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EU JOINT TRANSFER PRICING FORUM

Compilation of comments received on some aspects of improving the functioning of the Arbitration Convention

Meeting of 26 June 2014

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A. Section 1, Starting point of the 3-year period

Question:

MS are invited to complete/revise if necessary the list in ANNEX 1 A of the Revised discussion paper. MS should provide information on how they define the starting point of the 3-year period in the meaning of Article 6 (1) AC. For ease of reference the list is attached to this e-mail. Please complete/verify the information in the 2 columns (definition in national language and its translation into English) for your respective MS and send it back to us.

Answers received:

Bulgaria

BG	Дата на връчване на акта, с който се определят задължения, произтичащи от корекция на трансферните цени.	The date of service (receipt) of the tax assessment notice containing a transfer pricing adjustment.

Croatia

HR	Dan primitka poreznog akta koji za posljedicu može imati dvostruko oporezivanje	The date on which the taxpayer receives the tax assessment notice or equivalent that results in double taxation

Cyprus

CY	Η ημερομηνία επίδοσης της ειδοποίησης επιβολής φορολογίας [που αντανακλά τις τροποποιήσεις για τις τιμές μεταβίβασης].	The date of service (receipt) of the tax assessment notice [that reflects the transfer pricing adjustment].

Denmark

A revised description of the Danish definition of the starting point of the 3-year period in the meaning of Article 6 (1) AC. In Denmark the reference to the relevant Danish law has changed since 2003.

Revised version:

DK	Såfremt skattemyndighederne agter at foretage en skatteansættelse på et andet grundlag end det, der er selvangivet, skal den skattepligtige underrettes skriftlig herom. Det skal samtidig underrettes om, at skatteyder har en frist på mindst 15 dage regnet fra skrivelsens datering, til at fremkomme med en udtalelse imod den foreslåede ændring af skatteansættelsen, jf. Skatteforvaltningslovens § 20. Har den skattepligtige udtalt sig inden fristens udløb, skal skattemyndighederne give skriftlig underretning om skatteansættelsen (kendelse). I Danmark vil den første endelige underretning fra skattemyndighederne om 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.*]

Estonia

According to the Estonian domestic law, the date of notification of or delivery of the administrative act is decisive in case of similar procedure for appeals.

Thus, the starting point of the 3 year period in the meaning of the article 6(1) AC would be the date on which the taxpayer receives the tax assessment notice or equivalent. In Estonian: "arvates haldusakti teatavaks tegemise või kättetoimetamise päevast".

Finland

FI	Päivä, jona verovelvollinen on saanut tiedon ensimmäisestä verotuspäätöksestä tai vastaavasta toimenpiteestä, jolla siirtohinnoittelua on oikaistu. på svenska: Dagen då den skattskyldige fått kännedom om det första skattebeslutet eller den motsvarande åtgärden, genom vilken den interna prissättningen har korrigerats.	The date on which the taxpayer receives the first tax assessment notice or equivalent decision resulting in a transfer pricing adjustment.

Greece:

- definition in english: "from the date of receipt of the tax assessment notice"

- definition in greek: "απο την ημερομηνία επίδοσης του φύλλου ελέγχου"

Ireland

We have verified the information in the 2 columns and confirm that the entry is correct that no amendment is required.

Latvia

LV	Diena, kad nodokļu maksātājam paziņots lēmums par audita rezultātiem	The date on which the taxpayer is notified on the tax tax assessment

Lithuania

LT	Data, kurią kompetentinga institucija pranešė asmeniui apie priimtą sprendimą. Pranešimo data suprantama kaip dokumento įteikimo data pagal Mokesčių administravimo įstatymo 164 straipsnį: 1. Dokumentai mokesčių mokėtojui gali būti įteikiami tokiais būdais: 1) tiesiogiai įteikiant; 2) siunčiant registruotu laišku; 3) telekomunikacijų galiniais įrenginiais;	There is no specific provision embedded in national legislation, thus, the general rules applied: it is a date, when competent authority informed the taxpayer of the decision adopted. In practice date of informing means the date when document is delivered, i. e. the starting point of the three-year period is the date on which the taxpayer receives (is recognised to

	4) viešai paskelbiant.	have received) the final tax assessment note from the tax authorities. The date of receipt depends on the way of communication and is governed by general rules provided in 164 Article of Law on Tax Administration: Documents may be communicated to the taxpayer in the following manner: 1) personally; 2) by registered mail; 3) by telecommunications terminal equipment; 4) by publishing.

