COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 14.9.2009
SEC(2009)1169 final

COMMISSION STAFF WORKING DOCUMENT

Accompanying the

COMMUNICATION FROM THE COMMISSION TO THE COUNCIL, THE EUROPEAN PARLIAMENT AND THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE
on the work of the EU Joint Transfer Pricing Forum in the period March 2007 to March 2009 and a related proposal for a revised Code of conduct for the effective implementation of the Arbitration convention (90/436/EEC of 23 July 1990)

Final Report of the EU Joint Transfer Pricing Forum on the Interpretation of some Provisions of the Arbitration Convention

{COM(2009)472 final}
{SEC(2009)1168}

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1. INTRODUCTION

Under the Chairmanship of Mr. Bruno GIBERT, partner of CMS Bureau Francis Lefebvre and the Vice-Chairmanship of Mr. Theo Keijzer, Vice-President Tax Policy in Shell International BV, the Netherlands, for Business and Mr Roy Warden, Assistant Director for Her Majesty's Revenue and Customs (until March 2008) and Mr. Stefaan De Baets, First Attaché in the Belgian Federal Public Service Finance, for tax administrations, meetings of the JTPF were held in Brussels on 28 June and 23 October 2007, on 21 February, 5 June, 27 and 28 November 2008.

In its work programme for 2007/2008 (document JTPF/013/2007) the EU Joint Transfer Pricing Forum (JTPF or Forum) had identified several areas where some practical solutions could be found: the Arbitration Convention, intra-group services, SMEs, Cost Contribution Arrangements and the monitoring of previous achievements.

With the knowledge gained since the "Convention for the elimination of double taxation in connection with the adjustment of profits of associated enterprises the "Arbitration Convention"[1] (or AC), entered into force in 1995, the JTPF members were of the opinion that a common view of interpretation of some provisions could usefully be addressed. The topics specifically identified were: interest charged/credited by tax administrations when a case is dealt with under the Arbitration Convention, the inter-action of the AC and domestic litigation, the scope of the AC (triangular transfer pricing and thin capitalization cases), the functioning of the AC (rules about the deadline for the setting-up of the Advisory Commission and criteria for independent persons of standing).

The present JTPF work supplements its first report on the same topic on the basis of which the Commission had prepared a Communication[2] including a Code of Conduct that was adopted by the Council[3].

The objective of the first report was to ensure a more effective and uniform application by all EU Member States of the Arbitration Convention. The report established procedures to enable smooth and timely progression through the various stages of the Arbitration Convention. The report also contained a recommendation to EU Member States on the suspension of tax collection during cross-border dispute resolution procedures.

This document reports on the achievements of the JTPF related to the interpretation of some provisions of the Arbitration Convention.

Once the report is agreed by the JTPF members it is expected that the Commission will prepare a Communication on the work of the Forum covering the years 2007-2008 and including in annex the present report, the agreed report on penalties and a proposal for a revised Code of Conduct on the Arbitration Convention. At a second stage Member States should at the Council level take actions to see the JTPF recommendations and conclusions implemented.

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1 OJ L/1990/225 of 20/08/1990 – Convention 90/436/EEC
2 OJ C/2004/122 of 30/04/2004 p.45
3 OJ C/2006/176 of 28/07/2006 p.8

2. JTPF CONCLUSIONS AND RECOMMENDATIONS

2.1. Serious penalties

Article 8 (1) of the Arbitration Convention states:

> *"The Competent Authority of a Contracting State shall not be obliged to initiate the mutual agreement procedure or to set up the advisory commission referred to in Article 7 where legal or administrative proceedings have resulted in a final ruling that by actions giving rise to an adjustment of transfers of profits under Article 4 one of the enterprises concerned is liable to a serious penalty".*

Article 8 (1) is supplemented by Individual Declarations made by each MS where it is explained what they considered to be a serious penalty.

This topic was discussed on several occasions by the JTPF and in its summary report on penalties (doc.JTPF/002/2007/EN) the Forum made the following statement:

> *"The Arbitration Convention currently excludes taxpayers who have incurred a serious penalty. The situation at the moment under the Arbitration Convention where 27 different definitions of a serious penalty exist does not sit easily with the idea of a single market. Therefore the JTPF will in the future look at what precisely a serious penalty should be for the purposes of the Arbitration Convention. The idea behind this work would be to clarify what a serious penalty is in terms of transfer pricing and to prevent taxpayers from being disadvantaged from different definitions within the EU. The JTPF will seek to define in which cases a penalty should be considered as serious".*

Subsequently MS were invited to inform the JTPF on the number of cases where access to the Arbitration Convention was denied because a serious penalty had been applied **(see annex 4.1)**. At that time only two MS had denied access to the arbitration convention (twice in France and on some occasions in Spain-but no figure is available). However the Business members expressed their concerns that this outcome did not reflect the pressure that this Arbitration Convention provision can put on taxpayers to agree with a non arm's length adjustment.

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.

JTPF conclusion:

The JTPF cannot change specific provisions of the Arbitration Convention but considers that the aim of the Arbitration Convention is the elimination of the double taxation and that Article 8.1 provides for the application of judgment by the Competent Authorities and as such, it was agreed that the Forum would recommend a liberal interpretation of the provision as follows.

JTPF recommendation:

As Article 8.1 provides for flexibility as regards the refusal to give access to the Arbitration Convention due to the existence of a serious penalty and considering the practical experience acquired since 1995 the JTPF invites MS to clarify or revise their unilateral statements in Annex of the Arbitration Convention in order to better reflect that a serious penalty should only be applied in exceptional cases like fraud.

2.2. Scope of the arbitration convention

2.2.1. Thin capitalisation cases

In its work programme the JTPF agreed to examine the scope of the Arbitration Convention and its application to what are commonly known as thin capitalization cases.

In order to assess the current position in the EU, MS completed a questionnaire **(see annex 4.2)** to answer whether or not they consider a case of "thin capitalization" under several scenarios to be solvable under the Arbitration Convention.

From the table the JTPF concluded unanimously that an adjustment arising in respect of the rate of interest fell within the scope of the Arbitration Convention. However differing views were held on the scope of the Arbitration Convention on any wider interpretation of the wording "financial relations" in Art 4 (1) in particular the quantum of the loan and the borrowing capacity.

Differing views were also expressed on the inclusion of adjustment to profits arising as a result of the application of anti-abuse rules.

Consequently the JTPF focused the debate on linking the recommendation to the arm's length principle and giving clarity that financial relations include more than the rate of interest on a loan. To help clarifying the situation MS were invited to complete a second table **(see annex 4.3**). On this basis the JTPF agreed the following recommendation on the scope of the provisions of the Arbitration Convention related to financial transactions:

JTPF recommendation:[4]

The Arbitration Convention (AC) makes clear reference to profits arising from commercial and financial relations but does not seek to differentiate between these specific profits types, to thus narrow the scope of the AC. The JTPF recognises the broad scope of the AC and recommends that MS do not seek to take a more restricted view of the type of profit arising from either commercial or financial relations to which the AC should apply.

In particular the JTPF considers profit adjustments arising from financial relations including a loan and its terms and based on the arm's length principle are within the scope of Arbitration Convention.

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[4] **Reservations on the scope of the AC: Thin Capitalisation**

Bulgarian reservation: Bulgaria holds the view that profit adjustments arising from an adjustment to the price of a loan (i.e. the interest rate) fall within the scope of the Arbitration Convention. On the contrary, Bulgaria considers that the Arbitration Convention does not cover cases of profit adjustments based on adjustments to the amount of financing. In principle the grounds for such adjustments lay in the domestic legislation of MS. The operation of varying national rules and the absence of an internationally recognized arms' length set of guidelines to be applied to a business' capital structure, to a great extent challenge the arms' length character of profit adjustments based on adjustments to the amount of a loan.

Czech reservation: The Czech Republic shall not apply the mutual agreement procedure under the Arbitration Convention in case that is a subject to the anti-abuse rules under the domestic law.

Dutch reservation: The Netherlands endorses the view that an adjustment of the interest rate (pricing of the loan) which is based on national legislation based on the arm's length principle falls within the scope of the Arbitration Convention. Adjustments of the amount of the loan as well as adjustments of the deductibility of the interest based on a thin capitalization approach under the arm's length principle or adjustments based on anti-abuse legislation based on the arm's length principle are considered to fall outside the scope of the Arbitration Convention. The Netherlands will preserve its reservation until there is guidance from the OECD on how to apply the arm's length principle to thin capitalization of associated enterprises.

Hungarian reservation: Hungary considers only those cases fall within the scope of the AC where double taxation is due to the adjustment of the interest rate of the loan and the adjustment is based on the ALP.

Italian reservation: Italy considers that the Arbitration Convention may be invoked in case of double taxation due to a price adjustment of a financial transaction not in accordance with the arm's length principle. Conversely, it cannot be invoked to solve double taxation arising from adjustments to the amount of loans, or double taxation occurred because of the differences in domestic rules on the allowed amount of financing or on interest deductibility.

Latvian reservation: Our understanding is that the Arbitration Convention cannot be invoked in case of double taxation arising as a result of application of general national legislation on adjustments of the amount of a loan or on deductibility of interest payments, that is not based on the arm's length principle provided for in Article 4 of the Arbitration Convention.

Therefore, Latvia considers that only adjustments of interest deductions performed under national legislation based on the arm's length principle are within the scope of the Arbitration Convention.

Polish reservation: Poland considers that procedure stipulated by Arbitration Convention may be applicable only in the case of interest adjustments. While adjustments concerning amount of a loan should not be covered by the Convention. In our opinion it is quite impossible to define how capital structure should look in practice in order to be in line with arm's length principle.

Portuguese reservation: Portuguese Tax Administration considers that the Arbitration Convention is applicable to the remuneration of the loan but profit adjustments arising from corrections to the amount of a loan between associated companies are considered to be outside the scope of the Arbitration Convention.

Slovakian reservation: We are of the opinion that an adjustment of the interest rate which is based on national legislation based on the arm's length principle should fall within the scope of the Arbitration

2.2.2. Transfer pricing triangular cases

The Forum studied the potential of applying the existing Arbitration Convention and related Code of Conduct to double taxation that resulted from the involvement of more than two parties to a transaction. This issue was firstly tackled by a specific sub-group composed of business and tax administration members. The sub-group met in Brussels on 15th January 2008, 29th April 2008 and 8th July, 2008 and sent its report to the JPTF in August 2008. The report was fully endorsed by the Forum during its November 2008 meeting.

This part of the report provides the conclusions, guidelines and recommendations arrived at so far on how to approach and resolve potential double taxation in so-called triangular transfer pricing cases (hereafter referred to as triangular cases). From the outset, it should be clear that because each case is different, it is very difficult to draft overly prescriptive guidelines and recommendations universally applicable.

2.2.2.1. Definition of a transfer pricing triangular case

The JTPF concluded that to deal with the topic of transfer pricing triangular cases it was desirable to firstly agree on a definition which should be neither too broad nor too narrow.

The agreed definition is

A triangular case is a case where two states in a MAP cannot fully resolve any double taxation arising in a transfer pricing case when applying the ALP because an associated enterprise - as defined in the Arbitration Convention - situated in a third state and identified by both EU Competent Authorities (evidence based on the comparability analysis including a functional analysis and other factual elements) had a significant influence in contributing to a non arm's length result in a chain of relevant transactions or commercial / financial relations and recognised as such by the taxpayer suffering the double taxation and requesting the MAP.

Two types of cases were distinguished:

- cases where all associated companies concerned are situated within the EU (hereafter referred to as EU triangular cases);
- cases where the associated company identified as being the source of non arm's length results in a chain of relevant transactions or commercial / financial relations is situated outside the EU (hereafter referred to as non-EU triangular cases).

Convention but the adjustments to profits arising as a result of the application of anti-abuse rules under domestic legislation should fall outside the scope of the Arbitration Convention.

The present report only addresses EU triangular cases. The Forum has however decided to maintain the activities of the sub-group in order to submit its findings on non-EU triangular cases.

2.2.2.2. Considerations on the scope of the arbitration convention

2.2.2.2.1. Background

Article 4 of the Arbitration Convention contains i.e. the following provision:

> "The following principles shall be observed in the application of this Convention:
>
> 1. Where:
>
> (a) an enterprise of a Contracting State participates directly or indirectly in the management, control or capital of an enterprise of another Contracting State,
>
> or
>
> (b) the same persons participate directly or indirectly in the management, control or capital of an enterprise of one Contracting State and an enterprise of another Contracting State,
>
> *and in either case conditions are made or imposed between the* ***two enterprises*** (emphasis added) *in their commercial or financial relations which differ form those which would be made between independent enterprises, then any profits which would, but for those conditions, have accrued to one of the enterprises, but, by reason of those conditions, have not so accrued, may be included in the profits of that enterprise and taxed accordingly".*

This provision could be explained in such a way that the Arbitration Convention is only applicable to bilateral cases.

However, article 6 of the Arbitration Convention provides:

> *"1. Where an enterprise considers that, in any case to which this Convention applies, the principles set out in Article 4 have not been observed, it may, irrespective of the remedies provided by the domestic law of the Contracting States concerned* (emphasis added)*, present its case to the Competent Authority of the Contracting State of which it is an enterprise or in which its permanent establishment is situated. The case must be presented within three years of the first notification of the action which results or is likely to result in double taxation within the meaning of Article 1.*
>
> *The enterprise shall at the same time notify the Competent Authority if other Contracting States may be concerned in the case* (emphasis added). *The Competent Authority shall then without delay notify the Competent Authorities of those other Contracting States* (emphasis added).
>
> *2. …".*

Also in line with the preamble of the Arbitration Convention in which it is stated that:

"CONSIDERING the importance attached to the elimination of double taxation in connection with the adjustment of profits of associated enterprises (emphasis added), *…".*

Article 6 read in conjunction with the preamble of the Arbitration Convention could lead to the conclusion that the scope of the AC includes EU triangular cases.

2.2.2.2.2. Considerations:

This conclusion is also in line with the statements made at the JTPF meeting of 23 October 2007 concerning the adoption of a wide view about the transaction ("*the arm's length principle goes beyond two transactions*") and about the Arbitration Convention ("*the aim of the* Arbitration Convention *is to resolve double taxation related to Transfer Pricing and therefore we should not try to find arguments to prevent its application*") and "*that the implementation of the* Arbitration Convention *leads to a lot of legal problems as regards the interpretation of its provisions but as the supreme goal is the elimination of the double taxation, the JTPF should always assume a wide interpretation*".

Drawing on the above mentioned elements the JTPF concluded that an approach to solve EU triangular cases under the Arbitration Convention is possible. To that extent all MS should agree that triangular cases are covered by the scope of the Arbitration Convention.

JTPF conclusion:

Considering that the Arbitration Convention is a multilateral convention between MS with the ultimate aim to eliminate double taxation in connection with the adjustment of profits of associated enterprises. It is open to MS to interpret the provisions of the Arbitration Convention in a way consistent with the aim of eliminating double taxation. In accordance with that approach Member States recognise the principle that all EU transactions involved in EU triangular cases fall within the scope of the Arbitration Convention.

2.2.2.3. First stage of the Arbitration Convention: MAP

2.2.2.3.1. Possible approach to deal with triangular cases

The JTPF identified three options to deal with EU triangular cases under the Arbitration Convention.

(1) Competent Authorities can decide to take a multilateral approach (immediate and full participation of all Competent Authorities concerned); or

(2) Competent Authorities can decide to start up a bilateral procedure and should invite the third MS CA(s) to participate as (an) observer(s) to the MAP discussions, the two parties of the bilateral procedure being the member states having identified (based on the comparability analysis including a functional

analysis and other factual elements) the associated enterprise [as defined in the Arbitration Convention] situated in another MS that had a significant influence in contributing to a non arm's length results in the chain of relevant transactions or commercial / financial relations; or

(3) Competent Authorities can decide to start up more than one bilateral procedure in parallel (possibly three or more) and should invite the respective third MS CA(s) to participate as (an) observer(s) to the MAP discussions.

From the beginning of the procedure, the Competent Authorities will agree which of the three approaches will be applicable.

The Forum recognises that in a given situation (e.g. imminent resolution of the case or particularly complex transactions, …) it may be appropriate to apply art. 7(4) (extending time limits) to agree a short extension.

