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**EU JOINT TRANSFER PRICING FORUM**

**QUESTIONNAIRE ON THE INTERACTION BETWEEN MAP**

**AND JUDICIAL APPEALS**

**ART 7.3 OF THE ARBITRATION CONVENTION**

**Meeting of 21<sup>st</sup> February 2008**

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# Questionnaire on Article 7(3) of the Arbitration Convention

## 1. Background information

The inter-action of domestic legal procedures with the Arbitration Convention is recognised by many observers as a difficult area. Some MS have previously attempted to clarify their positions so that taxpayers can better understand the options open to them to resolve double taxation. However, the positions of not all MSs are clear. The Forum has therefore decided first to clarify the status quo and if possible identify improvements in this area that can be made to ensure the better elimination of double taxation in the EU.

This questionnaire attempts to clarify the position over what is meant by Article 7(3) of the Arbitration and what it actually means to apply or not to apply that Article.

### 1.1. *Article 7 of the Arbitration Convention*

**This article states:**

"1. If the competent authorities concerned fail to reach an agreement that eliminates the double taxation referred to in Article 6 within two years of the date on which the case was first submitted to one of the competent authorities in accordance with Article 6 (1), they shall set up an advisory commission charged with delivering its opinion on the elimination of the double taxation in question.

Enterprises may have recourse to the remedies available to them under the domestic law of the Contracting States concerned; however, where the case has so been submitted to a court or tribunal, the term of two years referred to in the first subparagraph shall be computed from the date on which the judgment of the final court of appeal was given.

2. The submission of the case to the advisory commission shall not prevent a Contracting State from initiating or continuing judicial proceedings or proceedings for administrative penalties in relation to the same matters.

**3. Where the domestic law of a Contracting State does not permit the competent authorities of that State to derogate from the decisions of their judicial bodies, paragraph 1 shall not apply unless the associated enterprise of that State has allowed the time provided for appeal to expire, or has withdrawn any such appeal before a decision has been delivered. This provision shall not affect the appeal if and in so far as it relates to matters other than those referred to in Article 6.**

4. The competent authorities may by mutual agreement and with the agreement of the associated enterprises concerned waive the time limits referred to in paragraph 1.

5. In so far as the provisions of paragraphs 1 to 4 are not applied, the rights of each of the associated enterprises, as laid down in Article 6, shall be unaffected."

## **1.2. List of Member States having made a unilateral statement declaring that they will apply Article 7(3):**

In 1995:

- France
- and the United Kingdom

In 2005:

- Belgium,
- the Czech Republic,
- Latvia,
- Hungary,
- Poland,
- Portugal,
- Slovakia
- and Slovenia

Regrettably, it is not clear what is meant by "apply."

## **2. Questionnaire**

In order to assess the situation prevailing in each Member State it was agreed by the members of the JTPF to clarify how their tax administration applies Article 7 (3) in practice. It was considered that this situation can lead to long delays in the application of the Arbitration Convention and the elimination of double taxation. **Therefore Member States are invited to complete the following questionnaire and to send their answers to the JTPF secretariat by Thursday 20<sup>th</sup> December 2007.**

### **Question 1:**

Considering Art. 7(3) "*Where the domestic law of a Contracting State does not permit the competent authorities of that State to derogate from the decisions of their judicial bodies, paragraph 1 shall not apply unless the associated enterprise of that State has allowed the time provided for appeal to expire, or has withdrawn any such appeal before a decision has been delivered.*", can your Member State/Tax administration derogate from the decisions of their judicial bodies?

### **Question 2:**

Those MS who can derogate, what do they consider to be a judicial body and when is the decision considered as final?

**Question 3:**

3.1 Those MS who can derogate, do they actually derogate in practice?

3.2 If the case has so far never arisen, would those countries who can derogate be willing to derogate in practice?

**Question 4:**

MS who cannot derogate, do they stop in practice all negotiations with the other MS or do they continue and inform the taxpayer once they have reached an agreement so that he has the choice to see the agreement implemented or to continue with his judicial appeals?