Poland

PL	Bieg okresu trzyletniego rozpoczyna się od pierwszej z następujących dat: daty doręczenia protokołu kontroli albo daty doręczenia decyzji podatkowej.	The three year period starts with the first of the following dates: date of delivery of tax audit report or date of delivery of tax decision.

Slovakia

We confirm the information stated on behalf of the Slovak Republic in the Annex 1 A of the revised document

Slovenia

SI	Za začetek teka triletnega obdobja se šteje datum vročitve odločbe o davčni odmeri ali enakovreden dokument [ki ima za posledico, dvojno obdavčitev].	The date on which the taxpayer receives the first tax assessment notice or equivalent [that results in double taxation].

Spain

Spain does not need to revise this definition.

Sweden

We hereby verify that the information regarding Sweden in the 2 columns (definition in national language and its translation into English) in ANNEX 1 A of the Revised discussion paper is still valid. Please also find the information regarding Sweden below:

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):

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]*

United Kingdom

As stated in our Statement of Practice SP01/11 HMRC will regard the first notification as being the finalisation of a transfer pricing enquiry which gives rise to double taxation. This stage will be marked by the determination of the quantum of the additional profits arising from a transfer pricing adjustment such as the issue of a closure notice, or the amendment of a return during an enquiry.

The starting point will be the date of issue of the related notice, letter or amendment.

B. Section 2, Possibility to appeal against denial of access to the AC

Question:

MS are invited to inform the Secretariat about whether it is possible in their MS to appeal against a denial of access to the AC. Some MS have already done so – see last box on page 8 of the discussion paper.

Answers received:

Bulgaria

In Bulgaria it is possible to appeal against the denial of access to the AC.

Croatia:

It is not possible to appeal against a denial of access to the AC. This possibility is not regulated by Croatian legislation.

Cyprus

The Cyprus tax legislation makes no provision for an appeal in case of denial of access to the Arbitration Convention**.**

Denmark[1]

It is possible to appeal against a denied access to the AC in Denmark and we regard this as sufficient. We do not think that procedures should be implemented in the CoC.

Estonia

Participants in proceedings have the right to appeal the return of an application for the issue of an administrative act and other measures taken by the tax authority (§ 138 (1) Taxation Act).

[1] Response to earlier questionnaire see doc. JTPF/001/2014/EN

France[2]

I would like to make a comment regarding section C.2 of the discussion paper on the improvement of the functioning of the Arbitration Convention, about the question "Is it possible in your MS for the taxpayer to appeal against denied access to the AC. If so, do you regard this as sufficient?"

In France, like most of decisions of the administration concerning a taxpayer, the decision of denying access to the AC can be challenged by the taxpayer concerned before Courts. The availability of that right of appeal appears as being sufficient.

Greece

Our legislation does not include any provisions regarding the possibility to appeal against a denial of access to the AC.

Finland

There is no specific provision regarding this issue.

Ireland

There is no possibility to appeal against a denial of access within domestic tax legislation but it may be possible for the taxpayer to seek a judicial review of the Revenue Commissioner's denial of access to the AC.

Latvia

According to Administrative Procedure Law and the Law on Taxes and Fees the decision of officials of the tax administration, which are administrative acts, could be appealed. So that we consider that the denial of access to the AC could be appealed.

[2] Response to earlier questionnaire see doc. JTPF/001/2014/EN

Lithuania

In Lithuania taxpayer is entitled to appeal against every act or failure to act of tax administration. This general provision is seen as permitting to appeal against a denial of access to the AC. Regarding the subject of the dispute, this case would be attributed to administrative judicial proceedings, therefore, appeal should be placed to the court directly (there is no pre-trial proceedings stage for the case). However, there is no judicial practice so far.