The JTPF noted that the monitoring of the Code of Conduct is an ongoing exercise. However, other than recommending that the third MS(s) should be involved as soon as possible in the proceedings and discussions, it was agreed at this time not to give more specific guidance on the first stage of the procedure.

JTPF Recommendation

As soon as Contracting States Competent Authorities have agreed that the case under discussion is to be considered a triangular case (as defined in 2.2.2.1 of the report) they should immediately invite the other EU Competent Autority(ies) to take part in the proceedings and discussions as (an) observer(s) or as (an) active stakeholder(s) and decide together which is their favoured approach. To that extent all information should be shared with the other EU Competent Authority (ies) through for example Exchange of Information. The other EU Competent Authority should be invited to acknowledge the actual or possible involvement of "his" taxpayer.

2.2.2.3.2. Considerations about the possible consequences for the third state

The timing and extent of the involvement of a third Member State(s) may vary. Initially (a) third MS CA(s) could be invited as (an) observer(s) during the first stage of the Arbitration Convention procedure (MAP). The status of the observer may then shift to that of stakeholder(s) depending on the development of the discussions and evidence presented. If that (those) third member State(s) want(s) to participate in the proceedings of the second stage (arbitration), it (they) has (have) to become (a) stakeholder(s). In that case, the JTPF notes that Art.7 (4) may be applied in order to give any necessary time for the preparation of a position paper by the third MS(s). However given that the third Member State(s) was (were) involved in the previous discussions any extension would be expected to be short.

If the Third Member State(s) remain(s) throughout the discussions as (an) observer(s) only, that shall not have any consequence on the application of the provisions of the Arbitration Convention (e.g. timing issues and procedural issues).

Attendance in the role of observer does not bind the observer(s) Member State(s) to the final outcome of the Arbitration Convention procedure.

Any exchange of information must comply with the normal legal and administrative requirements and procedures.

The presence of the observer(s) will provide a wider context to the transaction being examined. However any provision of the Arbitration Convention would not be applicable to (an) Observer Member State(s). As regards the second stage of the Arbitration Convention that third State(s) would not be bound by the opinion of the Advisory Commission (unless the observer(s) had agreed to in fact become (a) Contracting State(s) of the mutual agreement procedure).

2.2.2.4. Second stage of the Arbitration Convention in multilateral or parallel bilateral procedures: mandatory arbitration

The third state(s) can only be part of the procedures related to the second stage if it(they) has(have) decided to become (a) Contracting State(s) of the mutual agreement procedure.

If the Competent Authorities decide to take a multilateral approach, each of the Competent Authorities must be a stakeholder to ensure they can have full representation at any advisory commission.

If an advisory commission is to be set up under the multilateral approach, the Contracting States will have regard to the requirements of Article11(2) of the Arbitration Convention, introducing as necessary additional rules of procedure, to ensure that the advisory commission, inclusive of its Chairman, is able to adopt its opinion by a simple majority of its members.

If the Competent Authorities decide to start up more than one bilateral procedure in parallel, advisory commissions for each separate procedure will have to be set up. However, the following problems may well arise : the risk that the advisory commissions could reach conflicting opinions delivered at differing times, increased costs, logistic difficulties in establishing advisory commissions -(more independent persons of standing, secretarial services for each advisory commission, several Chairmen etc, …). The JTPF felt that the bilateral parallel procedures would result in inefficiencies possibly leading to the non elimination of the double taxation and possibly based on non arm's length principles.

For these reasons, the JTPF recommends applying a multilateral procedure to resolve the double taxation issues in EU triangular cases.

JTPF Recommendation:

Considering the pros and cons of the above approaches the JTPF recommends applying a multilateral procedure to resolve the double taxation. However this should always be agreed by all Competent Authorities based on the specific facts and circumstances of the case. If a multilateral approach is not possible and a two (or more) parallel bilateral procedure is adopted, the Forum recommends that all relevant Competent Authorities shall be involved in the MAP stage one discussions either as a Contracting State to the initial Arbitration Convention application or as (an) observer(s).

2.2.2.5. Role of the Taxpayer

The JTPF recognises the key role of the taxpayer in EU triangular cases.

As soon as possible the taxpayer should inform the tax administrations that (an)other party(ies) in (a) third MS(s) is(are) involved. Without such information the resolution of the case could be impossible due to the different deadlines. Additionally it is in the interest of both tax administrations and taxpayer(s) that a co-operative position is taken to achieve swift resolution. This implies the timely exchange of information and delivery of documentation by all stakeholders (including the Competent Authorities).

Although the MAP is in essence a procedure between tax administrations, in view of the specific nature of the triangular cases, more involvement of the taxpayers in the MAP could be envisaged for example by providing additional information requested and points of factual clarification.

In this context it must also be added that it is primarily for the taxpayer to identify the commercial/financial relationship(s) resulting in double taxation. The taxpayer needs to provide a comprehensive analysis of all relevant facts and present evidence based reasons as to which contracting States should start the appropriate procedure adoption of the EUTPD-concept might be quite helpful in this respect.

JTPF Recommendation:

It is recommended that taxpayer(s) should, as soon as possible, inform the tax administration(s) involved that (an)other party(ies), in (a) third MS(s), could be involved in the case. That notification should be followed in a timely manner by the presentation of all relevant facts and supporting documentation. Such an approach will not only lead to quicker resolution but also guard against the non resolution of double tax issues by virtue of differing Member States` procedural deadlines.

2.3. Interest charges during MAP negotiations

The Forum considered the issue of interest charges and refunds during the time it takes to run and complete the MAP process (Doc.JTPF/016/2007/EN and Doc.JTPF/003/2008/EN).

During its October 2007 meeting the JTPF recognised that:

- MS interest provisions are part of the general administration rules governing the tax policy of a country;
- interest charges are not put in place to put a penalty on the taxpayer or to sanction a fault from the taxpayer;
- the length of time the Arbitration Convention or MAP procedure takes is largely due to the actions of the tax administrations not the taxpayer;
- two periods for interest charged should be distinguished: one covering the period before the adjustment for which the tax administration is fully entitled to receive a compensation for late payment (the so called accrual of interests for late payment) the second one covering interest charged (or to be charged if the payment was suspended) during the MAP negotiations (where the taxpayer is requested to pay interest because the tax administrations try to determine between themselves where the tax should be paid). The JTPF discussions focus on this second type of interest charge;
- As regards the possibility for the JTPF to adopt conclusions on such a topic, it must keep in mind that the recommendation from the JTPF to suspend tax collection was finally endorsed by the MS in the Council and subsequently implemented through administrative or legislative amendments. This new issue would require the same approach;
- The Forum recommendations would be based on chapter IV, 4.64 to 4.66 of the OECD Guidelines;

In February 2008, tax administrations were asked to answer the question whether their tax system does foresee the reimbursement of interest incurred on the amount of taxes to be reimbursed to a taxpayer at the end of a MAP procedure under the Arbitration Convention.

From the table **(see annex 4.4)** it can be seen that a large majority of MS do reimburse interest incurred on the amount of taxes to be reimbursed to a taxpayer at the end of a MAP.

From the table it can be also concluded that MS have supplemented their administrative practice by suspending tax collection during the MAP process. MS report that at the conclusion of the MAP process the suspended tax is dealt with in the following ways:

- tax released for collection or repaid without attracting any interest
- tax released for collection or repayment with interest

- each case dealt on its merits in terms of charging or repaying tax

Based on these factual elements the JTPF makes the following recommendation:

JTPF conclusion

Considering that during MAP negotiations a taxpayer should not be adversely affected by the existence of different approaches on interest charges and refunds during the time it takes to run and complete the MAP process.

JTPF recommendation

JTPF recommends that MS should apply one of the following approaches:

- Tax to be released for collection and repaid without attracting any interest, or

- Tax to be released for collection and repaid with interest, or

- Each case to be dealt with on its merits in terms of charging or repaying interest (possibly during the MAP process).

2.4. Deadline for the setting-up of the advisory commission

This issue is ruled by two articles of the Arbitration Convention:

> Article 7 (1) says: *"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".*
>
> Article 9 (7) of the Arbitration Convention says that *"the Contracting States shall take all necessary steps to ensure that the advisory commission meets without delay once cases are referred to it".*

The Code of conduct for the effective implementation of the Convention on the elimination of double taxation in connection with the adjustment of profits of associated enterprises provides for the following clarifications:

- Under point 4.2 "Unless otherwise agreed between the Contracting States concerned, the Contracting State that issued the first tax assessment notice, i.e. final decision of the tax administration on the additional income, or equivalent which results, or is likely to result, in double taxation within the meaning of Article 1 of the Arbitration Convention, takes the initiative for the establishment of the advisory commission and arranges for its meetings, in agreement with the other Contracting State".

- Under point 4.3 "A case is considered to be referred to the advisory commission on the date when the Chairman confirms that its members have received all relevant documentation and information as specified under point 4.2 e)".

From the above it was concluded that no clear deadline had been established for the setting-up of an advisory commission.

This conclusion is further evidenced by the entries in the table in **annex 4.5.** where it is documented that it takes much more than three years to see a case solved whereas the Arbitration Convention was designed to come to a quick resolution of the disputes.

The absence of a clear deadline for the setting-up of the advisory commission is considered by the JTPF Business members as the major drawback of the Arbitration Convention. The JTPF came to a consensus to suggest the following recommendation:

JTPF conclusion:

The JTPF considers the absence of a clear deadline for the setting-up of the advisory commission as a major obstacle to a smooth functioning of the Arbitration Convention.

JTPF recommendation

The JTPF invites Member States to set up the advisory commission no later than 6 months following the expiration of the period mentioned in article 7. Where one Competent Authority does not take the necessary actions another Competent Authority involved shall take the initiative.

2.5. Independent persons of standing

2.5.1. List of independent persons of standing

The Forum wished to review the criteria to be applied to ensure the competence and independence of those appointed. The JTPF invited, on regular basis, MS to update their list of independent persons of standing and to submit relevant CVs.

Annex 4.6 encloses the updated list at the beginning of June 2008.

Several members, based on their experience with the second phase of the Arbitration Convention, emphasised the need to keep those lists well updated and to have CVs available in order to choose the most appropriate persons.

2.5.2. Independence

In considering independence Article 9 says:

> *1. The advisory commission referred to in Article 7 (1) shall consist of, in addition to its Chairman:*
>
> *- two representatives of each Competent Authority concerned; this number may be reduced to one by agreement between the Competent Authorities,*
>
> *- an even number of independent persons of standing to be appointed by mutual agreement from the list of persons referred to in paragraph 4 or, in the absence of agreement, by the drawing of lots by the Competent Authorities concerned.*

2. When the independent persons of standing are appointed an alternate shall be appointed for each of them according to the rules for the appointment of the independent persons in case the independent persons are prevented from carrying out their duties.

3. Where lots are drawn, each of the Competent Authorities may object to the appointment of any particular independent person of standing in any circumstance agreed in advance between the Competent Authorities concerned or in one of the following situations:

- where that person belongs to or is working on behalf of one of the tax administrations concerned,

- where that person has, or has had, a large holding in or is or has been an employee of or adviser to one or each of the associated enterprises,

- where that person does not offer a sufficient guarantee of objectivity for the settlement of the case or cases to be decided.

4. The list of independent persons of standing shall consist of all the independent persons nominated by the Contracting States. For this purpose each Contracting State shall nominate five persons and shall inform the Secretary-General of the Council of the European Communities thereof. Such persons must be nationals of a Contracting State and resident within the territory to which this Convention applies. They must be competent and independent. The Contracting States may make alterations to the list referred to in the first subparagraph; they shall inform the Secretary-General of the Council of the European Communities thereof without delay.

5. The representatives and independent persons of standing appointed in accordance with paragraph 1 shall elect a Chairman from among those persons of standing on the list referred to in paragraph 4, without prejudice to the right of each Competent Authority concerned to object to the appointment of the person of standing thus chosen in one of the situations referred to in paragraph 3. The Chairman must possess the qualifications required for appointment to the highest judicial offices in his country or be a jurisconsult of recognized competence.

6. The members of the advisory commission shall keep secret all matters which they learn as a result of the proceedings. The Contracting States shall adopt appropriate provisions to penalize any breach of secrecy obligations. They shall, without delay inform the Commission of the European Communities of the measures taken. The Commission of the European Communities shall inform the other Contracting States.

7. The Contracting States shall take all necessary steps to ensure that the advisory commission meets without delay once cases are referred to it.

The Code of conduct for the effective implementation of the Convention on the elimination of double taxation in connection with the adjustment of profits of associated enterprises does not provide additional information as regards the competence or independence requirements for the independent persons of standing.

From the above provisions it can be concluded that two levels in any assessment of competence and independence exist: a first assessment of independence and competence must be done by the MS before someone is put on its list and a second assessment by both States before someone is selected to become a member of an advisory commission. Moreover it should not be forgotten that the independence criteria should also be considered again when appointing a person of standing to the advisory commission.

The Forum considered developing specific rules that would facilitate the assessment of the competence of the independent persons of standing. However, the members, by consensus, agreed to examine this question at a later stage: when a few more cases will have been sent to advisory commissions.

The JTPF also agreed that the absence of criteria to be applied for considering a person of standing to an advisory commission as independent and competent can lead to problems delaying the setting-up of an advisory commission.

Based on the experience gained by other organizations in charge of (commercial) dispute resolution, as regards declarations of independence and absence of conflict of interests, the JTPF provided an example of notice (**see annex 4.7**).

JTPF recommendation:

The JTPF recommends using a standard notice where the selected independent persons of standing shall sign a declaration of acceptance and a statement of independence for the particular case.

2.5.3. Nationality of the independent person of standing

Some Members wanted to clarify whether a MS could nominate in the list of independent persons of standing also nationals from other MS.

During its November 2008 meeting the JTPF concluded:

JTPF conclusion:

From the existing situation (see the names of the Netherlands independent persons of standing) it can be concluded that these persons do not have to be nationals of or resident in the nominating state but nationals of a Contracting State and resident within the territory to which the Convention applies.

2.6. Date of admissibility of a case

The issue of the interpretation of the provisions of the Arbitration Convention as regards the question to know from which date a case is admissible/covered by the Arbitration Convention once a country joins the Convention.

Article 18 says:

"This Convention shall enter into force on the first day of the third month following that in which the instrument of ratification is deposited by the last signatory State to take that step. The Convention shall apply to proceedings referred to in Article 6 (1) which are initiated after its entry into force."

A consensus could be found on the following recommendation:

JTPF recommendation:

On the basis of Article 18 of the Arbitration Convention the JTPF recommends that a case is covered by the provisions of the Arbitration Convention when the request is timely presented after the date of entry into force of the accession to the Arbitration Convention by the new member states, even if the adjustment applies to earlier fiscal years.

2.7. Interaction between MAP and judicial appeal

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, not all MSs' positions 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.

Article 7 of the Arbitration Convention 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."

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

In 2008:

- Italy,
- Lithuania,
- And Malta.

2.7.1. JPTF conclusions

The JTPF decided to attempt to clarify Member States' 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. To reach that goal the JTPF sent a questionnaire in order to assess the situation prevailing in each Member State.

The JTPF concluded that the answers in **annex 4.8** clarify the situation prevailing in each Member State.

3. CONCLUDING REMARKS

The JTPF considers that the improvement of the practical functioning of the Arbitration Convention is an ongoing exercise. Whilst it is still open to debate what the future work areas for the Forum are from the written reports sent by the Member States, it can be seen that several areas still need to be discussed and clarified.

It is also noted that further work is required on what if any guidance on non EU triangular cases is appropriate.

The JTPF invites the Commission, Member States and the Council to take the necessary actions to implement its conclusions and recommendations.

ANNEXES

ANNEX I: SUMMARY TABLE ON SERIOUS PENALTIES (DOC JTPF 007 REV1 BACK 2007)

Introduction and context

This table provides information about whether access to the Arbitration Convention was ever denied to a taxpayer because of the existence of a serious penalty (Article 8 of the Convention) as defined by the relevant Member States.

Summary table:

This table derived by Secretariat from Member States replies and describes the actual situation (at the end of June 2007).