**Question 5:**

In general it may be useful to learn about any experience with the application of art 7(3). Where it is not yet covered by your answers to the previous questions could you describe your national experiences?

**Answers to question 1:**

Considering Art. 7(3) "Where the domestic law of a Contracting State does not permit the competent authorities of that State to derogate from the decisions of their judicial bodies, paragraph 1 shall not apply unless the associated enterprise of that State has allowed the time provided for appeal to expire, or has withdrawn any such appeal before a decision has been delivered.", can your Member State/Tax administration derogate from the decisions of their judicial bodies?

<b>Member State</b>	<b>Question 1</b>
Austria	No In Austria it is not possible to derogate from decisions of the Supreme Administrative Court (Verwaltungsgerichtshof) or from decisions of the Supreme Constitutional Court (Verfassungsgerichtshof).
Belgium	
Bulgaria	No
Cyprus	No
Czech Republic	No Generally any decision of the Tax administration must be in accordance with the decision of the Court
Denmark	No
Estonia	No
Finland	In principal, yes. If the result of an MAP –procedure is to reduce the taxes payable in Finland, the domestic decision is made on the basis of Sec 89 of the Act on Taxation Procedure, which in turn refers to a consideration of expediency. Therefore the final result may deviate from an eventual court decision in the case. Please note however, that Finland does not generally enter into MAPs if the taxpayer has commenced appeals procedures; a MAP may be launched when the final decision is reached (see below)
France	
Germany	Die deutsche Finanzverwaltung kann bei der Umsetzung einer Verständigungsvereinbarung von den Entscheidungen der deutschen Finanzgerichte abweichen auf der Grundlage von § 175a Abgabenordnung
Greece	
Hungary	No, Due to constitutional and administrative reasons
Italy	No
Ireland	Not permitted
Latvia	No Latvia's State Revenue Service can not derogate from the decision of judicial bodies. The judicial body in this context is Administrative Court (three instances: District Administrative Court, Regional Administrative Court, Administrative Department of Senate of Supreme Court). According to the

	<p>6th paragraph of Article 37 of Law on Taxes and Fees a taxpayer can appeal the State Revenue Services General Directors decision to a Court. Administrative Department of Senate of Supreme Court is the last instance which hears administrative cases in cassation procedure. In accordance with Article 351 of Administrative Procedure Law this judgment is final and can not be appealed</p>
Lithuania	
Luxembourg	
Malta	<p>No Malta cannot derogate</p>
Netherlands	<p><b>Yes</b></p>
Poland	<p>No</p> <p>According Polish rules, the tax administration can not derogate from decision of Polish judicial bodies concerning administrative decision based on given state of affairs. It means, that due to Polish provisions regulating procedure before administrative courts, the legally valid judicial decision (final decision) is obliging to the tax administration involved in individual case. Judicial decision is final when the appeal is not allowed</p>
Portugal	<p>No</p> <p>Considering that the Constitution of the Portuguese Republic establishes that any court decision will be bounding and mandatory for all public and private entities and has prevalence over decisions from any other authority, Portugal made a statement to clarify that the provisions of Art. 7(3) of the AC shall be applied.</p> <p>The juridical effects from a judicial decision can't, therefore, be modified by a decision from the Tax Administration or by a solution reached within the scope of a mutual agreement procedure</p>
Romania	
Slovak Republic	<p>No.</p> <p><u>Commentary:</u> According to the Section 53 para. 11 of the Slovak Tax Administration Act (No. 511/1992 Coll.), if the court decided on a lawsuit by which the decision had been challenged; this decision, according to the aforementioned law, could not be examined to the extent, within which the court decided. According to the Section 250j para. 6 of the Civil Judicial Order, administrative bodies are bound by the legal opinion of the court and according to the Section 250 1a of the Civil Judicial Order, the court of first instance as well as the administrative body are bound by the legal opinion of the court of appeal. According to the Section 250k para. 2, if the new decision was delivered after dissolution of the decision issued by the administrative body and this decision to the new compliant was dissolved again, because the administrative body had derogated from the legal opinion expressed in the first judgement without having changed the state of facts or legal state, the court would oblige the administrative body to refund all costs (law expenses) to the complainant</p>
Slovenia	