Poland

In Poland it is not possible to appeal against a denial of access to the AC.

Slovakia

Firstly, SK would like to inform that so far the access to the AC has not been denied in practice. However, under the current state of law, there is not a clear possibility to appeal against such a denial.

Slovenia

In Slovenia the competent authority informs the taxpayer when accepting or denying access to the MAP by a letter. Since such a letter concerns the international procedure and has no formal legal nature it is - in our opinion - not very likely that it would be taken into account by a Court, if the taxpayer would want to appeal against a denial of access to the Arbitration Convention. However, so far a denial of access to the MAP in general has not been challenged in the court. Additionally, we would point out that it has never happened that the competent authority would deny a taxpayer access to the MAP under AC.

Spain

Taxpayers may appeal Spanish Competent authority communication denying access to MAP.

Sweden

In Sweden it is not possible to appeal against a denial of access to the AC according to 4 § förordningen (2000:1077) om handläggning av ärenden enligt skatteavtal.

United Kingdom[3]

There is no formal right to appeal in the Arbitration Convention therefore we do not believe it is possible to put appeal procedures in the Code Of Conduct where access is denied by a Member State.

In the UK, where a person is denied access to their legal rights or believes the law is not being properly applied they may be able to challenge via a Judicial review. This would, we believe, theoretically be the case if access to the Arbitration Convention was improperly denied although, in practice, it is likely that more informal representations would first be made by the taxpayer to HMRC.

Non-governmental Members[4]

Isabel Verlinden (contribution based on views collected from the network of PwC Member Firms within the EU)

Procedures to address denied access to the AC should be implemented under the AC CoC as this is currently lacking in most Member States. A separate, permanent arbitration commission could be established within the framework of the AC whereby taxpayers submit their appeal to denied access. Such a commission would probably only handle denied access appeals and would perhaps need to operate on a permanent basis to avoid the delays that can occur in assembling a commission.

[3] Response to earlier questionnaire see doc. JTPF/001/2014/EN

[4] Response to earlier questionnaire see doc. JTPF/001/2014/EN

C. Section 10, Approval to agreements reached under the AC

Question:

MS are invited to inform the Secretariat about whether agreements reached under the Arbitration Convention (1st phase/2nd phase) are made subject to the approval of the enterprise. Some MS have already done so, see ANNEX 4 of the discussion paper.

Answers received:

Bulgaria

Bulgaria has little experience with the application of the AC. Bulgarian law and administrative procedures do not contain any special rules as to how to implement the agreements reached under the AC. Our administrative approach is to notify the taxpayer/taxpayers involved on the outcome of the MAP without seeking for his approval. There is no requirement in our law to receive the approval of the taxpayer. However the taxpayer involved may file an appeal against the tax assessment notice which implements the mutual agreement.

Croatia

There is no practical experience in Croatian tax Administration with the agreements under the Arbitration Convention. We will consider the experience of other Member States and update our legislation if it will be necessary.

Cyprus

Cyprus has no experience concerning agreements reached under the Arbitration Convention.

Earlier response:[5]

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.

[5] Response to earlier questionnaire see Annex 4 of the revised discussion paper (doc. JTPF/011/REV2/EN)

Denmark[6]

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.

Estonia

In Estonia, there is no need for approval by the taxpayer, but a taxable person has the right to submit the opinion and objections to a tax authority before the issue of an administrative act concerning the taxable person's rights (§ 13 (1) of the Taxation Act).

Finland:

There is no specific legislation.

Germany[7]

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) at

http://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.

[6] Response to earlier questionnaire see Annex 4 of the revised discussion paper (doc. JTPF/011/REV2/EN)

[7] Response to earlier questionnaire see Annex 4 of the revised discussion paper (doc. JTPF/011/REV2/EN)

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.

Greece

Our legislation does not include any provisions regarding the approval of the enterprise to agreements reached under the AC.

Ireland

Agreements under 1st Phase and 2nd Phase are not subject to the approval of the enterprise.