Member State	Access to the AC was denied	Access to the AC was not denied	comments
Austria		**X**	
Belgium		**X**	No request received so far where a taxpayer has faced a serious penalty.
Bulgaria	NR	NR	
Cyprus	NR	NR	
Czech Republic	NR	NR	
Denmark		**X**	
Estonia	NR	NR	
Finland		**X**	
France	**X**		MAP under AC suspended until serious penalty is final. Two cases so far.
Germany		**X**	
Greece		**X**	No request received so far where a taxpayer has faced a serious penalty.
Hungary	NR	NR	
Italy		**X**	No request received so far where a taxpayer has faced

			a serious penalty.
Ireland		**X**	
Latvia	NR	NR	
Lithuania	NR	NR	
Luxembourg		**X**	
Malta	NR	NR	
Netherlands		**X**	
Poland		**X**	No request received so far where a taxpayer has faced a serious penalty
Portugal		**X**	
Romania	NR	NR	
Slovak Republic	NR	NR	
Slovenia	NR	NR	
Spain	**X**		
Sweden		**X**	No request received so far where a taxpayer has faced a serious penalty.
United Kingdom		**X**	No request received so far where a taxpayer has faced a serious penalty.

NR= not relevant so far because the new MS has had no cases under the AC.

ANNEX II: SUMMARY TABLE ON THIN CAP QUESTIONNAIRE (DOC JTPF 018 REV2 2007)

Thin capitalisation questionnaire

In order to assess the current position in the EU, MS have agreed to say whether or not they consider a case of "thin capitalization" to be solvable under the Arbitration Convention. The JTPF considers that this analysis will be useful to both taxpayers and tax administrations.

Different tax administrations have different rules used to look at debt arrangements between associated persons. In some countries, "normal" transfer pricing rules apply. In some countries, there are special rules. Some countries have both. But all rules tend to consider the problem in a similar fashion: the outcome must be that the debt arrangements reflect those which would have existed between third parties.

By "thin capitalization" tax administrations typically mean looking at the rate of interest charged between associated persons or the amount of the debt on which interest is charged. When considering the amount of the debt, tax administrations look at the amount which could have existed at arm's length (borrowing capacity) and also some tax administrations look at the amount of debt which would have existed (borrowing capacity and attitude to debt and/or risk.).

With this in mind, the JTPF asks you to say whether or not you would accept a case into the AC where your tax administration:

reduces the rate of interest paid on an inter-company loan (Q1)

reduces the amount of a loan on which interest is paid because of the limited borrowing capacity of the debtor (Q2)

reduces the amount of a loan on which interest is paid because the debt would not have existed for reasons unrelated to borrowing capacity. (Q3)

reduces the amount of a loan on which interest is paid because the debt exceeds a thin cap ratio (Q4)

Please say the reasons if your answer is negative.

Finally, please say whether your view would differ if the actions above had been taken by another tax administration and you were being asked to give a corresponding adjustment. (Q5)

Thin capitalisation table

Updated on the basis of the MS replies and amendments after the October meeting

Member State	Question 1	Question 2	Question3	Question 4	Question 5
Austria	YES	YES	YES	YES	YES
Belgium	YES	Yes but on a	Yes but on a	Yes but on a case by	Yes but on a

		case by case	case by case	case	case by case
Bulgaria	Yes	NA No specific legislation	NA No specific legislation	NA No specific legislation	As regards the rate of interest paid on a loan (question n.1) Bulgaria would accept a case into the AC if actions had been taken by another tax administration Questions 2-4: No because it is not a question about the application of the arm's length principle
Cyprus	Yes	Yes	Yes	Not relevant. No thin cap rules in Cyprus. Normal transfer pricing rules apply. On a case by case	No. In case of Q4 where the adjustment is solely based on a thin cap ratio it shall not be accepted under the AC.
Czech Republic	Yes in general	NA	NA	Generally no	Generally no
Denmark	YES	YES	YES	YES	NO
Estonia	YES	YES	YES	There are no thin capitalisation rules in Estonia, "normal" transfer pricing rules apply	NO
Finland	YES	YES	YES	No. There are no thin cap ratio rules in Finland	Cases (1-3) will be accepted into the AC if we were being asked to give a corresponding

					adjustment to the actions taken by another tax administration and if it is a question of the arm's length adjustment. If the action taken by another tax administration is based on thin cap ratio rules (point 4), the case won't be accepted into the AC solely on that basis
France	YES	No specific legislation	No specific legislation	No specific legislation	Yes
Germany	Yes but on a case by case	Yes but on a case by case	Yes but on a case by case	Yes but on a case by case	Yes but on a case by case
Greece	No specific rules In reply to the Thin Capitalization Questionnaire regarding the implementation of Arbitration Convention, we would like to inform you that the Greek tax legislation has no special thin capitalization rules and each case of loan agreement between associated enterprises is examined,	No specific rules	No specific rules	No specific rules	No specific rules

	according to the arm's length principle (ALP) that is foreseen in our taxation legislation. Furthermore, according to the income tax law provisions (§d, article 31, of law 2234/1994) any kind of accrued interest on loans and credits, is deducted from the gross income. The amount of deducted interest, independently of the loan nature, is subject of substance that is examined from the competent controlling tax authorities				
Hungary	YES	We can not see the detailed background of the reduction of the amount of a loan. Hungary does not apply	We can not see the detailed background of the reduction of the amount of a loan. Hungary does not apply	YES	Actually we have not yet such issues, but we would like to examine it further.

		such rules	such rules		
Italy	Yes, of course. This is a transfer pricing issue.	Not applicable (a recent law abolished Italian thin cap legislation)	Not applicable (a recent law abolished Italian thin cap legislation)	Not applicable (a recent law abolished Italian thin cap legislation)	As for the pricing of the loan (question n.1), of course we would accept a case into the AC also if the actions had been taken by another tax administration. As for the amount of the loan (question n. 2-3-4), we would not accept to discuss the double taxation issue in the framework of the Arbitration Convention. Reason: It does not seem that there is a common agreement among EU Member States as to the fact that the ALP may be applied to thin cap domestic rules. Besides, also among those considering thin cap rules in the context of transfer pricing rules, there is disagreement as to the identification

					of the cases in which thin cap rules were applied on the basis of the arm's length principle or not. For this reason, the elimination of double taxation shall necessarily be agreed between competent authorities and cannot be decided by a third party, such as the advisory commission
Ireland	Yes	No specific legislation	No specific legislation	No specific legislation	Prepared to accept the case into the AC if the other Member State concerned agrees. Cases to be dealt with on the basis of trying to find the arm's length profit.

Latvia	yes	No	No	No	Yes on a case by case under MAP
Lithuania	Yes	No specific rules	No specific rules	No	Case by case under MAP
Luxembourg	YES	YES	YES	YES	YES
Malta	YES	YES	YES	YES	YES
Netherlands	Yes, in case the tax administration reduces the rate of the interest paid, the case would be accepted into the AC	No, if the amount of a loan on which interest is paid is reduced because of the limited borrowing capacity of the debtor the case will not be accepted into the AC. In order to try and find a solution to any double taxation resulting from this, these cases are accepted under a mutual agreement procedure on the basis of article 25, paragraph 3 of the OECD Model Tax Convention (MTC).	No, in case the amount of a loan on which interest is paid is reduced because the debt would not have existed for reasons unrelated to borrowing capacity the case will not be accepted into the AC. In order to try and find a solution to any double taxation resulting from this, these cases are accepted under a mutual agreement procedure on the basis of article 25, paragraph 3 of the OECD MTC	No, in case the amount of a loan on which interest is paid is reduced because of the debt exceeding the thin capitalization ratio mentioned in article 10d Wet op de Vennootschapsbelasting 1969 (Dutch Corporate Tax Law) the case will not be accepted into the AC, nor will it be accepted under a mutual agreement procedure on the basis of article 25 of the OECD MTC	In case another tax administration reduces the rate of interest based on their own national thin capitalization legislation (or interest cover ratio legislation) the case would be accepted into the AC In case another tax administration reduces the amount of a loan on which interest is paid based on their own national thin capitalization legislation the case would not be accepted into the AC. These cases are accepted under a mutual agreement procedure on the basis of article 25, paragraph 3 of

					the OECD MTC
Poland	Yes, case concerning reduction of the rate of interest could be accepted into arbitration procedure	No according to Polish tax rules, there are no administrative instruments that would influence the amount of the loan	No according to Polish tax rules, there are no administrative instruments that would influence the amount of the loan	NO according to Polish tax rules, there are no administrative instruments that would influence the amount of the loan, however if the debt exceeds a thin cap ratio, the interests paid cannot be deductible from the taxable income	in case of corresponding adjustment, the action of Polish administration would be the same, i.e. only cases concerning interest.
Portugal	YES	No. The thin capitalization rules are not applicable to cases that involve UE entities	No. The thin capitalization rules are not applicable to cases that involve UE entities	No. The thin capitalization rules are not applicable to cases that involve UE entities	- Case 1 would be acceptable. - Cases 2-4 as far as the reduction of the amount of a loan on which the interest is paid is not made under the transfer pricing rules, they are not covered by the AC, so in principle they couldn't be acceptable.
Romania	Yes, in general. The interest expenses are entirely deductible in case the debt equity ratio is equal or less then 3. The debt equity ratio represents the ration between the borrowed capital (with a reimbursement	Analysis on a case by case situation.	Analysis on a case by case situation.	Analysis on a case by case situation.	Analysis on a case by case situation.

	period over one year) and the registered capital, as a mean of values existing at the beginning and end of the period for which the profit tax is calculated. The borrowed capital is the total amount of credits and loans with reimbursement period over one year. In case the debt equity ratio is higher the three, the interest expenses as well as the net loss related to the exchange rate are not deductible. These last expenses are to be reported for the next period in the above-mentioned conditions. In case of bilateral or multilateral tax agreement, their provisions are superior to the provisions of the internal legislation.				
Slovak	Yes	No specific	No specific	No specific rules	On a case by

Republic		rules	rules		case
Slovenia	In general it would be accepted into AC	Slovenia does not apply such instruments	Slovenia does not apply such instruments	Yes, but case by case	Case by case
Spain	YES	YES Assuming there is no penalty	YES Assuming there is no penalty	This kind of provision is not applicable to EU companies	YES
Sweden	YES	YES	YES	YES	Sweden would probably accept a case into the AC if the above adjustments were made by another MS
United Kingdom	YES	YES	YES	"YES"	?

Additional information:

Bulgaria: *regulation on thin capitalization in Bulgaria*

According to the Corporate Income Taxation Act (CITA) interest expenses incurred by companies in Bulgaria are regulated for taxation purposes. Art. 43, para. 1 of the Act stipulates that interest expenses, calculated as shown below, shall not be recognized for tax purposes in the year in which they are accounted for:

UIE = IE – (IR + 0,75 x FRPI), where:

UIE are the unrecognized interest expenses;

IE are the interest expenses determined in accordance with para. 3;

IR is the total amount of interest receipts;

FRPI is the accounting financial result prior to any interest expenses and receipts.

According to Art. 43, para. 3 of CITA interest expenses shall include any financial (interest) expenses in connection with borrowed capital financing. The interest expenses, however, shall not include:

1. interest under financial leasing or bank credit, except where the parties to the transaction are related parties, or the leasing, and the credit, respectively, has been guaranteed or secured or extended by order of a related party;

2. penalty interest on delayed payments and indemnities;

3. interest that is unrecognized for tax purposes on other legal grounds.

This rule shall not apply where:

$$\frac{BC1 + BC2}{2} \leq 3 \times \frac{EQ1 + EQ2}{2},$$ where

BC1 is the borrowed capital as at 1 January of the current year;

BC2 is the borrowed capital as at 31 December of the current year;

EQ1 is the equity as at 1 January of the current year;

EQ2 is the equity as at 31 December of the current year.

The interest expenses of the credit institutions shall not be regulated under the procedure set forth above.

It is important to note that this rule applies to all companies subject to corporate taxation in Bulgaria irrespective of the fact whether the interest expenses have been incurred as a result of controlled or uncontrolled transactions. In other words, this rule is in place even if all interest expenses have been incurred in arm's length dealings.

As regards debt arrangements between associated enterprises only the rate of interest charged is subject to regulation in Bulgaria under the transfer pricing rules now in force. Under CITA the amount of loans granted between associated parties is not subject to limitation for the purposes of transfer pricing.

Taking account of the above Bulgaria may only reduce (adjust) the rate of interest charged on an inter-company loan but is not allowed to limit the amount of an inter-company loan. Therefore, in case of Bulgaria only the first of the presented four hypotheses may fall under the AC.

Reciprocally Bulgaria shall make a corresponding adjustment in the first case, i.e. where the other tax administration has reduced the rate of interest paid on an inter-company loan. For the time being Bulgaria is not willing to accept a case under the AC where the amount of an inter-company loan is adjusted by the foreign state. Otherwise Bulgaria will suffer a loss of tax revenue reducing the tax base of its companies by the amount of interest attributable to the non-recognized portion of a granted loan, which portion would have generated income if invested in a different manner.

Cyprus:

No provisions on thin cap, usual rules would apply, no experience with the AC, would be examined on a case by case.

CZ:

Comments to question 4: Under domestic law we apply strict thin cap. Ratio as an anti abuse rule. Therefore it is not acceptable to adjust amount of a loan on which interest is paid due to exceeding thin cap ratio under AC (or under MAP).

Comments to question 5: our view does not differ if the actions mentioned in the questionnaire have been taken by another tax administration.

France:

1. Reminder of the new French system

With Article 113 of the 2006 Finance Act, France radically reformed its system for combating the manipulation of financial charges, as provided for under Article 212 of the General Tax Code. The new system came into force at the start of the financial year on 1 January 2007.

Under the new Article 212, interest paid to associated enterprises is deductible only up to an amount calculated on the basis of the annual average of the average effective rates applied by credit institutions for variable-rate business loans with an initial duration of more than two years. If a higher rate is applied, the company may nevertheless present evidence that this rate is not excessive in relation to the rate that would have been charged by an independent financial institution or body under similar conditions.

Furthermore, an enterprise is regarded as being under-capitalised if the interest due to associated enterprises simultaneously exceeds the following three ratios: a debt ratio, an interest coverage ratio and a ratio of interest paid to associated companies. However, an enterprise regarded as being under-capitalised on the basis of the above ratios may present evidence to the contrary by demonstrating that its overall debt ratio is less than or equal to the overall debt ratio of the group to which it belongs.

These provisions apply to all interest due to directly or indirectly associated enterprises (with the exception of interest owed by credit institutions, by corporate treasuries under a group's central management agreement or by a company in connection with the acquisition costs of leased assets).

If a company is regarded as being under-capitalised on the basis of the three aforementioned ratios and has not presented any evidence to the contrary, the portion of the interest payment due to associated enterprises that exceeds the highest of these three ratios may not be deducted in the financial year in question unless it is less than €150 000. The portion may be carried forward for deduction in subsequent financial years, subject to certain limitations and, where appropriate, with a 5% reduction.

2. Can a mutual agreement procedure be requested under the European Arbitration Convention for an adjustment on the basis of under-capitalisation legislation?

For an adjustment by the French authorities under the new Article 212 of the General Tax Code, we should distinguish between two different situations.

If the adjustment relates to the interest rate, the legislation allows the company to present evidence to the contrary. It must show that the interest rate charged on instalments paid by an associated enterprise is not excessive in relation to the rate that would have been charged by an independent financial institution or body under similar conditions.

This rule is consistent with the arm's length principle as set out in Article 4 of the European Arbitration Convention. It is therefore possible to initiate a mutual agreement procedure under the Convention for an adjustment under Article 212 of the General Tax Code to limit the interest rate.

If the adjustment is made on the basis of the above capitalisation ratios, the effect of the interest limitation is to defer the deduction and not to oppose it permanently. The portion of the interest payment not deductible immediately may be deducted in the following financial year. The residual amount for the end of that financial year may be deducted in subsequent financial years, subject to the same conditions (with a 5% reduction made at the start of each of these subsequent years to represent the cost of time).

If there is no double taxation, adjustments made on the basis of the capitalisation ratios are unlikely to give rise to a mutual agreement procedure under the European Arbitration Convention.

For adjustments made by another State, it is difficult to say what the situation would be because each case would require an examination of the under-capitalisation legislation in force in that State.

Nevertheless, the interest rate or the debt incurred by an enterprise vis-à-vis another enterprise that is part of the same group may be challenged by initiating a mutual agreement procedure as provided for under the European Arbitration Convention only if the legislation in force in the State in question is based on the arm's length principle

Germany:

It’s a difficult issue. The answer is Yes but on a case by case. We want to exclude cases where it was the application of anti abuse rules.