Spain	
Sweden	<b>Yes,</b> the Swedish Competent Authority can derogate from the decisions of the judicial bodies if this follows from a provision in a Double Taxation Agreement or another agreement to eliminate double taxation such as the Arbitration Convention (Chapter 7 Paragraph 4 of the Tax Assessment Act (1990:324))
United Kingdom	

## Answers to question 2

Those MS who can derogate, what do they consider to be a judicial body and when is the decision considered as final?

Member State	Question 2
Austria	NA
Belgium	
Bulgaria	NA
Cyprus	NA
Czech Republic	NA
Denmark	NA
Estonia	NA
Finland	The assessment adjustment board is the first instance of appeal in every tax district and, thus, can be considered as judicial body. The Administrative Courts are also considered as judicial bodies. Administrative Courts deal with appeals against decisions made by the authorities and administrative disputes. The decision is considered as final when it has reached a legal validity, i.e. when the appeal period has expired, the Supreme Administrative Court has given its decision or the right to appeal has been denied
France	
Germany	<p>Eine Entscheidung wird als endgültig angesehen, wenn das Urteil und insbesondere der streitgegenständliche Steuerbescheid rechtskräftig beziehungsweise bestandskräftig geworden sind. Entscheidender Anknüpfungspunkt für die Möglichkeit einer Abweichung ist grundsätzlich der Steuerbescheid selbst – es ist unschädlich, wenn der Steuerbescheid bestandskräftig ist. Dies gilt unabhängig davon, ob er Gegenstand eines Gerichtsverfahrens war. Daher kommt es tatsächlich immer auf die Bestandskraft des Steuerbescheides selbst an.</p> <p>Als „judicial body“ betrachtet D in diesem Zusammenhang die Finanzgerichtsbarkeit als rechtsprechende Gewalt für die in § 33 Abs. 1 Finanzgerichtsordnung genannten Streitigkeiten, insbesondere öffentlich-rechtliche Streitigkeiten über Abgabenangelegenheiten, soweit die Abgaben der Gesetzgebung des Bundes unterliegen und durch Finanzbehörden des Bundes oder der Länder verwaltet werden. Ausgeübt wird die Finanzgerichtsbarkeit durch unabhängige, von den Verwaltungsbehörden getrennte besondere Verwaltungsgerichte. Diese sind in den Ländern die Finanzgerichte als obere Landesgerichte und im Bund der Bundesfinanzhof.</p>
Greece	
Hungary	NA
Italy	NA
Ireland	NA
Latvia	NA
Lithuania	

Luxembourg	
Malta	NA
Netherlands	The Netherlands consider a court or a tribunal to be a judicial body (i.e. in The Netherlands: Rechtbank, Gerechtshof, Hoge Raad). A decision is considered to be final if all rights to appeal are no longer open
Poland	NA
Portugal	NA
Romania	
Slovak Republic	NA
Slovenia	
Spain	
Sweden	<p>Sweden considers the following as a judicial body:</p> <ol style="list-style-type: none"> <li>1. Tax administration</li> <li>2. County administrative courts</li> <li>3. Administrative courts of appeal</li> <li>4. The Supreme administrative court</li> </ol> <p>The decision is considered as final when the time for appeal has elapsed.</p> <p>A decision made by the Tax administration can be reassessed. Such a reassessment can be applied for by the taxpayer before the expiration of the fifth calendar year after the assessment year.</p> <p>A reassessment made by the Tax administration can be appealed against to the County administrative court by the taxpayer before the expiration of the fifth calendar year after the assessment year.</p> <p>A decision made by the County administrative court can be appealed against to the Administrative court of appeal by the latest at two months after the day the decision of the County administrative court was announced.</p> <p>A decision made by the Administrative court of appeal can be appealed against to the Supreme administrative court, but the decision will be reconsidered by the Supreme administrative court only if the Supreme administrative court grants a leave to appeal. The decision is considered final on the day the Supreme administrative court announces its decision.</p>
United Kingdom	