Latvia

We have not had any practice on AC and we do not have national legislation on this issue.

Lithuania

Taxpayer should be informed about the decision reached before exchange of closing letters between competent authorities, inviting him to provide its position. However, the opinion of the taxpayer does not preclude Lithuanian competent authority from the final decision to be adopted according to the consensus of the competent authorities only.

Poland

There is no obligation under Polish law to obtain approval of the enterprise for the agreement reached under MAP. Nevertheless, if the enterprise considers that MAP heading toward unsatisfactory result for him, he could withdraw application for MAP in any stage of procedure.

Slovakia

The Slovak Republic has not had any experience with results from arbitration panels so far. Theoretically, we would inform the taxpayer about the agreement reached, but it would not be subject to taxpayer´s approval.

Slovenia

In principle agreements reached under the Arbitration Convention (1st phase/2nd phase) are not made subject to the approval of the enterprise.

Spain

Taxpayers are informed of the agreement between competent authorities and they can accept or reject it. However, before implementing the agreement they must accept the agreement in writing. The same applies in cases where the Advisory Commission has given an opinion on a particular case.

Sweden:

In Sweden the mutual agreement will not be implemented if the taxpayer does not agree to the agreement reached under the Arbitration Convention (1st phase or 2nd phase). The double taxation will then remain

United Kingdom

We have previously commented on the second phase.

In respect of the first phase, where mutual agreement has been reached and domestic remedies suspended, the taxpayer and other persons directly affected are offered the possibility to reject the agreement and pursue the domestic remedies that had been suspended. Where the taxpayer rejects the agreement the UK would consider that the efforts of the competent authorities to resolve the case by MAP to have been exhausted and that the case is closed."

Previous comments[8]:

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.

[8] Response to earlier questionnaire see Annex 4 of the revised discussion paper (doc. JTPF/011/REV2/EN)

D. Section 12, Implications of the new Article 7 OECD MTC

Question:

Belgium provided the JTPF with a contribution on the implication of the new Article 7 OECD MTC on the AC (see ANNEX 6 of the discussion paper). Section A of this paper lists 3 options. MS and NGMs are invited to send their views on the options and to indicate which of the options they prefer.

Answers received:

Bulgaria

As to the issue of the implications of the new Art. 7 of the OECD Model Tax Convention Bulgaria is in favour of Option 1 for the following reasons:

- The present tax treaty policy of Bulgaria is not to adhere to the new version of Art. 7 of the OECD MTC. Bulgaria will have a position (see Positions of non-OECD economies) on the new Art. 7 which will appear in the 2014 Update of the OECD MTC which states that it "reserve the right to use the previous version of Article 7, *i.e.* the version that was included in the Model Tax Convention immediately before the 2010 Update", subject to its positions on that previous version.;

- Bulgaria is of the opinion that the provision of Art. 4 (2) of the AC should not be interpret autonomously but in accordance with the relevant international tax rules derived from the Commentary on OECD MTC since the text of Art. 4 (2) of AC reproduces almost wholly the text of Art 7 (2) of the OECD MTC as it reads before 22 July 2010 and there are no other universal international standards accepted or applied. For this reason when interpreting the "arm's length" principle in the case of transfers between a PE and other parts of the same enterprise Bulgaria would apply the Commentary on Art 7 of the OECD MTC. Since all Bulgarian Tax Treaties contain the wording of Art. 7 as it reads before 22 July 2010 Bulgaria would determine the profits of a PE situated its territory on the basis of the 2008 Update of the OECD MTC and the applicable Commentary. The same approach would be used in determining the arm's length profits of a PE situated in Bulgaria for the purposes of Art 4(2) of the AC. This situation would change if Bulgaria has a Tax Treaty containing the new Art. 7 of the OECD MTC. In such a case the principles of Art. 4 (2) of the AC will be interpreted on the basis of the 2010 Update of the OECD Commentary.