Ireland:

In order to assess the current position in the EU, MS have agreed to say whether or not they consider a case of "thin capitalization" to be solvable under the Arbitration Convention. The JTPF considers that this analysis will be useful to both taxpayers and tax administrations.

Different tax administrations have different rules used to look at debt arrangements between associated persons. In some countries, "normal" transfer pricing rules apply. In some countries, there are special rules. Some countries have both. But all rules tend to consider the problem in a similar fashion: the outcome must be that the debt arrangements reflect those which would have existed between third parties.

By "thin capitalization" tax administrations typically mean looking at the rate of interest charged between associated persons or the amount of the debt on which interest is charged.

When considering the amount of the debt, tax administrations look at the amount which could have existed at arm's length (borrowing capacity) and also some tax administrations look at the amount of debt which would have existed (borrowing capacity and attitude to debt and/or risk.).

Questions: With this in mind, the JTPF asks you to say whether or not you would accept a case into the AC where your tax administration:

reduces the rate of interest paid on an inter-company loan?

Response: Ireland does not have legislation that reduces the rate on interest on inter-company loans for tax purposes. Ireland does have legislation that provides that interest on a loan is to be treated as a distribution of profits rather than a tax deductible amount if the interest represents more than a reasonable commercial return for the use of the principal. As this relates to an arm's length interest level, we consider that the Arbitration Convention is applicable.

reduces the amount of a loan on which interest is paid because of the limited borrowing capacity of the debtor?

Response: Ireland does not have this type of thin capitalization rule.

reduces the amount of a loan on which interest is paid because the debt would not have existed for reasons unrelated to borrowing capacity.

Response: Ireland does not have this type of thin capitalization rule.

reduces the amount of a loan on which interest is paid because the debt exceeds a thin cap ratio

Response: Ireland does not have this type of thin capitalization rule.

Say whether your view would differ if the actions above had been taken by another tax administration and you were being asked to give a corresponding adjustment.

Response: In relation to the four scenarios, where the conditions of Article 4 of the Arbitration Convention apply and the other Member State concerned is prepared to accept the case into the Arbitration Convention, we would also be prepared to accept it into the Arbitration Convention. We will deal with all cases on the basis of trying to find the arms' length profit and without regard to the nature of any specific thin capitalization rules of the other Member State.

Netherlands: reasons to say no

A case will not be accepted into the AC if the amount of a loan on which interest is paid is reduced because of the debt exceeding the thin capitalization ratio mentioned in article 10d Wet op de Vennootschapsbelasting 1969 (Dutch Corporate Tax Law). The reason for this is that the OECD has not reached any conclusions in earlier OECD discussions on thin capitalization, because the OECD could not find an at arm's length measure to establish the debt / equity ratio suitable for specific situations. As a result every member state applies its own rules. As long as there is a lack of consensus between member states, these cases should in our view not be accepted into the AC.

A case will not be accepted into the AC if the amount of a loan on which interest is paid is reduced for reasons other than the national thin capitalization ratio mentioned in article 10d Wet op de Vennootschapsbelasting 1969 (Dutch Corporate Tax Law). These cases are accepted under a mutual agreement procedure on the basis of article 25, paragraph 3 of the OECD MTC.

Latvia:

Latvia considers that it is necessary to examine the practice (jurisprudence, case law) of European Court of Justice in cases regarding thin capitalization. In our opinion, the questions which are in the scope of international agreements concluded between Member Sates of European Union are not in the scope of ECT and cannot be heard as cases in the Court of Justice. Therefore, we think that to decide whether or not thin capitalization should be solved under the Arbitration Convention it is necessary to study the case-law of the Court of Justice in this field.

There are different regulations regarding transfer pricing and thin capitalization issues in the legislation of Latvia. Since in thin capitalization cases it is complicated to apply transfer pricing methods, Latvia considered that according to the arm's length principle it is preferable to implement simpler methods for control of interest payments.

These methods which are used in Latvia are similar to methods mentioned in the Questionnaire on Thin Capitalization. Although, Latvia does not reduce interest rates or amount of loan on which the interest is paid, according to the Law on Enterprises Income Tax the State Revenue Service of Latvia shall increase the taxable income of company by interest payments:

(a) which exceed the amount of interest payments calculated by applying previous month short-term credit rate in the credit institutions specified by the Central Statistics Bureau for the taxation period and multiplied by 1.2;

(b) in proportion to the degree to which the average amount of debt obligations in the taxation period (in respect of which the interest payments are calculated) exceeds the amount which is equal to four times the amount of own capital reflected in the annual report of taxpayer, which is reduced by the conversion of long-term deposits into reserves and other reserves, which have not been created as a result of the division of profit.

Since each member state has its own rules and methods applicable to thin capitalization, the extension of Arbitration Convention on thin capitalization could be arranged by coming to mutual agreement on the approach which could be acceptable for all member states. Considering the OECD commentaries on the articles of Model Tax Convention, in case of thin capitalization to avoid double taxation member states should follow the principles set in Article 9 Paragraph 1 or Article 11 Paragraph 6.

At this moment, Latvia is not ready to give approving or denying answer because the issue of the Arbitration Convention extension on thin capitalization needs to be examined more deeply.

Oral statement: national rules on Thin Cap exist but Latvia has no experience with the AC and therefore cannot answer the questions.

Malta:

Malta does not have specific rules concerning Thin Capitalisation. Malta would, however, accept a case into the Arbitration Convention where profits of an enterprise are adjusted by the Maltese tax administration in the circumstances referred to in Article 4 of the Arbitration Convention since it reduces the:

– rate of interest paid on an inter-company loan;

– amount of a loan on which interest is paid because of the limited borrowing capacity of the debtor;

– amount of a loan on which interest is paid because the debt would not have existed for reasons unrelated to borrowing capacity;

– amount of a loan on which interest is paid because the debt exceeds a thin cap ratio.

Malta would also accept a case into the Arbitration Convention if the actions mentioned above had been taken by another tax administration and Malta was asked to give a corresponding adjustment.

Poland:

Issue of thin capitalization is recognized in Polish tax regulations as capitalization by debt. Interest paid on such debt agreements are treated differently than dividends. Dividends shall not be considered the revenue earning costs in contrary to interest.

If debt arrangements are between associated companies and it will result in profit shifting between those companies, Polish tax administration will apply "normal" transfer pricing rules. However, those rules will include only cases relevant to level of interest paid on the loan.

Pursuant to specific Polish rules, in case of interest adjustment, tax administration is bound to use the lowest interest rate - based on arm's length rules. Thus, making corresponding adjustment by Polish tax administration, those provisions must be taken into account.

In such circumstances, it is possible to accept the case concerning the rate of interest under Arbitration Convention.

Portugal:

The thin capitalization rules are considered a specific anti-abuse measure to counter practices related to excessive debt and are restricted only to related entities resident in third countries.

In what concerns abusive practices concerning interest paid on loans by resident companies to EU related entities, namely where the loan in full or partly should be in substance qualified fully or partly as equity the tax administration is allowed to re-characterise the debt under the general anti-abuse provision.

So, for the amount of the loan [question 2-4] we could not accept to include the double taxation issues in the scope of the arbitration convention.

Slovak republic:

New domestic rules on thin capitalization approved in 2007 and amended in 2008 will be effective as of 1 January 2010. New thin cap rules are stipulated in the section 21 of the Income Tax Act and designed as anti-abuse measures. Under these rules, the amount of the tax-deductible interest paid out by the taxpayer to the lender is limited, provided the following conditions are met - direct or indirect capital share is minimum 25%, the debt-equity-ratio exceeds 6:1 and the average balance of credits and loans exceeds 3 316 400 €.

Currently there are no special thin capitalization rules within the Slovak tax legislation and therefore "normal" transfer pricing rules, following the ALP, apply. For the time being, we have no practical experience with AC cases. We would consider each case on a case by case basis. We would take into account each case of possible double taxation at least under the Article 25 of pertinent double tax treaty and consider possibility to solve the cases under the Arbitration Convention on a case by case basis.

Slovenia:

Thin capitalisation is treated under the Article 32 «Interest on the surplus of loans» of the Corporate Income Tax Act (in force since 1.1.2007), where it is stipulated that: Interest on loans, excluding cases involving borrowers - banks and insurance undertakings, received from a shareholder or partner who at any point in the tax period directly or indirectly holds no less than 25% of shares or holdings in the capital or voting rights of the taxable person, provided that the loans in question exceed, at any point in the tax period, four times the amount of the holding of the shareholder or partner in the taxable person's capital (hereinafter: surplus of loans), established with regard to the amount and duration of the surplus of loans in the tax period, shall not be recognized as expenditure, unless the taxable person provides evidence that he/she could have received the surplus of the loans from a lender who is a non-affiliated person.

Loans extended by a shareholder or partner subject in the above paragraph involve also loans extended by third parties, including loans extended by banks, which are guaranteed by the shareholder or partner in question, and/or when the loans are obtained in connection with a deposit held in that bank by the shareholder or partner in question.

The amount held by a shareholder or partner in the capital of the recipient of a loan shall be determined for the tax period as an average on the basis of the balance of paid-in capital, net profit brought forward, and reserves as at the last day of each month in the tax period.

Nevertheless, interest not recognized as an expenditure is interest on the loans other than those raised by banks and insurance undertakings received by a partner who, at any point in the tax period concerned, directly or indirectly holds no less than 25% of shares or holdings in the capital or voting rights of the taxable person, provided that at any point in the tax period concerned those loans exceed:

In the first year after the date of entry into force of the Corporate Income Tax Act, a

factor of eight;

In the second, third and fourth year, a factor of six;

And in the fifth year, a factor of five times the amount of this partner's holding in the taxable person's capital, established with regard to the amount and period of duration of the surplus of loans in the tax period concerned.

We would also like to emphasize that the Corporate Income Tax Act and the Transfer pricing Provision are following the Transfer pricing Guidelines of the OECD. The Act stipulates the methods on calculating the arm's length price on goods and services, as well as that to take into the account when calculating the comparable market price.

Sweden:

Swedish comments are inserted in italics below.

reduces the rate of interest paid on an inter-company loan

If made by the Swedish tax administration: Yes

If made by foreign tax administration: Yes

reduces the amount of a loan on which interest is paid because of the limited borrowing capacity of the debtor

If made by the Swedish tax administration: Not applicable as the Swedish tax administration cannot make this kind of adjustments.

If made by foreign tax administration: Even though we do not find it obvious that issues of this kind is covered by the AC, we would accept them.

reduces the amount of a loan on which interest is paid because the debt would not have existed for reasons unrelated to borrowing capacity.

If made by the Swedish tax administration: Not applicable as the Swedish tax administration cannot make this kind of adjustments.

If made by foreign tax administration: Even though we do not find it obvious that issues of this kind is covered by the AC, we would accept them. We do not understand why the thin cap question in the bullet point below is not covered by this bullet point.

reduces the amount of a loan on which interest is paid because the debt exceeds a thin cap ratio

If made by the Swedish tax administration: Not applicable as the Swedish tax administration cannot make this kind of adjustments.

If made by foreign tax administration: Even though we do not find it obvious that issues of this kind is covered by the AC, we would accept them. In this context we would like to state that Sweden does not agree to the principles of the thin cap approach. The Swedish opinion is that thin cap approaches is not in accordance with the arm's length principle. Consequently, Sweden is unlikely to accept adjustments made by a foreign tax administration due to thin cap rules in the foreign jurisdiction.

Sweden wants to clarify that they do not have any specific thin cap rules but are able to make an adjustment if the conditions are not arm's length.

United Kingdom:

The UK approach is to look at the whole amount of the relevant payment of interest and consider whether that represents the amount that would have been paid at arm's length. We do not necessarily divide the amount into its components, such as that related to the rate of interest or the amount of the debt, but either of those components taken separately or together could be relevant. On that basis, I think it is fair to say that the answer to the first three questions is "Yes", as recorded in the paper. But I do not think that the answer to the fourth question can be "Yes" because, as we have explained, we would only accept into the Arbitration Convention cases involving the application of the arm's length principle. In this respect, the UK may be close to Estonia and Finland. The point we were trying to make was that we might accept into the Arbitration Convention a case where an adjustment had been made by reference to a ratio, but only to the extent of trying to establish what the position would have been at arm's length. So "No" is not a completely adequate answer to the fourth question either.

ANNEX III: SCOPE OF THE AC QUESTIONNAIRE

All MS tax administrations' members were invited during June 2008 meeting to answer **whether they consider that the arbitration convention can be applied to thin cap issues.**

The answers were the following:

Member State	Preliminary Answer
Austria	YES if based on the application of the arm's length principle
Belgium	In principle YES
Bulgaria	
Cyprus	YES if based on the application of the arm's length principle
Czech Republic	Yes if related to interest rate
Denmark	YES
Estonia	YES
Finland	YES in principle
France	YES if based on the application of the arm's length principle
Germany	YES if based on the application of the arm's length principle
Greece	In principle YES, if based on the application of the arm's length principle, but there is no common thin capitalisation definition
Hungary	NO because they have thin cap rules
Italy	NO
Ireland	In principle YES but Ireland has no thin capitalization legislation
Latvia	In principle YES if based on the application of the arm's length principle
Lithuania	In principle YES
Luxembourg	?
Malta	YES if based on the application of the arm's length principle
Netherlands	NO
Poland	Yes only if related to interests
Portugal	NO
Romania	
Slovak Republic	Yes if based on the application of the arm´s legth principle
Slovenia	YES in principle but limited to the interests
Spain	YES because based on article 4 of the AC
Sweden	In principle YES but there is no common thin cap definition
United Kingdom	YES

ANNEX IV: QUESTIONNAIRE ON MAPS AND RELATED INTEREST (DOC JTPF 010 BACK 2008)

During the 21st JTPF meeting of 21 February 2008 tax administrations' members were invited to answer whether under their domestic laws or administrative provisions they reimburse interest incurred on the amount of taxes to be reimbursed to a taxpayer at the end of a MAP procedure under the Arbitration Convention.

Question:

Does your tax system foresee the reimbursement of interest incurred on the amount of taxes to be reimbursed to a taxpayer at the end of a MAP procedure under the Arbitration Convention?

To facilitate the debates could you also consider this additional question:

Could you specify any specific condition to be fulfilled for the reimbursement and whether the amount of interest to be reimbursed is limited to the period of time counting from the request for a MAP's?