### Answers to question 3.1 and 3.2

**3.1** Those MS who can derogate, do they actually derogate in practice?

**3.2** If the case has so far never arisen, would those countries who can derogate be willing to derogate in practice?

<b>Member State</b>	<b>Question 3.1</b>	<b>Question 3.2</b>
Austria	NA	
Belgium		
Bulgaria	NA	NAN
Cyprus	NA	NA
Czech Republic	NA	NA
Denmark	NA	NA
Estonia	NA	NA
Finland	<b>No cases</b>	<b>Yes if necessary</b>
France		
Germany	Wenn es erforderlich ist, ja. Dies ist der Fall, wenn der Steuerbescheid tatsächlich bereits bestandskräftig ist	nicht angezeigt
Greece		
Hungary	NA	NA
Italy	NA	NA
Ireland	NA	NA
Latvia	NA	NA
Lithuania		
Luxembourg		
Malta	NA	NA
Netherlands	<b>Yes</b>	-
Poland	NA	
Portugal	NA	
Romania		
Slovak Republic	NA	NA
Slovenia		
Spain		
Sweden	<b>Yes.</b> There have been such cases in Sweden, though not yet under the Arbitration convention	<b>yes</b>
United Kingdom		

## Answers to question 4

MS who cannot derogate, do they stop in practice all negotiations with the other MS or do they continue and inform the taxpayer once they have reached an agreement so that he has the choice to see the agreement implemented or to continue with his judicial appeals?

<b>Member State</b>	<b>Question 4</b>
Austria	In such a case the negotiations with the other MS will be stopped. An advisory commission will not be set up
Belgium	
Bulgaria	Bulgarian Administrative Procedure Code does not provide for a suspension of the initiated court proceedings on the grounds of pending administrative procedure (MAP). Therefore the Bulgarian Revenue Authorities, being bound to the court decision, would not be willing to proceed with the initiated MAP once a court appeal has been filed. However, the taxpayer has the option to withdraw his appeal and wait for the final MAP outcome. In such a case the Bulgarian Revenue Authorities would proceed with the negotiations with the other MS
Cyprus	No experience
Czech Republic	In practice, in case of judicial proceedings out tax administration should interrupt MAP and wait for the decision of the judicial body
Denmark	We will continue the procedure and inform the taxpayer once an agreement has been reached and then he has the choice to see the agreement implemented or to continue with his judicial appeals.
Estonia	It might be that we will stop negotiations
Finland	NA
France	
Germany	NA
Greece	
Hungary	As we have indicated formerly Hungary cannot give practical examples on the application of the Arbitration Convention yet. Theoretically, if there is a final judicial decision, Hungarian competent authority has to dismiss the claim and must finish the process without any delay
Italy	<p>An existing litigation does not prevent that the initial stage provided for by the Arbitration Convention – i.e. the mutual agreement procedure – is started. Therefore, the mutual agreement procedure continues even if a litigation is in progress. On the other hand, the situation is more complex with respect to the second stage provided for by the above Convention, that is the arbitration stage.</p> <p><u>Assumption n. 1. Both competent authorities reach a mutual agreement before a decision has been delivered.</u></p> <p>The Italian competent authority informs the taxpayer that they have reached an agreement. As a domestic appeal is pending, for the purposes of implementing any such agreement, the Italian competent authority needs an</p>