Croatia

Croatia has concluded Double Tax Treaty with each Member State of the European Union, except with Cyprus. Two of them are in procedure: Double Tax Treaty with Portugal is concluded and signed and, at the moment, internal procedures for entry into force are in progress; Double Tax Treaty with Luxembourg is concluded and will be signed at the begining of May 2014, after which internal procedures for entry into force will be conducted. In all Double Tax Treaties between Croatia and EU Member States, Croatia has, during negotiations with other countries, agreed upon the old version of the Article 7 of the OECD Model Tax Convention (as it reads before 22 July 2010), and considers Option I of Annex 6 as the most simple option for implementation, considering there is no risk, for now, that in relations between Croatia and other EU Member States one country applies the old version of Article 7 and another the new version of Article 7. But, regarding the OECD efforts to broadly apply the new version of Article 7 of the OECD Model Tax Convention (2010 Update) and regarding the possibility that most of EU Member States will in the future tend to apply the new Article 7, Croatia will give consideration to the new Article 7 and its implementation in internal legislation and in relations with other EU Member States.

Cyprus:

In our opinion the solution offered in option II (agreement between MS that the principle "at arm's length" in Article 4(2) of the AC has the same meaning as is contained in the OECD commentary in the 2010 update) is preferred, since it achieves a uniform application of the principle "at arm's length" among all the EU member states.

Denmark:

"Denmark would welcome an agreement on how to treat the new version of Article 7 in OECDs Model Tax Convention. However, the solution has to respect national law and the existing double tax conventions.

In most of the Danish Tax Conventions the provision on Business Profits are formulated in accordance with the OECD Model Tax Convention. Therefore the income in a permanent establishment is calculated in accordance with the OECD Model Tax Convention and the commentaries (however, with respect of a different formulation in the specific Convention).

In 2012 our internal legal rules were changed as a consequence of the changes in Article 7 of the OECD Model Tax Convention and the commentaries. Since the OECD Model at the moment includes two different versions of Article 7 it was necessary to regulate on when to use which version. The wording of our new internal rules are the same as the new Article 7 of the OECD Model Tax Convention (2010). However, it is also stipulated in our internal legal rules that if the wording of the Article on Business Profits in the applicable double tax convention is different from this wording then the income in the permanent establishment has to be calculated in accordance with this Article (from the applicable convention).

Therefore, in case there is no double tax convention between the two countries, the income in a permanent establishment has to be calculated in accordance with the new Article 7 (2010).

Option 1: Option 1 is in accordance with the Danish internal legal rules. However, since Denmark does not have double taxation conventions with all the other EU member states we would like to add that in these cases the new Article 7 (2010) should be applied.

Option 2: Option 2 is not in accordance with our internal legal rules for calculating the income in a permanent establishment.

Since this option differs from what was chosen within the OECD, this option might cause problems in all the countries that did not decide to renegotiate their double taxation conventions.

Option 3: Outside the mandate of the Forum and burdensome to implement."

Estonia:

Estonia is of the opinion that 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, without any special additional provision.

I cannot find the option, but I would like 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. It seems to be most appropriate to the option II, although it is not exactly, but the 1. interpretation of the Belgian contribution seems to be even more alike.

Finland

Finland prefers option 1 ("Article 4(2) of the AC shall have the same meaning than what has been included in the bilateral treaty between the concerned states.")

Greece

We believe that the implications of the new Art.7 should be explored further.

Ireland

Per our replay of 19th April 2013, Ireland prefers Option 1

Lithuania

Lithuania considers this as a legal issue, whether the AC may oblige to follow the principles established in the OECD model Convention. For the particular principles applicable to the parties are agreed in bilateral tax treaties. We would be of the view that bilateral tax treaties establish the principles of attribution of profits to permanent establishment

Poland

At this moment Poland do not have new Article 7 in our DTAs. Nevertheless, option 1 seems to be the most reasonable compromise at this time, despite the problems related to various definitions in DTA. Option 2 is contrary to DTAs and the AC, which could rise problems in case of court disputes with the taxpayer. The best solution is option 3, but requires a change in the AC.