Member State	Preliminary Answer
Austria	YES
Belgium	YES Interest for late payment In case of late payment of tax, in principle an interest is due for the duration of the period of non-payment, calculated at the statutory interest rate (art. 414, BITC 92). However, in case of appeal against the tax assessment, the interest is only due for the first 6 months, but will resume at the end of the month in which the formal notification of the decision was sent to the taxpayer. Moratorium interest According to article 418, BITC 92, moratorium interest at the statutory interest rate is paid from the month after which the (undue) tax is paid until the notification with which the amount is put at the disposal of the taxpayer. Application under the Arbitration convention

	The reimbursement of taxes as a result of a decision of the competent authorities at the end of the mutual agreement procedure or arbitration procedure give rise to moratorium interest as stipulated un article 418, BITC, 92 (circular AFZ/INTERN IB/98-0170 of July 7th, 2000)
Bulgaria	**NO** Bulgarian domestic law does not provide for any specific rules for reimbursement of taxes to a taxpayer in the case of a MAP being initiated under the Arbitration Convention. No special rules are applicable either as regards the charging of interests during a MAP on the reimbursable amount of tax. This means that in such cases the general rules provided for in the Tax and Social Procedure Code (TSPC) concerning reimbursement of taxes apply. According to the TSPC the revenue administration shell reimburse interests incurred on taxes to be refunded only if such taxes have been collected on the grounds of a tax assessment act issued by the revenue administration when such tax assessment act has been subsequently repealed by an administrative body or a court. It is important to mention that our tax legislation envisages suspension of tax collection in specific cases only, i.e. when guarantee is established in the name of the revenue administration. **Taking into consideration the above said if taxes are paid by a taxpayer on the grounds of his tax return (as a result of a self-assessment process) no interests are chargeable and reimbursable on any amount of tax (reported on the tax return) subject to reimbursement on whatever grounds.** It is concluded from the above that the reimbursement of interests in case of MAPs as well as the suspension either of tax or interest collection during MAPs could not be possible without modifications of the national rules which requires very careful analyses and political decision
Cyprus	YES
Czech Republic	Generally no. The interest is paid for late payment. The only case when it is possible to refund this interest is if the interest payment arises due to tax administration's incorrect assessment (e.g. when the additional tax assessment after tax audit is reduced by remedies or MAP)
Denmark	YES
Estonia	**NO** Similar situation as it is in Bulgaria - if taxes are paid *(voluntarily)* by a taxpayer on the grounds of his tax return (as a result of a self-assessment

	process) **no interests are chargeable and reimbursable** on any amount of tax (reported on the tax return) subject to reimbursement on whatever grounds. Taxation Act in Estonia (§ 116 (1)) provides interest payments for tax authorities for the benefit of the taxable person **only** in case a taxable person has paid an amount of tax, an amount of tax has been collected from a taxable person or an amount of tax has been set off against a claim for refund submitted by a taxable person **on the basis of a notice of assessment or liability decision** and the amount of tax exceeds the amount of tax due according to an Act concerning a tax So, to reimburse the interests incurred on the amount of taxes to be reimbursed to a taxpayer at the end of a MAP procedure under the Arbitration Convention, Estonia needs to modify its tax system
Finland	In principle yes. There are no any time limitations
France	**NO** But in case of MAP no interest is charged
Germany	YES Germany provides for interest payments on supplemental tax claims or tax refunds for a time period starting 15 months after the end of the calendar year in which the tax accrued. In a mutual agreement procedure as to the EU Arbitration Convention Germany includes the issue of interest refunds or interest claims on a case by case basis into the results of the MAP negotiations. The reasons for the inclusion are manifold: Questions of reciprocity, i.e. the other country does not charge interests on late payments, interest payments are higher than the tax amount due to the lengths of the negotiations, etc. The result of the negotiation is to be included into the tax assessment and the calculation and the assessment of interests according to Section 175a of the German Fiscal code
Greece	YES
Hungary	YES
Italy	YES
Ireland	**NO**
Latvia	Yes, Latvia's tax system foresees the reimbursement of interests incurred on the amount of taxes to be reimbursed to a taxpayer at the end of a MAP procedure under the Arbitration Convention.

	According to the first paragraph of Article 28 of Law "On Taxes and Fees", tax payment incorrectly recovered by the tax administration shall be refunded to the taxpayer within a period of 15 days from the day when the tax administration has taken or a court has adopted a decision that the payment has been recovered in error. The refundable amounts shall be increased by 0.025 per cent (interest fee) of the payment amount incorrectly recovered for each late day. If the tax administration refunds the amount after the 15 days the interest fee shall be increased till 0.05% for each overdue day. Therefore if in the result of MAP the decision will be made that tax is incorrectly levied in Latvia, Latvia's tax administration will reimburse to Latvia's taxpayer incorrectly recovered tax amount and interest fee for the period from day when the tax was collected till day when the final decision in MAP was made
Lithuania	**NO**
Luxembourg	**NO** But interests are suspended during the MAP
Malta	YES
Netherlands	YES
Poland	YES There are no specific rules concerning MAP procedure; In case of late payment of tax, in principle an interest is due for duration of period of non-payment. General rules laid down in Polish Tax Ordinance shall apply in such case. If at the end of MAP the tax on which interests incurred will be reimbursed also such interest will be reimbursed. Reimbursement is possible only on request submitted by taxpayer, in refund of overpaid tax, issued in limited period of time.
Portugal	**NO** In accordance with domestic law the taxpayer is entitled to payment of compensation interest wherever: (i) there is an incorrect assessment of tax by the tax administration; (ii) such incorrect assessment is established by way of an administrative remedy or judicial proceeding; (iii) such incorrect assessment gives rise to payment of tax in excess of that which would be legally due. Interest shall be calculated as from the date of the undue tax payment up to tax reimbursement in pursuance to the repealed act

	No special rules are foreseen for the reimbursement of interests incurred on the amount of taxes to be reimbursed to a taxpayer at the end of a MAP under the Arbitration Convention
Romania	There are no specific rules on penalty's under MAP provisions. Under the Tax Procedure Code for late payment, the tax payer has to pay penalty's. Penalty's are computed until the debt is switch off (by payment, compensation, enforcement). Penalty has to refer to an existing debt, if the debt is diminish by a court decision, by example, the penalty's are diminish also according to the remaining value of the debt. This fact is according with the principle "the secondary is following the principal" and in this case the debt is "the principal" and the penalty's is "the secondary"
Slovak Republic	Yes There are no specific administrative rules concerning MAP and the interest in the Slovak Republic. However, according to the general rules laid down in the Tax Administration Act No. 511/1992 Coll., if the amount of the tax was decreased (or reimbursed) by a legitimate decision, the tax administration would ex officio decrease (or reimburse) penalty or default interest proportionally
Slovenia	YES Q1: Yes, in general the Slovene tax system foresees the reimbursement of interests although it should be pointed out that Slovenia does not have experience in MAP procedure Q2: If a case under the MAP procedure would occur, the taxpayer would be, under the current Tax Procedure Act, entitled to the reimbursement of interests from the point onward when the overpayment of tax has occurred.
Spain	There are no specific rules for MAPs and the reimbursement is not automatic
Sweden	YES Sweden do not apply any time limitation
United Kingdom	YES in all cases

ANNEX V: NUMBER OF PENDING CASES UNDER THE AC AT THE END OF 2007 (DOC JTPF 016/REV2/BACK/2008)

1. Total amount of pending MAPs under the EU Arbitration Convention in relation to Member States as of 31/12/2007

	DK	DE[5]	EL	ES	FR	IE	IT	LU	NL[6]	AT	PT	FI	SE	UK
BE	0 0	9 7	0 0	1 0	5 5	0 0	2 0	0 0	0 0	0 0	0 0	0 0	0 0	2 1
	DK	2 2	0 0	0 0	0 0	0 0	0 0	0 0	0 0	0 0	1 1	0 0	2 2	0 0
		DE	0 0	4 4	18 18	0 0	10 10	0 0	11 11	3 3	3 3	0 0	1 1	16 13
			EL	0 0	0 0	0 0	1 0	0 0	0 0	0 0	0 0	0 0	0 0	0 0
				ES	14 14	1 1	3 3	0 1	2 2	0 0	3 1	0 0	0 0	6 6
					FR	7 7	4 4	0 2	8 7	1 1	4 5	0	0 0	18 21
						IE	0 0	0 0	0 0	0 0	0 0	0 0	0 0	1 1
							IT	0 0	1 1	0 0	0 1	0 0	0 1	3 3
								LU	0 0	0 0	0 0	0 0	0 0	0 0
									NL	0 0	1 1	0	2 2	10 9

[5] Hungary has one case with Germany (2007)

[6] NL has one case with PL (where Poland does not have a case) and one case with HU (both in 2007)

										AT	0 0	0 0	0 0	0 0
											PT	0 0	0 0	1 2
												FI	1 2	0 0
													SE	0 0

Number of cases: [7]168-193

[7] Discrepancies in the number of pending cases reported by Member States may result from cases considered closed on 31/12/2007 by one Member State but not yet formally closed by the other Contracting State

2. Pending MAPs under the EU Arbitration Convention in relation to Member States as of 31/12/2007, for which the request was presented before 2000.

	DK	DE	EL	ES	FR	IE	IT	LU	NL	AT	PT	FI	SE	UK
BE	0 0	1 1	0 0	0 0	1 1	0 0	0 0	0 0	0 0	0 0	0 0	0 0	0 0	0 0
	DK	0 0	0 0	0 0	0 0	0 0	0 0	0 0	0 0	0 0	0 0	0 0	0 0	0 0
		DE	0 0	0 0	0 0	0 0	0	0 0	0 0	0 0	0 0	0 0	0 0	0
			EL	0 0	0 0	0 0	0 0	0 0	0 0	0 0	0 0	0 0	0 0	0 0
				ES	0	0 0	0 0	0 0	0 0	0 0	0 0	0 0	0 0	0
					FR	0 0	0 0	0 0	0 0	0 0	0 0	0 0	0 0	0
						IE	0 0	0 0	0 0	0 0	0 0	0 0	0 0	0 0
							IT	0 0	0 0	0 0	0 0	0 0	0 0	0 0
								LU	0 0	0 0	0 0	0 0	0 0	0 0
									NL	0 0	0 0	0 0	0 0	0 0
										AT	0 0	0 0	0 0	0 0
											PT	0 0	0 0	0 0

												FI	0 0	0 0
													SE	0 0

Number of cases: 2 [8]

[8] Discrepancies in the number of pending cases reported by Member States may result from cases considered closed on 31/12/2007 by one Member State but not yet formally closed by the other Contracting State

3. Pending MAPs under the EU Arbitration Convention in relation to Member States as of 31/12/2007, for which the request was presented in 2000.

	DK	DE	EL	ES	FR	IE	IT	LU	NL	AT	PT	FI	SE	UK
BE	0 0	1 0	0 0	0 0	0	0 0	0 0	0 0	0 0	0 0	0 0	0 0	0 0	0 0
	DK	0 0	0 0	0 0	0 0	0 0	0 0	0 0	0 0	0 0	0 0	0 0	0 0	0 0
		DE	0 0	0 0	0 0	0	0	0 0	0 0	0	0	0 0	0 0	0
			EL	0 0	0 0	0 0	0 0	0 0	0 0	0 0	0 0	0 0	0 0	0 0
				ES	0	0 0	0 0	0 0	0 0	0 0	0 0	0 0	0 0	1 1
					FR	0 0	0 0	0 0	1 0	0 0	0 1	0 0	0 0	0 1
						IE	0 0	0 0	0 0	0 0	0 0	0 0	0 0	0 0
							IT	0 0	0 0	0 0	0 0	0 0	0 0	0 0
								LU	0 0	0 0	0 0	0 0	0 0	0 0
									NL	0 0	0 0	0 0	0 0	0 0
										AT	0 0	0 0	0 0	0 0
											PT	0 0	0 0	0 0

												FI	0 0	0 0
												SE	0 0	

Number of cases: 1-5[9]

[9] Discrepancies in the number of pending cases reported by Member States may result from cases considered closed on 31/12/2007 by one Member State but not yet formally closed by the other Contracting State

4. Pending MAPs under the EU Arbitration Convention in relation to Member States as of 31/12/2007, for which the request was presented in 2001.

	DK	DE	EL	ES	FR	IE	IT	LU	NL	AT	PT	FI	SE	UK
BE	0 0	1 0	0 0	0 0	0	0 0	1 0	0 0	0 0	0 0	0 0	0 0	0 0	0 0
	DK	0 0	0 0	0 0	0 0	0 0	0 0	0 0	0 0	0 0	0 0	0 0	0 0	0 0
		DE	0 0	0 0	0 0	0	0	0 0	1 1	0	1 0	0 0	0 0	0
			EL	0 0	0 0	0 0	0 0	0 0	0 0	0 0	0 0	0 0	0 0	0 0
				ES	0	0 0	0 0	0 0	0 0	0 0	0 0	0 0	0 0	0
					FR	0 0	0 0	0 0	0 0	0 0	1 0	0 0	0 0	0
						IE	0 0	0 0	0 0	0 0	0 0	0 0	0 0	0 0
							IT	0 0	0 0	0 0	0 0	0 0	0 0	0 0
								LU	0 0	0 0	0 0	0 0	0 0	0 0
									NL	0 0	0 0	0 0	0 0	0 0
										AT	0 0	0 0	0 0	0 0
											PT	0 0	0 0	0 0

												FI	0 0	0 0
													SE	0 0

Number of cases: 1-5 [10]

[10] Discrepancies in the number of pending cases reported by Member States may result from cases considered closed on 31/12/2007 by one Member State but not yet formally closed by the other Contracting State

5. Pending MAPs under the EU Arbitration Convention in relation to Member States as of 31/12/2007, for which the request was presented in 2002.

	DK	DE	EL	ES	FR	IE	IT	LU	NL	AT	PT	FI	SE	UK
BE	0 0	0	0 0	0 0	0 1	0 0	0 0	0 0	0 0	0 0	0 0	0 0	0 0	0 0
	DK	0 0	0 0	0 0	0 0	0 0	0 0	0 0	0 0	0 0	0 0	0 0	0 0	0 0
		DE	0 0	0 0	0	0	1 1	0 0	0	0 0	0	0 0	0 0	0
			EL	0 0	0 0	0 0	0 0	0 0	0 0	0 0	0 0	0 0	0 0	0 0
				ES	1 1	0 0	0 0	0 0	0 0	0 0	0 0	0 0	0 0	0 0
					FR	0 0		0 0	0 0	0 0	0 0	0 0	0 0	1 2
						IE	0 0	0 0	0 0	0 0	0 0	0 0	0 0	0 0
							IT	0 0	0 0	0 0	0 0	0 0	0 0	0 0
								LU	0 0	0 0	0 0	0 0	0 0	0 0
									NL	0 0	0 0	0 0	0 0	1 1
										AT	0 0	0 0	0 0	0 0
											PT	0 0	0 0	0 0

												FI	0 0	0 0
												SE	0 0	

Number of cases: 4-6 [11]

[11] Discrepancies in the number of pending cases reported by Member States may result from cases considered closed on 31/12/2007 by one Member State but not yet formally closed by the other Contracting State

6. Pending MAPs under the EU Arbitration Convention in relation to Member States as of 31/12/2007, for which the request was presented in 2003.

	DK	DE	EL	ES	FR	IE	IT	LU	NL	AT	PT	FI	SE	UK
BE	0 0	0	0 0	0 0	0 1	0 0	0 0	0 0	0 0	0 0	0 0	0 0	0 0	0 0
	DK	0 0	0 0	0 0	0 0	0 0	0 0	0 0	0 0	0 0	0 0	0 0	0 0	0 0
		DE	0 0	0 0	0	0	0 0	0 0	0 0	0 0	0 1	0 0	0 0	0
			EL	0 0	0 0	0 0	0 0	0 0	0 0	0 0	0 0	0 0	0 0	0 0
				ES	1 0	0 0	0 0	0 0	0 0	0 0	0 0	0 0	0 0	1 0
					FR	0 0	1 1	0 0	0	0 0	1	0 0	0 0	0
						IE	0 0	0 0	0 0	0 0	0 0	0 0	0 0	0 0
							IT	0 0	0 0	0 0	0 0	0 0	0 0	0 0
								LU	0 0	0 0	0 0	0 0	0 0	0 0
									NL	0 0	0 0	0 0	1 1	0 1
										AT	0 0	0 0	0 0	0 0
											PT	0 0	0 0	0 0

												FI	0 0	0 0
												SE	0 0	

Number of cases: 3-8[12]

[12] Discrepancies in the number of pending cases reported by Member States may result from cases considered closed on 31/12/2007 by one Member State but not yet formally closed by the other Contracting State

7. Pending MAPs under the EU Arbitration Convention in relation to Member States as of 31/12/2007, for which the request was presented in 2004.

	DK	DE	EL	ES	FR	IE	IT	LU	NL	AT	PT	FI	SE	UK
BE	0 0	1 0	0 0	0 0	0 0	0 0	0 0	0 0	0 0	0 0	0 0	0 0	0 0	0 0
	DK	0 0	0 0	0 0	0 0	0 0	0 0	0 0	0 0	0 0	0 0	0 0	0	0 0
		DE	0 0	0 0	3 1	0	0	0 0	3 3	0	0	0 0	0	1
			EL	0 0	0 0	0 0	0 0	0 0	0 0	0 0	0 0	0 0	0 0	0 0
				ES	1 1	0 0	0 0	0 0	0 0	0 0	0	0 0	0 0	1 0
					FR	0 0	0 0	0 0	0	0 0	0 0	0 0	0 0	0 1
						IE	0 0	0 0	0 0	0 0	0 0	0 0	0 0	0 0
							IT	0 0	0 0	0 0	0 0	0 0	0 0	0 0
								LU	0 0	0 0	0 0	0 0	0 0	0 0
									NL	0 0	0 0	0 0	0	0 0
										AT	0 0	0 0	0 0	0 0
											PT	0 0	0 0	0 0

												FI	0 0	0 0
												SE	0 0	

Number of cases: 6-11[13]

[13] Discrepancies in the number of pending cases reported by Member States may result from cases considered closed on 31/12/2007 by one Member State but not yet formally closed by the other Contracting State

8. Pending MAPs under the EU Arbitration Convention in relation to Member States as of 31/12/2007, for which the request was presented in 2005.

