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EU JOINT TRANSFER PRICING FORUM

DUTCH CONTRIBUTION ON

THE QUESTION WHETHER PERSONS OF STANDING TO AN

ADVISORY COMMISSION ARE INDEPENDENT

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Centre de Conférences Albert Borschette
Rue Froissart 36 - 1040 Brussels

Contact:

Edward Morris, Telephone (32-2) 295.15.67 Edward.Morris@ec.europa.eu

Jean-Marc Van Leeuw, Telephone (32-2) 295.89.36 E-mail: Jean-Marc.Van-Leeuw@ec.europa.eu

Further improving the functioning of the Arbitration Convention **Disagreement on the independent persons of standing to an advisory commission**

Appointment of independent persons of standing to an advisory commission

The Arbitration Convention states that an advisory commission has to be set up in case the competent authorities concerned fail to reach an agreement that eliminates double taxation within two years. The advisory commission shall include an even number of independent persons of standing, which have to be appointed by the competent authorities by mutual agreement.

The independent persons are chosen from the “list of independent persons of standing eligible to become a member of an advisory commission”, for which each Member State nominated five persons based on the criteria laid down in article 9, paragraph 4. One of the criteria is that the independent person must be ‘competent and independent’. It is left to the individual Member States to decide which interpretation should be given to this criterion.

As a consequence this could lead to the situation in which one Member State nominates a person to be a member of the advisory commission, while the other Member State involved objects against this nomination because a different interpretation is given to the criterion ‘competent and independent’. This would only be different if the Member States would have agreed on a common definition of the terms ‘competent and independent’.

Current situation in case of lack of consensus

Article 9, paragraph 1 provides a procedure which should be followed in case there is lack of consensus between the competent authorities on the appointment of the independent persons. This fallback procedure is the drawing of lots. In paragraph 3 the circumstances are mentioned under which each of the competent authority may object to the appointment of the independent person of standing which is drawn according to the procedure.

Given the fact that the competent authorities involved already disagree on the outcome of the mutual agreement procedure and the criteria for the independent persons of standing, it is not unlikely that the procedure of drawing lots can be very time-consuming or that the process may be stalled indefinitely. This is even more complicated because not all CV’s of the independent persons of standing are available (in English) at this time.

Possible alternative

One alternative to the drawing of lots procedure could be that the independent persons of standing appointed to the advisory commission should meet the criteria in the eyes of both the competent authorities. In practice this means that the strictest interpretation of ‘competent and independent’ is decisive. The competent authorities involved should be clear on their interpretation of the criteria for the independent persons as soon as they are obliged to set up an advisory commission. In that case both competent authorities will have a good understanding about which person can be appointed to the advisory commission. This would mean that the procedure of drawing lots can be prevented and the installation of the advisory commission will be less time-consuming.

However, this solution may be unsatisfactory to the competent authority from the Member State with the less strict definition of ‘competent and independent’. For example: the Netherlands is of

the opinion that independent status cannot be guaranteed when a tax consultant is appointed to the advisory commission, unless the case at hand involves a purely factual matter. As soon as the case involves a policy matter, either in whole or in part, a tax consultant may have a stake in the conclusions to be drawn by the advisory commission. If the other competent authority involved has only nominated tax consultants to the “list of independent persons of standing eligible to become a member of an advisory commission”, this would effectively mean that they have to look at the persons other member states nominated to the list as a fall back option.

Does the EU JTPF agree that countries should clarify their position on independency at the earliest stages of setting up an advisory commission?

Does the EU JTPF think that additional steps are necessary?