Slovakia

Slovakia has recently submitted to the OECD the reservation on the Article 7 MTC where, reserves the right to apply the pre-2010 version of Article 7. Slovakia would, thus, prefer Option 1. This is a substantial comment of the Slovak Republic to the Section 12 of the revised discussion paper.

Slovenia

We would prefer Option 1.

Taking into account the disadvantages of Option 1 maybe some general guidance can be given how to proceed in cases when two different sets of rules apply (e.g. when concerning several states between which different treaty provisions are applicable).

Spain

Spain supports option 1.

Sweden:

Sweden supports option 1. This option gives the most clarity and predictability for the taxpayer. As UK writes the AC exists to prevent double taxation and it would not be appropriate to have a different standard applying under the AC than applies in MAP (when treaties dictate).

United Kingdom

As previously stated we believe Option 1 is the only one feasible.

As the UK sees the position, the assessment and the allocation of income between an enterprise of a Contracting State and its permanent establishment is based on the domestic laws of the Contracting States and the provisions of Article 7 of the tax treaty between the Contracting States concerned. We do not believe that Article 4(2) of the EAC has any relevance here, and only comes in to play as an alternative procedure to the mutual agreement procedure under the Double Taxation Convention between the Contracting States concerned providing a guaranteed elimination of double taxation arising.

As such if an attribution of profit has been calculated based on Article 7 of the Treaty any MAP resolution must similarly be based upon the appropriate OECD commentary corresponding to that article, i.e. the old commentary for an old article 7 and the new commentary for a new article 7 provision; we do not see how you can apply a different commentary to that under which the original adjustment was made. Consider the position if we tried to apply a different commentary for a MAP request under the Treaty to that under the EAC, it would allow a taxpayer to arbitrage between a request under the Convention and the Treaty to its advantage!

We also note that the report identifies that the implementation of Option III would be outside the mandate of the EUJTPF.

Non-governmental Members

Isabel Verlinden

(contribution based on views collected from the network
of PwC Member Firms within the EU)

Dear Mr Neale, Dear Tom,

Thank you for the invitation to provide additional input on section 12 of the Revised Discussion Paper on the improvement of the functioning of the Arbitration Convention (JTPF/011/REV1/2013/EN; "Revised Discussion Paper"), being the implications the new article 7 of the 2010 version of the OECD Model Tax Convention ("2010 OECD MTC")[9] may have for article 4 of the EU Arbitration Convention ("AC")

In order to provide broader insight on the options as proposed in the Belgian contribution ***(JTPF/006/BACK/2011/EN*** - "Belgian contribution"), we have consulted PwC Member Firms located in the EU ("PwC network consultation") in order to obtain practical insights from the respective Member States ("MS") on how this topic could be addressed. We have consolidated the comments and suggestions from the PwC network consultation in this submission.

1. General comments on the arm's length principle embedded in article 4(2) of the AC

There are merits in the fact that the AC has included its proper notion of the "arm's length principle" with respect to profit allocation to Permanent Establishments ("PEs") in article 4(2) of the AC. The wording of article 4(2) of the AC is clearly based on article 7 of the OECD Model Tax Convention as it read before the revised version of 22 July 2010 ("former OECD MTC"). Including its proper notion was aimed at bridging the differences that existed in Double Taxation Conventions ("DTCs") between MS as well as to cover for the absence of DTCs between certain MS. The wording included in article 4(2) AC as regards the allocation of profits to PEs could thus be seen as aiming at superseding potential divergent views and applications among MS in order to provide for an effective tool for resolving double taxation arising from disputes on the profit allocation to PEs within the European Union.

The fact that article 4(2) AC includes its proper notion and the fact that it is defined sufficiently broad (it does not include the wording of article 7(3) of the former OECD MTC), is in our view an important element to take into account in considering the options put forward in the Belgian contribution as regards the implications that the new article 7 of the 2010 OECD MTC may have for the AC. In order to fully achieve the purpose and potential of the AC as a tool for elimination of double taxation, the **MS, their competent authorities and the advisory commissions should be able to rely on a common interpretation of the arm's length principle** for the attribution of profits to a PE.