	DK	DE	EL	ES	FR	IE	IT	LU	NL	AT	PT	FI	SE	UK
BE	0 0	4 4	0 0	0 0	3 0	0 0	1 0	0 0	0 0	0 0	0 0	0 0	0 0	0 0
	DK	1 1	0 0	0 0	0 0	0 0	0 0	0 0	0 0	0 0	0 0	0 0	0 0	0 0
		DE	0 0	2 2	4 5	0 0	3 3	0 0	1 1	1 1	1 1	0 0	0 0	3 3
			EL	0 0	0 0	0 0	0 0	0 0	0 0	0 0	0 0	0 0	0 0	0 0
				ES	2 3	0 0	0 0	0 0	0 0	0 0	0 1	0 0	0 0	0 2
					FR	1 1	0 0	0 0	0 0	0 1	1	0 0	0 0	5 6
						IE	0 0	0 0	0 0	0 0	0 0	0 0	0 0	0 0
							IT	0 0	0 0	0 0	0 0	0 0	0 0	1 0
								LU	0 0	0 0	0 0	0 0	0 0	0 0
									NL	0 0	1 0	0 0	0 0	0
										AT	0 0	0 0	0 0	0 0
											PT	0 0	0 0	0 0

												FI	0 0	0 0
												SE	0 0	

Number of cases: 29-42[14]

[14] Discrepancies in the number of pending cases reported by Member States may result from cases considered closed on 31/12/2007 by one Member State but not yet formally closed by the other Contracting State

9. Pending MAPs under the EU Arbitration Convention in relation to Member States as of 31/12/2007, for which the request was presented in 2006

	DK	DE	EL	ES	FR	IE	IT	LU	NL	AT	PT	FI	SE	UK
BE	0 0	1 1	0 0	0 0	1 1	0 0	0 0	0 0	0 0	0 0	0 0	0 0	0 0	2 1
	DK	0 0	0 0	0 0	0 0	0 0	0 0	0 0	0 0	0 0	0 0	0 0	1 1	0 0
		DE	0 0	1 1	5 7	0	0	0 0	2 2	1 1	0	0 0	0 0	3 3
			EL	0 0	0 0	0 0	1 0	0 0	0 0	0 0	0 0	0 0	0 0	0 0
				ES	4 3	0 0	1 1	0 0	1 1	0 0	2 0	0 0	0 0	1 1
					FR	4 4	2 2	0 1	2 3	1 1	0 1	1 1	0 0	7 6
						IE	0 0	0 0	0 0	0 0	0 0	0 0	0 0	0
							IT	0 0	1 1	0 0	0 1	0 0	0 1	1 3
								LU	0 0	0 0	0 0	0 0	0 0	0 0
									NL	0 0	0 1	0 0	1 0	5 3
										AT	0 0	0 0	0 0	0 0
											PT	0 0	0 0	1 2

												FI	12	00
													SE	00

Number of cases: 45-66[15]

[15] Discrepancies in the number of pending cases reported by Member States may result from cases considered closed on 31/12/2007 by one Member State but not yet formally closed by the other Contracting State

10. Pending MAPs under the EU Arbitration Convention in relation to Member States as of 31/12/2007, for which the request was presented in 2007

	DK	DE[16]	EL	ES	FR	IE	IT	LU	NL[17]	AT	PT	FI	SE	UK
BE	0 0	1 1	0 0	1 0	 1	0 0	0 0	0 0	0 0	0 0	0 0	0 0	0 0	0
	DK	1 1	0 0	0 0	0 0	0 0	0 0	0 0	0 0	0 0	1 1	0 0	1 1	9 0
		DE	0 0	1 1	3 5	 0	6 6	0 0	4 4	1 1	1 1	0 0	1 1	0 7
			EL	0 0	0 0	0 0	 0	0 0	0 0	0 0	0 0	0 0	0 0	0 0
				ES	5 6	1 1	2 2	0 1	1 1	0 0	1 0	0 0	0 0	2 2
					FR	2 2	1 1	0 1	5 4	0 0	1 2	1 1	0 0	5 5
						IE	0 0	0 0	0 0	0 0	0 0	0 0	0 0	1 1
							IT	0 0	0 0	0 0	0	0 0	0	1
								LU	0 0	0 0	0 0	0 0	0 0	0 0
									NL	0 0	0 0	0 0	 1	4 4
										AT	0 0	0 0	0 0	0 0

16 Hungary has one case with Germany (2007)

17 NL has one case with PL and one case with HU (both in 2007)

											PT	0 0	0 0	0
												FI	1 2	0 0
													SE	0 0

Number of cases: 55-81[18]

[18] Discrepancies in the number of pending cases reported by Member States may result from cases considered closed on 31/12/2007 by one Member State but not yet formally closed by the other Contracting State

11. Total amount of pending MAPs under the EU Arbitration Convention as of 31/12/2007 in relation to the year when the request was received by the tax administration[19]

	Requests received prior to 2000	Requests received in 2000	Requests received in 2001	Requests received in 2002	Requests received in 2003	Requests received in 2004	Requests received in 2005	Requests received in 2006	Requests received in 2007	Total pending cases
2007	2	1 - 5	1 - 5	4 - 6	3 - 8	6 - 11	29 - 42	45 - 66	55 - 81	146 - 226
2006	2 - 5	3 - 6	0 - 4	4 - 9	10 - 16	8 - 20	39 - 55	46 - 69		112 - 184
2005	16 - 24	1 - 13	5 - 10	10 - 18	12 - 23	12 - 25	42 - 68			98 - 181
2004	24	8	12	24	23	16	0			107

[19] Discrepancies in the number of pending cases reported by Member States may result from cases considered closed on 31/12/2007 by one Member State but not yet formally closed by the other Contracting State

ANNEX VI: LIST OF INDEPENDENT PERSONS OF STANDING (DOC JTPF 010/BACK/REV11/2005)

Arbitration Convention - Article 9 (4)

List of independent persons of standing as of 01/06/2008 [20]

Member State	Name	Date of Nomination	Eligible as Chairman[21]	CV available
AUSTRIA	Mr. Karl BRUCKNER	08.2000	NO	EN CV
	Mr. Siegfried DAPOZ	08.2000	NO	EN CV
	Mrs Veronika BERECZ	12.2007	NO	EN CV
	Mr. Wolfgang MALZER	12.2007	NO	EN CV
	Mr. Robert OTTEL	12.2007	NO	EN CV
BELGIUM	Mr. Jacques AUTENNE	1995	YES	EN CV
	Mr. L.A. DENYS	1995	YES	EN CV
	Mr. Jacques GHYSBRECHT	1995	NO	
	Mr. Luc HINNEKENS	1995	YES	EN CV
	Mr. Jacques MALHERBE	1995	YES	EN CV
BULGARIA	Mr Bisser Slavkov	04.2008	NO	EN CV
	Mr Alexander Penov	04.2008	YES	EN CV
	Mrs Dimitrinka Spiridonova	04.2008	NO	EN CV
	Mrs Evelina Dimitrova	04.2008	YES	EN CV
CYPRUS				
CZECH REPUBLIC	Mr. Frantisek FRANCIREK	01.2007	NO	EN CV
	Mr Tomas KROLUPPER	01.2007	NO	EN CV
	Mr. Jiri NEKOVAR	01.2007	NO	EN CV
	Mr. Marek ROMANCOV	01.2007	NO	EN CV
	Mr. Richard SVEJDA	01.2007	NO	EN CV
DENMARK	Mrs. Lene Pagter KRISTENSEN	1.2006	YES	EN CV
	Mr. Aage MICHELSEN	11.1993	YES	EN CV
	Mr. Jan PEDERSEN	11.1993	YES	EN CV
	Mr. Soren Lehman NIELSEN	1.2006	YES	EN CV
	Mr. John BYGHOLM	1.2006	NO	EN CV
ESTONIA				
FINLAND	Mr. Raimo IMMONEN	12.2004	NO	EN CV
	Mr. Seppo PENTTILÄ	12.2004	NO	
	Mrs. Marjaana HELMINEN	06.2006	NO	EN CV
	Mr. Ahti VAPAAVUORI	12.2004	NO	EN CV
	Mrs. Hannele RANTA-LASSILA	12.2004	NO	EN CV
FRANCE	Mr. Dominique LATOURNERIE	12.2001	YES	
	Mr. Jean GROUX	02.1996	YES	

[20] On the basis of the information available to the Commission Services

[21] On the basis of point 4.1 (c) of the Code of Conduct for the effective implementation of the AC (COM2004/297final)

	Mr. Guy GEST	02.1996	YES	
	Mr. Philippe THIRIA	12.2001	YES	
	Mr. Robert BACONNIER	02.1996	YES	
GERMANY	Mr. Thomas BORSTELL	09.2005	NO	DE/EN CV
	Mrs. Jutta FÖRSTER	09.2005	YES	DE/EN CV
	Mr. Jörg-Dietrich KRAMER	09.2005	YES	DE/EN CV
	Mr. Andreas OESTREICHER	09.2005	NO	DE/EN CV
	Mr. Matthias WERRA	09.2005	NO	DE CV
GREECE	Mrs Paschalis CONSTANTINOS	10.2005	YES	EN CV
	Mr. Panagiotis DAMILAKOS	10.2005	NO	EN CV
	Mrs. Katerina SAVVAIDOU	10.2005	NO	EN CV
	Mr. Antonis ATHANASOPOULOS	10.2005	NO	EN CV
	Mr. Fotios NICOLAIDIS	10.2005	NO	EN CV
HUNGARY				
IRELAND	Ms Marie Barr	01.2004	NO	EN CV
	Mr Paul McGowan	01.2004	NO	EN CV
	Mr Fergal O'Rourke	01.2004	NO	EN CV
	Mr Dermot Quigley	01.2004	NO	EN CV
	Mr Jim TIERNEY	01.2004	NO	EN CV
ITALY	Mr. Pietro ADONNINO	02.1994	YES	EN/IT CV
	Mr. Franco CALEFFI	02.1994	YES	EN/IT CV
	Ms. Silvia CIPOLLINA	10.2005	YES	EN/IT CV
	Mr. Enrico NUZZO	02.1994	YES	EN/IT CV
	Mr. Andrea SIMONI	02.1994	YES	EN/IT CV
LATVIA				
LITHUANIA				
LUXEMBOURG	Mr. Arno SCHLEICH	04.2001	YES	
	Mr. Martin SCHROEDER	04.2001	YES	
	Mr. Corneille BRUCK	09.1994	YES	
	Mr. André ELVINGER	09.1994	YES	
	Mr. Pierre PESCATORE	09.1994	YES	
MALTA	Ms Juanita Bezzina	06.2008	YES	EN CV
	Mr Neville Gatt	06.2008	YES	EN CV
	Mr Conrad Cassar Torreggiani	06.2008	YES	EN CV
	Mr Antoine Fiott	06.2008	YES	EN CV
	Mr Stephen Attard	06.2008	YES	EN CV
NETHERLANDS	Mrs. I.J.J. BURGERS	03.1996	YES	EN CV
	Mr. J.A.C.A. OVERGAAUW	05.2007	YES	EN CV
	Mr. H.MA.L. HAMAEKERS	05.2007	YES	EN CV
	Mrs. C. SILBERZTEIN	05.2007	YES	EN CV
	Mrs. F. GISKES	05.2007	NO	EN CV
POLAND	Mr. Bogumił Brzeziński	04.2008	YES	EN CV
	Mr. Jan Głuchowski	04.2008	YES	EN CV
	Mrs.Renata Hayder	04.2008	NO	EN CV
	Mrs. Hanna Litwińczuk	04.2008	YES	EN CV
	Mr. Włodzimierz Nykiel	04.2008	YES	EN CV
PORTUGAL	Mr. Rogério FERNANDES FERREIRA	11.2005	YES	

	Mr. José Guilherme XAVIER DE BASTO	11.2005	YES	
	Mr. José Luís SALDANHA SANCHES	11.2005	YES	
	Mr. António MARTINS	11.2005	NO	
	Mr. José VIEIRA DOS REIS	11.2005	NO	
ROMANIA				
SLOVAKIA	Mr. Vaclav DUFALA	03.2007	YES	EN CV
	Mrs. Gizela LENARTOVA	03.2007	YES	EN CV
	Mr. Artur OBERHAUSER	03.2007	YES	EN CV
	Ms. Christiana SERUGOVA	03.2007	NO	EN CV
	Mr. Marian TOTH	03.2007	NO	EN CV
SLOVENIA				
SPAIN	Mr. José Manuel CALDERON CARRERO	10.2005	YES	EN/SP CV
	Mr. Miguel CRUZ AMOROS	10.2005	YES	EN/SP CV
	Mr. Abelardo DELGADO PACHECO	10.2005	YES	EN/SP CV
	Mr. Luis LOPEZ-TELLO Y DIAZ AGUADO	10.2005	YES	EN/SP CV
	Mr. Fernando VELAYOS JIMENEZ	10.2005	YES	EN/SP CV
SWEDEN	Mrs. Kerstin BOSTRÖM	01.2006	YES	
	Mr. Stefan ERSSON	01.2006	YES	
	Mr. Carl Gustav FERNLUND	01.2006	YES	EN CV
	Mr. Sven-Olof LODIN	01.2006	YES	EN CV
	Mrs Ingrid MELBI	01.2006	YES	EN CV
UNITED KINGDOM	Mrs. Nuala BRICE	02.2002	YES	
	Mr. James David DEMACK	02.2002	YES	EN CV
	Mr. Malcolm GAMMIE QC	02.2002	YES	EN CV
	Mr. Avery JONES CBE	02.2002	YES	EN CV
	Mr. Gordon REID QC	02.2002	YES	EN CV

ANNEX VII: INDEPENDENT PERSON OF STANDING`S DECLARATION OF ACCEPTANCE AND STATEMENT OF INDEPENDENCE

INDEPENDENT PERSON OF STANDING`S DECLARATION OF ACCEPTANCE AND STATEMENT OF INDEPENDENCE

(Please mark the relevant box or boxes)

I, the undersigned,

Name: _____ First Name: _____

Preamble:

Before appointment or confirmation, a prospective independent person of standing shall sign a statement of independence and disclose in writing to the Secretariat[22] *any facts or circumstances which might be of such a nature as to call into question the independent person of standing's independence in the eyes of the parties. The Secretariat shall provide such information to the Competent Authorities in writing and fix a time limit for any comments from them. An independent person of standing shall immediately disclose in writing to the Secretariat and to the Competent authorities any facts or circumstances of a similar nature which may arise during the arbitration.*

ACCEPTANCE

¤ hereby declare that I accept to serve as independent person of standing in an advisory commission ruled by the principles established in the Convention on the elimination of double taxation in connection with the adjustment of profits of associated enterprises as well as in the Code of Conduct related to it, in the present case. In so declaring, I confirm that I have familiarized myself with the requirements of the provisions of the Convention and I am able and available to serve as an arbitrator in accordance with all of the requirements of those provisions,

INDEPENDENCE

(If you accept to serve as an independent person of standing, please also check one of the two following boxes. The choice of which box to check will be determined after you have taken into account, inter alia, whether there exists any past or present relationship, direct or indirect, with any of the parties (i.e. tax administrations and the companies or Multinational Enterprises or their counsel), whether financial, professional or of another kind and whether the nature of any such relationship is such that disclosure is called for pursuant to the criteria set out below. Any doubt should be resolved in favor of disclosure.)

¤ I am independent of each of the *parties (i.e. tax administrations and the companies or Multinational Enterprises or their counsel)* and intend to remain so; to the best of my

[22] The Secretariat is the one set-up according to provision 4.2 C of the Code of Conduct on the AC

knowledge, there are no facts or circumstances, past or present, that need be disclosed because they might be of such nature as to call into question my independence in the eyes of any of the parties

OR

¤ I am independent of each of the *parties (i.e. tax administrations and the companies or Multinational Enterprises or their counsel)* and intend to remain so; however, I wish to call your attention to the following facts or circumstances which I hereafter disclose because they might be of such a nature as to call into question my independence in the eyes of any of the parties. (Use separate sheet if necessary.)

