment as a separate and independent enterprise and in recognizing the dealings between the permanent establishment and the other parts of the enterprise. It provides a greater level of consistency between the taxation of branches and the taxation of subsidiaries under tax treaties. For instance, under this new approach, dealings in the nature of a license provided by a head office (the economic owner of the intellectual property) to a permanent establishment that is using the intellectual property will be recognized. The notional license will give rise to a notional royalty from the permanent establishment to the head office and will reduce the profits of the permanent establishment by the amount of that notional royalty.

[16] The Vienna Convention on the Law of Treaties recognizes that practices that have been previously followed by tax administrations and that show that countries have agreed on a certain interpretation are relevant for the interpretation of a treaty provision (under Article 31(3), the context in which a treaty must be interpreted includes "(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation."

The separate and independent enterprise fiction (including the recognition of notional dealings and notional payments) is confined to determining the attribution of profits to a permanent establishment under Article 7 and Article 23 (Elimination of double taxation).

4. The arm's length principle applicable under Article 4(2) of the EU Arbitration Convention

The drafters of the Arbitration Convention have worded the arm's length principle similarly as it was generally worded, at that time, in the bilateral tax treaties but without referring to those treaties. This seems due to the lack of tax treaties between some EU member states and to the inconsistent wording of Articles 7(2) (and 9) in tax treaties.

The aim of the arm's length principle of Article 4(2) is to solve double taxation resulting from conflicting approaches within the European Union between tax administrations and between tax administrations and enterprises with respect to the attribution of profits to permanent establishments. In order to fully achieve that aim, the Contracting States, their competent authorities and the advisory commission should rely on a common interpretation of the arm's length principle on the basis of which the profits should be attributed.

The EU Arbitration Convention itself does not contain any substantive rules as to how the general "arm's length principle" it endorses should be understood. Consequently, it must be considered whether the Contracting States, the competent authorities and the advisory commission may freely decide the rules to be followed under the Arbitration Convention or whether they are bound to international rules when applying the Convention. If they are bound to international rules, those rules should be specified.

The assessment and the allocation of income between an enterprise of a Contracting State and its permanent establishment have to be based on the domestic laws of the Contracting States and also on the provisions of Article 7 of the tax treaty entered into by the concerned Contracting States and of Article 4(2) of the Arbitration Convention which are directly applicable. It is normally on that basis that an enterprise determines the dealings between the different parts of the enterprise and that tax administrations control those dealings. In this respect, the provisions of Article 7 of the concerned treaty and their interpretation are especially relevant in order to apply the Arbitration Convention[17].

The relevance of the tax treaty in force between the concerned countries in order to define the concept "at arms' length" is confirmed by Article 3(2) of the Arbitration Convention, which refers for any term not defined in the Arbitration Convention (and unless the context

[17] The Vienna Convention on the Law of Treaties recognizes that any relevant rules of international law applicable in the relations between the parties should be taken into consideration in interpreting a treaty provision (Article 31(3)(c)).

otherwise requires) to the meaning that the undefined term has under the tax treaty between the concerned countries.

Due to the divergences in the application of the profits attribution rules between states, enterprises face uncertainty as to whether the rules accepted in one state will subsequently be accepted in another state. In this respect, the OECD Commentary on Article 7 is of great assistance in the application and interpretation of that Article. Tax administrations and taxpayers give great weight to the guidance contained in that Commentary. Observations have sometimes been inserted at the request of some OECD Member countries that do not endorse an interpretation given in the Commentary. Those observations usefully indicate the way in which those countries will apply Article 7 of their tax treaties. The OECD Commentary has been approved by the representatives of the OECD Member countries (apart from some observations), and consequently is part of the international legal order that the EU member states should follow in order to comply with the legal basis of Article 4(2).

In this respect, the Revised Code of Conduct for the effective implementation of the Arbitration Convention provides that *"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."* but does not specify if the arm's length principle advocated by the OECD should apply as revised from time to time (evolutionary interpretation) or not.

Different approaches can be followed in order to determine which rules shall apply to attribute profits to a permanent establishment.

Option I

The EU member states could agree that the principle "at arm's length" of Article 4(2) shall have the same meaning than the principle "at arm's length" of the Article on business profits included in the bilateral tax treaty concluded between the concerned states. Consequently, the tax administrations, the competent authorities and the Advisory Commission should take into consideration the interpretation given by the OECD Commentary on the provisions of Article 7 (including the observations of some states) corresponding to the provisions included in the concerned tax treaty.

The reference to the meaning of the concept "at arms' length" under a bilateral tax treaty shall imply that such meaning is taken into consideration even where the wording of Article 7 of the treaty differs from the wording of Article 4(2).