[9] OECD Model Tax Convention on Income and Capital, 22 July 2010.

2. Implications of article 7 of the 2010 OECD MTC and its Commentaries

Experience shows that MS have different practices in dealing with updates of the OECD MTC and its Commentaries. Most commonly, however, a dynamic approach is endorsed where changes to the OECD MTC and/or its Commentaries concern clarifications or refinements. Where more fundamental changes are made to the OECD MTC and its Commentaries, a dynamic interpretation necessarily causes concerns as to their application to an existing DTC that deviates from a changed OECD MTC. This is confirmed in certain court practices around Europe where a static approach is followed. Although many EU tax authorities also in those cases (where more fundamental changes are made to the OECD MTC and its Commentaries) may want to endorse a dynamic interpretation, the legalistic framework may hamper a uniform application of a dynamic approach.

There are grounds for accepting the view endorsed in the Belgian contribution that the OECD has brought some material changes to the principles governing the attribution of profits to a PE in the 2010 OECD MTC, including its Commentaries. Although the 2010 OECD MTC does not change the arm's length principle as such, it does bring material changes as to how to interpret this principle in dealings between a head office and its PE(s).

3. Interaction of individual DTCs *vis-à-vis* the AC

The above findings bring us to the fundamental question on the interaction of individual DTCs and the AC. The AC includes two provisions on this topic:

- Article 3 (2) AC states that ***"Any term not defined in this Convention shall, unless the context otherwise requires, have the meaning which it has under the double taxation convention between the States concerned. "***

- Article 15 AC states that ***"Nothing in this Convention shall affect the fulfilment of wider obligations with respect to the elimination of double taxation in the ca****se of an adjustment of* ***profits of associated enterprises resulting from other conventions to which the Contracting States are or will become parties or from the domestic law of the Contracting States."***

Where the MS have entered into DTCs that result in more far-reaching obligations than those of the AC to eliminate double taxation, the AC avoids conflicts (through its article 15), irrespective whether or not the AC supersedes DTCs in the EU.

The AC, as it was eventually enacted, is not a European Directive but constitutes a multilateral treaty that has a legal status that is similar to that of any other ordinary treaty under general international law. Some literature and scholars endorse the view that, by its legal basis and its object and purpose, the AC takes precedence over the DTCs[10] since it is closely connected with the EU Community even though it does not form part of the legal

[10] Commission Staff Working Paper, SEC (2001) 1681, page 288.

system of EU Community law[11]. This interpretation attributes a hybrid legal status to the AC as a 'species' of EU Community law[12]. The hybrid status of the AC would imply that its general relationship *vis-à-vis* other DTCs (to the extent not explicitly regulated by article 15 of the AC) is not governed and regulated by ordinary principles of the Law of Treaties[13] but by the principle lex superior ***derogat legi inferiori.***[14]

If the AC would nonetheless be interpreted as an international treaty, the application of international principles and the hierarchical rules of the Law of Treaties would lead to a later or a more specific DTC dealing with the same scope as the AC prevailing over the AC. However, if the AC is interpreted as of a superseding nature, its provisions would by the principle lex superior ***derogat legi inferiori*** prevail, even if the DTC is of a later date and/or is more specific.[15]

The ambiguous status of the AC *vis-à-vis DTCs* between MS is in our view part of the issue causing the problems on how to interpret the new article 7 of the 2010 OECD MTC in view of the application of the AC.

4. Consideration of the options put forward in the Belgian contribution

a) Option 1

Agreeing amongst MS that the arm's length principle embedded in article 4(2) of the AC shall have the same meaning as the arm's length principle of the respective article on business profits included in the DTCs concluded between MS may not allow a uniform application within an EU context. The divergences that exist in the DTCs may moreover also lead to practical difficulties in applying the AC where the enterprise concerned is located in multiple MS.

It may be advisable under option 1, as it is currently described in the Belgian contribution, to address the fact that some MS may have a conflicting view (dynamic vs static) on how the provisions of the DTCs should be interpreted given the changes to article 7 of the 2010 OECD MTC and the Commentaries.