NON ACCEPTANCE

¤ hereby declare that I decline to serve as an independent person of standing in the subject case. (If you wish to state the reasons for checking this box, please do so.)

ANNEX VIII: QUESTIONNAIRE ON THE INTER-ACTION BETWEEN JUDICIAL APPEALS AND THE AC

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.

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?

Member State	Question 1
Austria	No In Austria it is not possible to derogate from decisions of the Supreme Adminstrative Court (Verwaltungsgerichtshof) or from decisions of the Supreme Constitutional Court (Verfassungsgerichtshof).
Belgium	NO
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	Selon le paragraphe 3 de l'article 7 de la convention européenne d'arbitrage, dans les cas où la législation interne d'un Etat contractant ne permet pas aux autorités compétentes de déroger aux décisions de leurs instances judiciaires, la procédure d'arbitrage n'est possible que si l'entreprise a laissé s'écouler le délai de présentation du recours auprès des juridictions nationales ou s'est désistée de ce recours avant qu'une décision ait été rendue. Par décision des instances judiciaires, il faut entendre une décision juridictionnelle, résultant en France du juge administratif qui est seul compétent en matière d'impôts directs visés par la convention européenne d'arbitrage. Dans sa déclaration unilatérale faite le jour de la signature de cette convention, la France a indiqué qu'elle ferait application de cette disposition. En effet, le principe de l'autorité de la chose jugée ne permettrait pas aux autorités compétentes de se conformer à l'avis d'une commission consultative constituée si elles devaient, ce faisant, remettre en cause une décision de justice passée en force de chose jugée. Par conséquent, les contribuables concernés devront donc faire le choix soit de poursuivre une procédure juridictionnelle jusqu'à son terme, soit d'y renoncer afin que la phase d'arbitrage de la convention puisse être conduite

	Ainsi, en application de ces principes, en cas de recours contentieux exercé par l'entreprise, le délai de deux ans prévu au paragraphe 1 de l'article 7 de la convention d'arbitrage au terme duquel la commission consultative doit être constituée, à défaut d'avoir trouvé un accord dans le cadre de la procédure amiable, commencera à courir à partir du moment où l'entreprise se sera désistée de son recours Ce report du point de départ du délai de deux ans s'applique dès lors qu'un recours de droit inteme est exercé contre une décision que ce soit devant l'administration ou devant un tribunal. En effet, selon le droit interne français, les contestations élevées par les contribuables sont d'abord obligatoirement soumises par voie de réclamation à l'administration des impôts et le contribuable peut ensuite porter le litige devant la juridiction compétente
Germany	The German revenue administration may, on the basis of Section 175a of the *Abgabenordnung* (Fiscal Code), derogate from the decisions of the German fiscal courts where the implementation of a mutual agreement understanding is concerned
Greece	The Hellenic Tax Authorities **can not derogate** from the decisions of judicial bodies, due to constitutional reasons. The judicial bodies responsible for tax disputes are the Administrative Courts: Administrative Court of first Instance, Administrative Court of Appeal, and Council of State
Hungary	No, Due to constitutional and administrative reasons
Italy	No
Ireland	No
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 6th paragraph of Article 37 of Law on Taxies 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
Lithuania	NO
Luxembourg	
Malta	No Malta cannot derogate
Netherlands	**Yes**
Poland	No 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	No 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. 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
Romania	No Tax administration cannot derogate from a court decision
Slovak Republic	No. <u>Slovak Tax Administration can not derogate from the Court decisions.</u>
Slovenia	No. In case of Slovenia the Slovene Tax administration can not derogate the decisions taken by judicial bodies
Spain	Spanish Constitution does not allow tax administration to act against a judicial decision
Sweden	**Yes**, 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	Yes. UK law (S815B Taxes Act 1988) enables the UK tax administration to give effect to outcomes reached under the Convention

<u>Answers to question 2</u>

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	NA
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	NA
Germany	A decision is considered final where a judgement has the force of *res judicata* and, in particular, a tax assessment notice becomes legally enforceable. The tax assessment notice itself constitutes the decisive point of reference for the ability to derogate – a legally enforceable tax assessment notice has no detrimental effect. This applies irrespective of whether the tax assessment notice was the subject of court proceedings or not. The binding effect of the tax assessment notice itself is, in fact, always the central issue. In this context, the "judicial body", from the German perspective, means the fiscal courts as the judicial power for the disputes cited in Section 33 (1) of the *Finanzgerichtsordnung* (Code of Procedure for Fiscal Courts), especially public-law disputes regarding fiscal matters, insofar as the taxes are subject to the Federation's legislative powers and are administered by the Federation or *Länder* (federal state) revenue authorities. Fiscal jurisdiction is exercised by special, independent administrative courts that are separate from the administrative authorities. At the *Länder* level, fiscal jurisdiction is exercised by the fiscal courts as the highest *Länder* courts. In the case of the Federation, the *Bundesfinanzhof* (Federal Fiscal Court) has fiscal jurisdiction .
Greece	NA
Hungary	NA
Italy	NA
Ireland	NA
Latvia	NA
Lithuania	NA
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	NA
Slovak Republic	NA
Slovenia	NA
Spain	NA
Sweden	Sweden considers the following as a judicial body: 1. Tax administration 2. County administrative courts 3. Administrative courts of appeal 4. The Supreme administrative court The decision is considered as final when the time for appeal has elapsed. 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. 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. 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. 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.
United Kingdom	The General Commissioners, Special Commissioners or UK Court (High Court, Court of Appeal, House of Lords) are judicial bodies

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?

Member State	Question 3.1	Question 3.2
Austria	NA	
Belgium	NA	**NA**
Bulgaria	NA	NAN
Cyprus	NA	NA
Czech Republic	NA	NA
Denmark	NA	**NA**
Estonia	NA	NA
Finland	**No cases**	**Yes if necessary**
France	Sans objet compte tenu de la réponse à la question 1	
Germany	Where necessary, yes. This is the case where the tax assessment notice is actually already binding. Wenn es erforderlich ist, ja. Dies ist der Fall, wenn der Steuerbescheid tatsächlich bereits bestandskräftig ist	Not applicable nicht angezeigt
Greece	NA	NA
Hungary	NA	NA
Italy	NA	NA
Ireland	NA	NA
Latvia	NA	NA
Lithuania	NA	NA
Luxembourg		
Malta	NA	NA
Netherlands	**Yes**	**-**
Poland	NA	
Portugal	NA	

Romania	NA	NA
Slovak Republic	NA	NA
Slovenia	NA	
Spain	NA	NA
Sweden	**Yes.** There have been such cases in Sweden, though not yet under the Arbitration convention	**yes**
United Kingdom	It has not been necessary to do this in a particular case	Derogation is a possibility that would be considered to allow the UK to uphold its obligations under the Arbitration Convention. Any possible derogation would be viewed in this context

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?

Member State	Question 4
Austria	We are prepared to continue our MAP negotiations irrespective whether an appeal is pending or not. Only for the set up of the advisory commission, we would regard a pending appeal as in conflict.
Belgium	Enterprises can introduce an (administrative) appeal – which may be followed by a judicial procedure as provided for in domestic law – and at the same time start the procedure under the AC. However, the AC provides that where the domestic law of a contracting state does not permit the competent authorities of that state to derogate form the decisions of their judicial bodies, the advisory commission shall not be set up 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 is delivered. The AC guarantees expressly the res judicata associated with a judicial judgment according to domestic law. The Belgian tax administration is not

	empowered to conform to a decision reached at the end of an arbitration procedure where this decision questions a judicial judgement in res judicata. Therefore, up till now, the Belgian authorities are of the opinion that the enterprises concerned have to make a choice between either continuing the procedure provided for in domestic law or continuing the procedure provided for in the AC. This position is stated in Circular AFZ/INTERN IB/98-0170 of July 7th, 2000. However, this circular will be updated and will contain additional clarifications concerning MAP, the advisory commission and other elements regarding the AC
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	Si cette renonciation n'est pas effectuée par l'entreprise, les discussions entre autorités compétentes dans la phase amiable de la procédure peuvent en pratique se poursuivre et, le délai de deux ans n'étant réputé courir qu'à partir du moment où l'entreprise s'est désistée. Si un accord intervient durant cette période, il sera proposé à l'entreprise qui pourra l'accepter et devra alors renoncer à tout contentieux pour pourvoir en bénéficier. Dans tous les cas, si les autorités compétentes parviennent à un accord dans la phase amiable assurant l'élimination de la double imposition, ce qui est la finalité de la convention européenne d'arbitrage, et que l'entreprise n'accepte pas cet accord ou l'accepte en refusant de renoncer à un recours contentieux par ailleurs engagé, aucune commission consultative ne pourra être constituée dès lors qu'une solution amiable s'était dégagée
Germany	NA
Greece	See Q5
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	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. Assumption n. 1. Both competent authorities reach a mutual agreement before a decision has been delivered. 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 advance approval from the taxpayer on the content of the agreement between competent authorities and the simultaneous withdrawal of the existing appeal. 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. 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. Assumption n. 2. A decision is delivered before the two competent authorities reach a mutual agreement Where a decision is delivered in favour of the Italian tax administration[23] 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.
Ireland	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. 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
Latvia	Latvia stops the negotiations in such situation because there is no possibility to change the decision of judicial body.
Lithuania	No experience
Luxembourg	
Malta	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. If the case is under review by a judicial body, then the taxpayer will need to decide

[23] If the decision is in favour of the taxpayer, there will be no double taxation any more.

	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.
Netherlands	NA
Poland	Polish provisions regulating administrative court procedure does not provide for automatic suspension of initiated court proceeding on the ground of pending MAP. Moreover, after final court decision, Polish tax administration being bound to it, would not be able to proceed with MAP. However initiated MAP could be the reason for court to suspend proceeding (taxpayer's or tax administration's request is required). In such case Polish tax administration would proceed with the MAP.
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	No experience yet. Still it can be mentioned that a court decision is mandatory
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	Slovenia did not have any cases under the Arbitration Convention yet. This means that there is not a lot of experience in this field. In general the taxpayer would have to decide whether to continue reaching an agreement under MAP or under domestic judicial appeal
Spain	As long as there is no judicial decision, both MAP and judicial procedure can continue at the same time. Once an agreement is reached within a MAP, Spanish competent authorities will inform the taxpayer and he will have the choice to see the agreement implemented or to continue with its judicial appeals
Sweden	NA
United Kingdom	NA

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	La France a été conduite en 2003 et 2005 à mettre en place avec l'Italie puis l'Allemagne une commission consultative sur des situations de double imposition en matière de prix de transfert entre entreprises associées. Préalablement, les entreprises concernées avaient été amenées à se désister de tout recours contentieux tendant à contester les redressements qui généraient la double imposition
Germany	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? The majority of German arbitration cases, which are based on a German correction, are not brought before the court in Germany. In general, an objection is submitted and suspension of enforcement granted. After that, the case is conducted within the framework of the Arbitration Convention. Where it comes to court proceedings, the following applies: The court proceedings do not halt negotiations with the other Member State. Instead, it is far more common for the proceedings to be suspended with the consent of the taxable person and of the court. In cases where taxable persons prefer first to pursue the legal proceedings pending in Germany, the mutual agreement procedure is suspended until the lawsuit has been dealt with. In practice, Germany then ensures that pending appeals procedures (objection/lawsuit) are settled, inter alia, through the (where appropriate, partial) withdrawal of the objection/lawsuit, prior to the implementation of a mutual agreement understanding through a tax assessment notice. Where no appeals procedure is pending, the revenue authorities ensure that applicants abstain from the submission of an appeal, insofar as the results of the mutual agreement understanding are implemented appropriately through the notice. Where a case is taken to court in a foreign country unable to derogate from its decisions, Germany conducts a mutual agreement procedure pursuant to Article 6 of the Arbitration Convention. Germany does, however, take the view that the advisory commission may not be convened as long as the case is pending before the court abroad
Greece	Since, Greece has no practical experience on the operation of the Arbitration Convention, regarding the application of Art. 7 (3), we can not give answers to questions 4 and 5 of the questionnaire at this stage. But, we would like inform you that a question regarding this matter is forwarded to the **Legal Council of the State,** in order to provide JTPF with our fully formal position.

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, 2nd 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	No experience
Luxembourg	
Malta	No experience
Netherlands	No experience
Poland	No experience
Portugal	No experience
Romania	No experience
Slovak Republic	No experience
Slovenia	On national level we would like to note that the Arbitration Convention was set into force on 24 October 2007 when it was passed through by the Parliament. We do not have much experience in the filed of the application of Art.7(3). In general when inspecting a taxpayer the procedure is as follows: After the tax inspection the tax inspector issues a provision. The taxpayer can file an appeal to the governmental body in this case, to the Ministry of Finance. If not satisfied with the outcome the taxpayer can than make a complain to the administrative (higher) court. Regardless to the complain the taxpayer is obliged to pay the penalties and late interests stated in the provision. If the penalties and late interests are in the course of appeal proven to be wrong they will be returned to the taxpayer
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 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. 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.
United Kingdom	NA

ANNEX IX: STATE OF PLAY OF THE IMPLEMENTATION OF THE CODE OF CONDUCT RELATED TO THE ARBITRATION CONVENTION (DOC: JTPF/006/BACK/REV5/2006/EN)

1. Introduction

The Code of Conduct for the effective implementation of the Arbitration Convention (90/436/EEC of 23 July 1990) was adopted by the Council of the European Union in December 2004.

The JTPF agreed in its working programme to monitor the implementation of the code. Therefore Member states have been invited to report on the way they have implemented this soft law instrument in their national laws or administrative practices.

It was considered as particularly important to give taxpayers the opportunity of knowing how Member states were dealing with point 5 of the Code on the suspension of tax collection during cross border dispute resolution procedures: "*Member States are recommended to take all necessary measures to ensure that the suspension of tax collection during cross-border dispute resolution procedures under the Arbitration Convention can be obtained by enterprises engaged in such procedures, under the same conditions as those engaged in a domestic appeals/litigation procedure although these measures may imply legislative changes in some Member States. It would be appropriate for Member States to extend these measures to the cross-border dispute resolution procedures under double tax treaties between Member States"***.**

2. Answers provided by EU tax administrations

AUSTRIA

a) Implementation of the Code of Conduct on the Arbitration Convention:

According to the work programme 2006 Austria intends to issue administrative guidelines on transfer pricing. In the drafting of these guidelines the Code of Conduct of the AC will be taken into consideration.

b) Position/situation in respect of the suspension of tax

Payment facilities a suspension of tax collection:

Generally it is possible to apply for a deferral of tax payments or a payment of the taxes in instalments (Section 212 of the Federal Fiscal Procedure Act – § 212 Bundesabgabenordnung/BAO).

As far as the suspension of tax collection is concerned, currently it is only possible in connection with an appeal against the decision of the tax office (Section 212a of the Federal Fiscal Procedure Act – § 212a Bundesabgabenordnung/BAO).

In principle, a similar treatment could also be envisaged in the context of mutual agreement procedures based either on DTC or on the AC. Such measures would in any case only apply in “bona fide” case and comprise only that part of the tax due in relation to double taxation caused by the profit adjustment.

BELGIUM

The Code was already implemented before its official adoption by the Council.

CYPRUS

In Cyprus we have implemented the Code of Conduct on the Arbitration Convention, including the suspension of tax collection, in the administrative practice of the Department of Inland Revenue through Circular 2007/5 issued on the 15th Feb 2007 and Regulation No 87/2007 published in the Official Gazette No.4176 dated 23/2/2007

The Cyprus Tax Administration is able and willing to suspend tax collection as recommended by the Code by virtue of the provisions of the Assessment and Collection of Taxes Laws (Art. 4,38,39,&40) and the provisions of the Income Tax Laws (Art.3&45).

CZECH REPUBLIC

The CoC has been published through the websites of the Czech Tax Administration. In case of application AC we will follow recommendations done by this CoC. Thus its principles shall be implemented through the administrative practice.

As regards the suspension of tax collection during cross-border dispute resolution procedures under conditions of our tax law any remedies generally have no suspending effect. Exceptionally, the taxpayer may request the tax administration either to defer his tax payments or to allow him to pay by instalments, if immediate payment would cause serious detriment to the tax debtor or if it is impossible for other serious reasons to collect all of the tax arrears from the tax debtor.