Examples:

Where the concerned treaty contains the provisions of Article 7(2) and (3) of the OECD Model as it reads before 22 July 2010, the principles of Article 4(2) will be interpreted on the basis of the OECD Commentary on Article 7 contained in the 2008 Update. This will be the case, even if such Commentary restricts the application of the Report "Attribution of Profits to Permanent establishments" by reason of the provisions of Article 7(3) which are not

included in Article 4(2) and even if, therefore, it could be argued that the Report should be entirely applicable in the context of Article 4(2).

Where the concerned treaty contains the provisions of Article 7(2) of the OECD Model as it reads in the 2010 Update, the principles of Article 4(2) will be interpreted on the basis of the OECD Commentary on Article 7 contained as of the 2010 Update. This will be the case, even if the wording of that provision is different from the wording of Article 4(2) and if, therefore, it could be argued that such Commentary should not apply.

Where the concerned treaty contains the provisions of Article 7(2) and (3) of the UN Model Double Taxation Convention, the principles of Article 4(2) will be interpreted on the basis of the UN Commentary on Article 7 that will be contained in the 2011 Update of that Model.

Where no treaty exists between the EU member states concerned by the application of the Arbitration Convention, the EU member states should expressly agree that the principle "at arm's length" of Article 4(2) has the same meaning than the principle "at arm's length" interpreted in the OECD Commentary as of the 2010 Update. As Article 4(2) does not contain the provisions of Article 7(3), the wording of Article 4(2) is large enough to cover all the rules provided for in the Report *"Attribution of Profits to Permanent establishments"*.

Those agreements could be included in the Code of Conduct for the effective implementation of the Arbitration Convention.

Advantages: Option I reconciles the rules governing the attribution of profits under bilateral tax treaties in force between the different EU member states and under the Arbitration Convention. It can be based on Article 3(2) of the Arbitration Convention.

Disadvantages: Option I endorses the application of two different sets of rules in order to attribute profits to a permanent establishment. Where several parts of an enterprise are situated in several states between which different treaty provisions are applicable, this option renders the attribution of profits to a permanent establishment more complicated and gives rise to mismatches.

Example:

An enterprise situated in State A has a PE in State B and a PE in State C. The tax treaty between State A and State B contains the new OECD Article 7 while the treaty between State A and State C contains the old OECD Article 7. A piece of software developed by the PE situated in State B is used by the PE situated in State C.

In order to determine the benefits attributable in States A and B to the PE situated in State B, the economic ownership of the software shall be attributed to the PE in State B and a notional royalty for the use of the software by the PE situated in State C shall be added to the benefits attributable to the PE situated in State B.

In order to determine the benefits attributable in States A and C to the PE situated in State C, a part of the actual costs of the development of the software shall be allocated to the PE situated in State C by reason of the use of the software by that PE and shall be deducted from the benefits attributable to that PE.

Option II

In order to achieve a uniform application of the principle "at arms' length" among all the EU member states, the member states could agree that the principle "at arm's length" of Article 4(2) has the same meaning than the principle "at arm's length" interpreted in the OECD Commentary as of the 2010 Update. As Article 1(2) deems a permanent establishment to be an enterprise of the State in which it is situated, the wording of Article 4(2) seems large enough to cover all the rules provided for in the Report *"Attribution of Profits to Permanent establishments"* based on the fiction that the permanent establishment is a separate and independent enterprise.

In order to achieve that goal, pre-eminence should be given to the Arbitration Convention in relation to the bilateral tax treaties that contain the old Article 7(2) and (3) of the OECD Model. In this respect, it can be argued that:

- Article 3(2) of the Arbitration Convention is not applicable to the meaning of the principle "at arm's length" of Article 4(2) because such application would go beyond the reference to the meaning of a term not defined in the Convention.
- Articles 3(2) and 15 of the Arbitration Convention imply that, except where the Arbitration Convention expressly provides otherwise, that Convention prevails over any treaty to which the Contracting States are or will become parties.
- It corresponds to the intent of the States having concluded the Arbitration Convention: they have included in Article 4 an autonomous definition of the principles "at arm's length" without referring to the corresponding principles included in Articles 7 and 9 of the bilateral treaties concluded between most of the EU member states; they have deemed a permanent establishment to be an enterprise of the State in which it is situated.

Advantages: Option II achieves a uniform application of the principle "at arms' length" among all the EU member states. It endorses the approach that most of the OECD member states have agreed to follow in the future.

Disadvantages: Some taxpayers could contest that interpretation where the applicable bilateral tax treaty contains Article 7(2) and (3) of the OECD Model as it reads before 22 July 2010.