	<p>advance approval from the taxpayer on the content of the agreement between competent authorities and the simultaneous withdrawal of the existing appeal.</p> <p>If the taxpayer does not give its approval and does not withdraw the appeal, the agreement reached cannot be implemented. In this case, however, the taxpayer can prosecute the domestic appeal.</p> <p>Obviously, since Italy cannot derogate from the decisions already made by its judicial authorities, once the decision has been delivered, the taxpayer cannot request the implementation of the agreement.</p> <p><u>Assumption n. 2. A decision is delivered before the two competent authorities reach a mutual agreement</u></p> <p>Where a decision is delivered in favour of the Italian tax administration<sup>1</sup> and against the taxpayer before the latter withdraws its appeal, considering that Italy cannot derogate from the decisions made by the judicial authorities, the double taxation can be avoided only if the other State considers that the assessment made in Italy is correct and accepts to make a downward adjustment. In the absence of an agreement, however, it is not possible to set up an advisory commission.</p>
Ireland	<p>We have no experience of this aspect of the operation of the Arbitration Convention. Our general approach is that we would allow an appeal to remain open while there is a reasonable prospect of a solution being found under a mutual agreement procedure. Once an appeal comes for hearing, the taxpayer will have to make a decision as to whether the appeal is to be withdrawn and the issue pursued under the Mutual Agreement/Arbitration Convention Procedure or is dealt with under the appeal procedure.</p> <p>The competent authorities will not be in a position to set up an advisory commission unless the taxpayer concerned has withdrawn any appeal against a matter to be dealt with by that commission</p>
Latvia	Latvia stops the negotiations in such situation because there is no possibility to change the decision of judicial body.
Lithuania	
Luxembourg	
Malta	<p>If the case is under objection but has not proceeded to a judicial body, negotiations with the other Member State may continue, provided the other Member State agrees.</p> <p>If the case is under review by a judicial body, then the taxpayer will need to decide whether to continue under the Mutual Agreement Procedure or the domestic procedure. If the tax payer opts for the latter, all negotiations with the other Member State will cease.</p>
Netherlands	NA

<sup>1</sup> If the decision is in favour of the taxpayer, there will be no double taxation any more.

Poland	the negotiations will be stopped
Portugal	Although no case of application of Art. 7 (3) is so far known to us, it is admissible that in practice the Tax Administration may opt for the suspension of negotiations with the competent authorities of the other Member State if a taxpayer has a pending judicial appeal on the issue under consideration and has no intention to withdraw his appeal
Romania	
Slovak Republic	If the taxpayer believes, that the decision of the tax administrative bodies resulted in taxation, which is not in line with the law, he may (does not have to) take legal action/complain. In case the taxpayer, who took legal action, decides the same matter to be resolved under the mutual agreement procedure between the competent authorities under the Arbitration Convention, he should take this complaint back before the delivery of a judgement. Going on in negotiations under the MAP would be superfluous, because the agreement reached by the competent authorities would not be applied, if it derogated from the court decision
Slovenia	
Spain	
Sweden	NA
United Kingdom	

## Answers to question 5

In general it may be useful to learn about any experience with the application of art 7(3). Where it is not yet covered by your answers to the previous questions could you describe your national experiences?