Consequently, despite of its merits, **option 1 does not seem to be the preferred way forward to achieve a uniform and effective elimination of double taxation in an EU context for profit attribution to PEs.**

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11 L. Hinnekens, "Different interpretations of the European Tax Arbitration Convention", EC Tax Review 1998/4.

12 E.J.W. Heithuis, "Het arbitrageverdrag: een vreemde eend in de Europeesrechtelijke bijt!?", W.F.R. 1994/6132, page 1865.

13 Vienna Convention on the Law of Treaties, 23 May 1969.

14 L. Hinnekens, "Different interpretations of the European Tax Arbitration Convention", EC Tax Review 1998/4.

15 A. Bernath, "The Implications of the Arbitration Convention: A step back for the European Community or a step forward for elimination of transfer pricing related double taxation", Master Thesis in International Tax Law, Jönköping University, May 2006.

b) *Option 3*

Option 3 would be the most unambiguous way forward to achieve a uniform application of the arm's length principle between a head office and its PE(s) among all of the MS. To that end, the AC itself needs to be amended, renegotiated and ratified by the MS. Although it would enforce a refreshed and uniform view on the interpretation of arm's length in the context of the AC among MS, it **is doubtful whether consensus can be reached** among the MS to actually replace the text of article 4(2) AC by the text of article 7(2) of the 2010 OECD MTC **within a reasonable timeframe.** This risks being even more likely should a consensus need to be found on the hierarchical status of the AC *vis-à-vis* ***DTCs*** between MS.

c) *Option 2*

Given the perceived drawbacks of option 1 and option 3, there are obvious merits in assessing and further exploring option 2 as an alternative measure to ensure a coherent and effective application of the AC in the particular cases concerned.

Pursuing this option would endorse the intention of MS to introduce an effective instrument in the EU for the elimination of double taxation in transfer pricing cases. A first step could then be to include in the Code of Conduct ("CoC") appropriate wording on the intention of the MS to apply the arm's length principle as advocated ***and updated*** by the OECD *from time to time.* Ultimately, the 2010 OECD MTC and its Commentaries reflect consensus among OECD member countries on the Authorised OECD Approach. Such interpretation would in our view not conflict with the wording of article 4(2) AC. Whilst article 4(2) AC is clearly based on the wording of article 7 of the former OECD MTC, it is worded sufficiently broad and it does not include the wording of article 7(3) of the former OECD MTC. Leaving out article 7(3) of the former OECD MTC was the most predominant change to article 7 of the 2010 OECD MTC.

Whilst the EU JTPF will need to consider that some MS are not (yet) OECD member countries, experience learns that most of these MS tend to apply OECD principles in transfer pricing matters.

One needs to recognise that the CoC only concerns soft law without legally binding power. Hence, the CoC cannot overrule the explicit wording of the AC. This is relevant not with respect to the wording of article 4(2) AC but rather with respect to the wording of article 3 and 15 of the AC. As such, one cannot rule out that a different interpretation may be given to articles 3 and 15 AC than the one put forward under option 2 of the Belgian contribution, even if the CoC endorses this option.

Consequently, pursuing **option 2,** whilst in the short term clearly being beneficial given its proper merits as well as given the potential shortcomings of both other options, **may only be an imperfect interim option pending implementation of better alternatives.**

Such alternatives could include option 3. If option 3 is pursued, obviously the opportunity exists that also other areas for improvement of the AC will be taken along, some of which we have already pointed out in our earlier PwC contribution on the improvement of the

functioning of the AC. The somewhat ambiguous nature of the legal hierarchical status of the AC and the scope of articles 3 and 15 AC is something that is also preferably addressed in such exercise to mitigate the risk of dissenting views and uncertainty within the EU when it comes to the application of the AC. The development of a multilateral instrument in the framework of action 15 of the BEPS Action Plan[16] may also help resolve the issue, although action 15 is probably to be viewed as part of a much broader debate on international taxation.

[16] *OECD (2013), Action Plan on Base Erosion and Profit Shifting, OECD Publishing.*