Option III

In order to achieve a uniform application of the principle "at arms' length" among all the EU member states, the Arbitration Convention could be revised in order:

- to replace the text of Article 4(2) by the text of Article 7(2) of the 2010 OECD Update;
- to stipulate that the OECD Commentary on Article 7(2), as amended from time to time, shall be used in order to interpret such provision;
- to stipulate expressly that the provisions of the Arbitration Convention shall prevail over the provisions of a bilateral tax treaty.

Advantages: Option III provides more certainty with respect to the rules governing the attribution of profits under the Arbitration Convention and the pre-eminence of those rules over the rules provided for in bilateral tax treaties.

Disadvantages: Option III needs a lengthy procedure in order to be in force and applicable. The implementation of Option III is outside the mandate of the EU Transfer Pricing Forum.

B. Additional contribution submitted by Belgium:

In February, it was decided that the implications of the new Article 7 of the OECD Model should be explored further and members were invited to comment on document JTPF/006/BACK/2011/EN. Based on these responses it will be decided whether a sub-group could be set up to work further on this issue.

Following Article 1, the Arbitration Convention applies in order to solve double taxation *"on the grounds that the principles set out in Article 4 and applied either directly or in corresponding provisions of the law of the State concerned have not been observed"*. Consequently, a Contracting State must observe the principles set out in Article 4(2) to attribute profits to a permanent establishment for the application of its taxing rights.

In our view, different interpretations of the principles provided for in Article 4(2) are possible.

1. **Application of the OECD Transfer Pricing Guidelines, by analogy, for the purposes of determining the business profits attributable to a PE.**

As Article 1(2) deems a permanent establishment to be an enterprise of the State in which it is situated, the wording of Article 4(2) is large enough to cover all the rules provided for in the OECD Report *"Attribution of Profits to Permanent establishments"* based on the fiction that the permanent establishment is a separate and independent enterprise. One may consider that the rules applicable under this Report and the new Article 7 of the OCDE Model are applicable under the EU Arbitration Convention. This would imply possible conflicts with the rules provided for under many tax treaties in force between member states which include the old Article 7 of the OECD Model.

In this respect, it could, however, be argued that the Arbitration Convention is prevailing over any treaty to which the Contracting States are or will become parties (except where Article 15 is applicable). This seems to correspond to the intent of the States having concluded the Arbitration Convention: they have included in Article 4 autonomous principles without referring to the corresponding principles included in Articles 7 and 9 of the tax treaties concluded between member states; they have stated in Article 15 that the Convention shall not affect the fulfilment of "wider obligations" with respect to elimination of double taxation to which the Contracting states are or will become parties, which means that outside such "wider obligations" in tax treaties, the Arbitration Convention prevails over previous and later treaties.

2. Application of the rules provided for under the old Article 7 of the OECD Model

As the text of Article 4(2) reproduces almost wholly the text of Article 7(2) of the OECD Model Tax Convention as it reads before 22 July 2010, one may consider that the rules applicable under the old Article 7 of the OCDE Model remain applicable under the EU Arbitration Convention (as these rules have been interpreted in the OECD Model update of July 2008). This would imply possible conflicts with the rules provided for under later tax treaties between member states which include the new Article 7 of the OECD Model.

In this respect, it could, however, been argued that, except where Article 15 is applicable, the Arbitration Convention would prevail over any treaty the Contracting States have concluded before being parties to the Arbitration Convention but would only apply to the extent that its provisions are compatible with those of tax treaties concluded after that moment. In such case, the provisions of the new Article 7 included in later treaties would be applicable because Article 4(2) would not be fully compatible with those of the new Article 7.

3. Application of the principle "at arm's length" included in Article 7 of the tax treaty concluded between the concerned states (old Article 7 or new Article 7, as the case may be)

One could also consider that Article 3(2) of the Arbitration Convention is applicable to the meaning of the principle "at arm's length" described in Article 4(2), the meaning of which is not defined in the Convention. The reference to the rules governing such principle in tax treaties seems, however, to go beyond simply referring to the meaning that a term not defined in the Convention has under tax treaties.

Conclusion

The Contracting States should eliminate uncertainties by agreeing on a common understanding on the principles applicable under Article 4(2) of the EU Arbitration Convention and their interaction with Article 7 (Business profits) of the tax treaties between EU member States.

In this respect, a consensus on the interpretation mentioned under point 2 above seems foreseeable without further extended work and lengthy discussions.

Belgium would prefer an interpretation along the lines of point 1, which would result in a uniform application of the principle “at arms’ length” among all EU member states by endorsing the approach that most of the OECD member states have agreed to follow in the future. At first sight, a consensus along these lines seems, however, more difficult to achieve.