Member State	Question 5
Austria	
Belgium	
Bulgaria	No experience
Cyprus	No experience
Czech Republic	
Denmark	NA
Estonia	No experience
Finland	NA
France	
Germany	<p>Die Mehrzahl der deutschen arbitration – Fälle, die auf einer deutschen Korrektur beruhen, gehen in Deutschland nicht vor Gericht. In der Regel wird Einspruch eingelegt und Aussetzung der Vollziehung gewährt und danach wird der Fall im Rahmen der Schiedskonvention geführt.</p> <p>Kommt es zu einem Gerichtsverfahren, gilt folgendes:</p> <ul style="list-style-type: none"> <li>• Das Gerichtsverfahren stoppt nicht die Verhandlungen mit dem anderen Mitgliedstaat. Es ist vielmehr üblich, dass mit Einverständnis des Steuerpflichtigen und des Gerichts das Verfahren ruht.</li> <li>• In den Fällen, in denen die Steuerpflichtigen es vorziehen, erst das in Deutschland anhängige Klageverfahren durchzuführen, wird das Verständigungsverfahren bis zur Erledigung der Klage ruhend gestellt.</li> </ul> <p>In der Praxis stellt D dann vor Umsetzung einer Verständigungsvereinbarung durch einen Steuerbescheid sicher, dass schwebende Rechtsbehelfsverfahren (Einspruch beziehungsweise Klage) ihre Erledigung finden, u.a. durch Rücknahme des Einspruchs bzw. der Klage (ggf. auch teilweise). Ist kein Rechtsbehelfsverfahren anhängig, stellen die Finanzbehörden sicher, dass der Antragsteller auf die Einlegung eines Rechtsbehelfs verzichtet, soweit mit dem Bescheid die Ergebnisse der Verständigungsvereinbarung zutreffend umgesetzt werden.</p> <p>Wird ein Fall in einem ausländischen Staat, der nicht von seinen Urteilen abweichen kann, vor Gericht geführt, führt Deutschland ein Verständigungsverfahren nach Art. 6 der Schiedskonvention. Deutschland ist allerdings der Auffassung, dass der Beratende Ausschuss so lange nicht einberufen werden kann, so lange der Fall im Ausland vor Gericht anhängig ist</p>
Greece	

Hungary	As to our experiences on national level, if the tax office faces a final judicial decision in course its process, the tax office must finish the process as soon as possible without further investigation
Italy	It could be useful to learn about the experience or the position (if it is too early to talk of experience, taking into account the recent entry into force of the Prolongation Protocol) of countries applying article 7, paragraph 3 with reference to the computation of the two-years period, in the case where the taxpayer withdraws the appeal before a decision has been delivered. Should the taxpayer withdraw the appeal before a decision has been delivered, if no mutual agreement has been reached between the competent authorities, it is possible to start the arbitration stage. But how shall the two-years period be computed? According to article 7, paragraph 1, 2 <sup>nd</sup> indent, read in conjunction with paragraph 3 of the same article 7, it can be assumed that the two-years time limit starts from the date when the taxpayer withdraws the first-instance appeal. It could be useful to learn whether this position is shared by all countries applying article 7, paragraph 3.
Ireland	No experience
Latvia	
Lithuania	
Luxembourg	
Malta	No experience
Netherlands	No experience
Poland	No experience According Polish rules, the tax administration can not derogate from decision of Polish judicial bodies concerning administrative decision based on given state of affairs. It means, that due to Polish provisions regulating procedure before administrative courts, the legally valid judicial decision (final decision) is obliging to the tax administration involved in individual case. Judicial decision is final when the appeal is not allowed.
Portugal	
Romania	
Slovak Republic	No experience
Slovenia	
Spain	
Sweden	In Sweden we have traditionally taken the below described approach, but this is not something that follows from the law. It is just a practise that the competent authority (the Ministry of Finance and the Swedish Tax Agency) adhere to. From a formal point of view a case can be tried simultaneously by both a Court and the competent authority. However, from a practical point of view in most cases we have chosen not to do so. Instead, as competent authority we normally choose to have our case rest and wait for the court(s) to decide its case. There is nothing in Swedish law or practise that suggests that a court should rest its case only because a mutual agreement procedure has been initiated.  There are two reasons for this practise. First of all, a taxpayer always has the right to go to court. If he has also chosen to initiate a mutual agreement

	<p>procedure he still has the right under Swedish law to have his case tried by a court. If he wins his case in a court there will be no double taxation to eliminate. If we and the other competent authority have spent a lot of time on the case this will of course be wasted. In such a situation we believe it is better to spend our resources on other cases.</p> <p>The second reason is that the mutual agreement procedure under a tax agreement is intended to be an extra ordinary or last resort in order to eliminate double taxation that can not be avoided in the regular procedures. The intention is not for the mutual agreement procedure to replace existing and regular procedures. It is also our experience as competent authority that it is easier to handle a case if at least one court has already tried it. The case is often better analysed in such a situation. But of course, it is always up to the taxpayer to decide whether he wants to go to court or not</p>
United Kingdom	