DENMARK

Through an administrative decision from January 7th 2005 ("SKM2005.2.TSS") we have implemented the CoC on the AC in Danish administrative, legal practice by saying that "the Danish tax administration will apply the CoC when applying the AC."

ESTONIA

In Estonia, as for The Code of Conduct on the Arbitration Convention, we will not implement it into our national legislation, but we will implement it in practice as it is soft law. No practice has been so far developed.

The suspension of tax collection is possible according to the Estonian Taxation system already. (Estonian Taxation Act § 128(2) 5 and § 146(3)).

FINLAND

The competent authorities are aware of the Code and are committed to abide by it, but formal implementation is not planned.

Deferral of the payment of tax in cases of international double taxation is allowed by article 90 of the Tax Procedure Act (90§ Laki verotusmenettelystä 18.12.1995/1558)

FRANCE

La France a soutenu sans réserve les travaux les travaux du Forum conjoint de l'Union européenne qui ont débouché par l'adoption par le Conseil d'un Code de conduite sur la mise en œuvre de la convention européenne d'arbitrage.

La France a publié le 23/02/2006 une instruction qui actualise sa doctrine en matière de traitement des procédures amiables ouvertes tant dans le cadre de la convention européenne d'arbitrage que dans le cadre d'un traité bilatéral. Elle reprend les conclusions du Code de conduite pour la mise en œuvre de la convention européenne d'arbitrage et s'inspire de celui-ci pour les procédures amiables bilatérales.

Par ailleurs, la France a adopté un texte spécifique – l'article L189A du Livre des procédures fiscales – qui met en place une procédure de suspension de la prescription de la mise en recouvrement en cas d'ouverture d'une procédure amiable, quel qu'en soit son type. Le texte en est le suivant.

«Lorsqu'à la suite d'une proposition de rectification, une procédure amiable en vue d'éliminer la double imposition est ouverte sur le fondement d'une convention fiscale bilatérale ou de la convention européenne 90/436/CEE relative à l'élimination des doubles impositions en cas de correction des bénéfices d'entreprises associées du 23 juillet 1990, le cours du délai d'établissement de l'imposition correspondante est suspendu de la date d'ouverture de la procédure amiable au terme du troisième mois qui suit la date de la notification au contribuable de l'accord ou du constat de désaccord intervenu entre les autorités compétentes.»

Ces dispositions sont applicables aux procédures amiables ouvertes à compter du 1er janvier 2005.

GERMANY

Germany has revised its Manual on Mutual Agreement and Arbitration Procedures. The revised version of the Circular Letter, which takes account of the Code of Conduct, was issued on 13th July 2006. As regards the suspension of tax collection during MAPs under the Arbitration Convention or a double tax treaty with another Member State, the Ministry of Finance is currently examining possible legislative amendments to the General Tax Code that would allow for the suspension of tax collection outside of an appeal procedure.

GREECE

According to the legislation in force in Greece, in case of an appeal within the prescribed time on behalf of the taxpayer against tax administration assessment decisions, an amount representing 10% of the tax in dispute (main tax, added tax and remaining taxes and duties assessed with it) must still be paid. The assessment of the remaining 90% is suspended until the relevant judicial decision is taken.

Moreover, according to the provisions of articles 200-205 of Code of Administrative (Legal) Procedure the collection of the above mentioned percentage of pre-assessment (10%) can also be suspended, by those especially defined in these provisions.

The above concern generally all the taxpayers and all types of tax disputes. Therefore also apply to disputes for which a cross border procedure settlement is pending.

Consequently, we believe that it is not necessary to introduce additional legislative measures for the suspension of tax collection, especially in cases where dispute resolution procedures are in progress, since this issue is already covered, even indirectly, by the existing legislation.

When these issues are finalized at European Community Level and legislative adaptations are deemed necessary, the Greek Tax Administration will examine the whole matter anew.

HUNGARY

The Hungarian Government had accepted the concept and draft of Act of Parliament on modifications of Tax Procedure Act on 26th of September 2007. As the Parliament had voted this draft, the Amending Act had been published under the title *"Act CXXVI of 2007"* on 16th of November 2007.

The Amending Act incorporated some significant rules of Code of Conduct, such as:

(i) suspension of tax collection

(ii) formal acknowledgement of receipt of taxpayer's request, minimum content of request, starting point of 2-year-deadline.

These incorporative rules had been set out in Art. 176/A. of Act XCII of 2003 on Tax procedure with retroactive effect. According to the decision No. 35/2007. (XII. 4.) of Minister of Foreign Affairs, these incorporative rules and the Act on AC came into effect simultaneously, from 1st of July 2006 to 1st of November 2007.

IRELAND

Staff in the Competent Authority area have been made aware of the Code of Conduct.

As regards suspension of tax collection during cross-border dispute resolution procedures, where an assessment is made on a taxpayer in respect of any undercharge to tax, the taxpayer is entitled to enter an appeal against the assessment. The taxpayer is required to pay the tax that, in the taxpayer's opinion, is due and payable. The balance of the tax involved will be suspended pending determination of the appeal. In general, the competent authority will be prepared to allow an appeal to remain open while an alternative procedure for dispute resolution has a prospect of resolving the point at issue.

ITALY

In order to apply the code of conduct, Italy does not need to implement it in its own legislation. Presently all offices involved in MAP AC are aware of its existence and of its importance and are doing their best in order to apply it.

We will give appropriate publicity to the code of conduct, publishing it on two websites: Department of Tax Policy's and Revenue Agency's.

As far as it regards the suspension of tax collection during a MAP AC, the Italian law n. 99 of 22 March 1993, which ratified the Arbitration Convention, already provided for the suspension of the collection or of the execution proceedings to international disputes started in accordance with the Arbitration Convention.

LATVIA

As the Arbitration Convention was ratified and is in force in Latvia since 1 June, 2007, Latvia hasn't any intend at this moment regarding implementation of Code of Conduct in legislative way. The Code of Conduct as it is soft law will be accepted as a best practice and will be considered in developing the administrative guidelines and administrative practice.

Suspension of tax collection:

The domestic law of Latvia provides the provisions which allow suspending of tax collection when the tax assessment of tax administration is litigated or appealed. Also the tax collections' suspension is possible on the decision of tax administration. Such a decision could be used also in the scope of Arbitration Convention.

LITHUANIA

Implementation of Code of Conduct on the Arbitration Convention

The Tax Administration of Lithuania hasn't plans for any kind of formal implementation of the Code on Conduct of the AC. It will be implement in administrative practices. Also Tax Administration is preparing Guidelines on transfer pricing and in drafting of these Guidelines the Code of Conduct will be taken in consideration.

Situation concerning the suspension of tax

In our Law on Tax Administration we have a provision that allows for the suspension of tax collection when taxpayer appeal against the tax administrator's decision.

LUXEMBOURG

There seems to be no need to implement the code of conduct into national legislation (or parts of it), the code has been made available to tax administration members involved in mutual agreement procedures.

The tax administration is able and willing to suspend tax collection as recommended by the code.

MALTA

With regard to the Code of Conduct, the Legal Notice incorporates the Arbitration Convention into Maltese Law and specifies that this Convention is to be interpretated in line with the said Code.

Suspension of tax collection:

Article 41(1) of the Income Tax Management Act states that:

"Where notice of objection or appeal against an assessment has been given, the Commissioner may, in his discretion, keep in abeyance the collection of not less than ninety per cent of that part of the tax assessed there under which is in dispute."

This legislation applies to all disputes, whether purely domestic or cross-border. Furthermore, the practice of the Inland Revenue (even before the existence of the Code) has been to apply such discretion so as not to collect 90% (at least) of the tax in dispute.

NETHERLANDS

The Netherlands has updated and streamlined its publications on mutual agreement procedures. The Code of Conduct on the Arbitration Convention is included in the updated decree **(IFZ2008/ 248M** of 29 September 2008). In practice the Netherlands had already started to apply the Code of Conduct.

Suspension of tax collection

Par. 3.1.8. of the Netherlands' Ministry of Finance of Decree No. IFZ 2001/295M, officially published in Dutch on 30 March 2001 reads: "Where the Netherlands is the state making the adjustment, the Netherlands' tax administration will upon request grant a deferral of payment on that part of the tax charge that is related to the adjustment. In principle, deferral will be granted until the date on which both the domestic and the international procedures for resolving the dispute have been completed. The policy in this respect will be based on the policy applying to objections lodged against tax assessments (see Article 25, Paragraph 2, of the Tax Collection Guidelines 1990 (*Leidraad Invordering* 1990))."

POLAND

Poland is going to issue the decree of the Minister of Finance, consequently regulations stipulated in CoC will be included in that act. Suspension of tax collection is possible (taxpayer's request is required) in certain situations: i) in case of important interest of taxpayer, ii) in case of important State interest. In both cases decision is taken by head of tax office.

PORTUGAL

Some administrative guidelines are presently under way to disclose through the website the provisions of the Code of Conduct. It is also deemed to be necessary to introduce, as soon as possible, a change to the legal regulations on transfer pricing for that part concerning the procedures in respect of the so-called "corresponding adjustments" with the purpose of establishing that the Code of Conduct shall apply to those cases covered by the Arbitration Convention.

Suspension of tax collection:

The suspension of payment of tax under the provisions of the arbitration convention will be implemented as from January 2008.

SLOVAK REPUBLIC

The Code of Conduct for the effective implementation of the Arbitration Convention has been published by the Ministry of Finance of the Slovak Republic on its official website and should be followed as an administrative practice when resolving the cases under the Arbitration Convention. Moreover, some of its issues are planned to be published as a part of further methodological guidance for the tax administration and public after the ratification of the Arbitration Convention/Accession Convention by all relevant Member States.

Suspension (deferral) of tax collection:

Generally, according to Slovak tax law (Tax Administration Act No. 511/1992 Coll., section 59, para. 2 and 4), tax authority can permit suspension of tax collection or payment in instalments based on the request of taxpayer. This suspension of tax collection or payment in instalments can be permitted by the tax authority for a period of maximum 12 months from the day when the tax payment is due.

SLOVENIA

In Slovenia, Accession Convention to the Arbitration Convention has been implemented through the Law on Ratification of the Accession Convention. According to the legal system in Slovenia the Code of Conduct could be implemented through the law – amendment of the Tax Procedure Act.

SPAIN

Spain has updated its domestic TP rules (New regulation included in Law 36/2006 published in the official gazette on 30th.November 2006). The preamble of the law refers explicitly to the reports of the Transfer Pricing Forum. It also introduces suspension of recollection of taxes when a MAP or AC is requested.

SWEDEN

We consider the procedure currently used in Sweden in line with the rules set up in the Code of Conduct on the Arbitration Convention and therefore have not taken any specific steps of implementation.

The Swedish system regarding penalties, tax surcharge, is based on the taxpayer providing the Tax Authority with misleading, incorrect or insufficient information. Remission of the tax surcharge might be given in certain situations. Tax collections can be suspended during any MAP.

The legal reference relevant for the possibility to grant suspension in Sweden is 17:6 in the Tax Collection Act. (Chapter 17, paragraph 6).

UNITED KINGDOM

The Code of Conduct on the Arbitration Convention is accepted as best practice by the UK.

Consideration is being given to further publicity for the best practice that would be helpful alongside other issues that arise in operating mutual agreement procedures.

Questions about tax collection are matters of domestic law. Where any discretion is allowed, the terms of the Code of Conduct are recognised as best practice.

3. Summary table:

This table derived by Secretariat from MS replies and describes the actual situation (at the beginning of February 2008).

Member States	Implementation through a legislative	Implementation through	Possibility to suspend tax collection / **legal**

	instrument / **legal reference**	administrative practice / **administrative reference**	**reference**
Austria		In preparation	YES section 212a and section 48 Bundesabgabenordnung (BAO) Federal Fiscal Procedure Act
Belgium		YES	YES Art 410 clause 3 of Belgian Income Tax Code 1992
Cyprus		YES Circular 2007/5 dated 15/02/2007	YES Income Tax Laws 2002-2006 Art. 3 & 45 Regulation Nr 87/2007 published in the Official Gazette No.4176 dated 23/02/2007.
Czech Republic		YES	Exceptionally
Denmark		YES Administrative decision (SKM 2005.2.TSS)	YES Art. 51 of the Tax Administration Act
Estonia		YES	YES Taxation Act §128(2) 5 and §146 (3)
Finland		YES	YES Art. 90 of the Tax Procedure Act
France		YES	YES Livre des procedures fiscales Art. L189A
Germany		YES	yes §361 paragraph 2 AO (General Tax Code)
Greece		YES	YES
Hungary	Art. 176/A. of Act XCII of 2003 on Tax Procedure	NO (in preparation)	YES para (6) of Art. 176/A. of Act XCII of 2003 on Tax Procedure
Italy		YES	YES Law nr.99 of 22 arch 1993
Ireland		YES	YES Part 41 of the Taxes

			Consolidation Act 1997[24]
Latvia		In preparation	YES
Lithuania		NO In preparation	YES Chapter 110 of the Law on Tax Administration No IX-2112
Luxembourg		YES	YES Loi générale des impôts 22/05/1931 § 251
Malta	YES Legal notice		YES Art. 41 of the Income Tax Management Act
Netherlands	YES Decree		YES Par. 3.1.8. of Decree No. IFZ 2001/295M
Poland		YES	YES art. 67a §1 pkt 2 Tax Ordinance
Portugal		YES	NO In 2008 a new legislative procedure will provide for suspension
Slovak Republic		YES	Exceptionally
Slovenia	?	NO In preparation	NO In preparation
Spain	YES (36/2006 Preamble)	YES	YES (l.36/2006 D.A.1ª)
Sweden		YES	YES Chapter17, paragraph 6 in the Tax Collection Act
United Kingdom		YES	YES

[24] As regards suspension of tax collection during cross-border dispute resolution procedures, where an assessment is made on a taxpayer in respect of any undercharge to tax, the taxpayer is entitled to enter an appeal against the assessment. The taxpayer is required to pay the tax that, in the taxpayer's opinion, is due and payable. The balance of the tax involved will be suspended pending determination of the appeal. In general, the competent authority will be prepared to allow an appeal to remain open while an alternative procedure for dispute resolution has a prospect of resolving the point at issue.

DRAFT REVISED CODE OF CONDUCT FOR THE EFFECTIVE IMPLEMENTATION OF THE CONVENTION ON THE ELIMINATION OF DOUBLE TAXATION IN CONNECTION WITH ADJUSTMENT OF PROFITS OF ASSOCIATED ENTREPRISES

THE COUNCIL OF THE EUROPEAN UNION AND THE REPRESENTATIVES OF THE GOVERNMENTS OF THE MEMBER STATES, MEETING WITHIN THE COUNCIL,

HAVING REGARD TO the Convention of 23 July 1990, on the elimination of double taxation in connection with the adjustment of profits of associated enterprises (the "Arbitration Convention"),

ACKNOWLEDGING the need both for Member States and taxpayers to have more detailed rules to implement efficiently the aforementioned Convention,

NOTING the Commission communication of on the reports on the interpretation of some provisions of the AC and penalties including a proposal for a revised Code of Conduct,

EMPHASISING that the Code of Conduct is a political commitment and does not affect the Member States' rights and obligations or the respective spheres of competence of the Member States and the Community resulting from the Treaty,

ACKNOWLEDGING that the implementation of this Code of Conduct should not hamper solutions at a more global level,

NOTING the conclusions of the report on penalties,

HEREBY ADOPT THE FOLLOWING REVISED CODE OF CONDUCT:

Without prejudice to the respective spheres of competence of the Member States and the Community, this revised Code of Conduct concerns the implementation of the Arbitration Convention and certain related issues of the mutual agreement procedure under double tax treaties between Member States.

1. Scope of the Arbitration Convention

1.1 EU triangular transfer pricing cases

a) For the purpose of this Code, a EU triangular case is a case where the two contracting Member States to a Mutual Agreement Procedure, presented under their Double Tax Treaties, cannot fully resolve any double taxation arising in a transfer pricing case when applying the arm's length principle because an associated enterprise situated in another Member State(s) and identified by both EU Competent Authorities (evidence based on the comparability analysis including a functional analysis and other factual elements) had a significant influence in contributing to a non arm's length result in a chain of relevant transactions or commercial / financial

relations and recognised as such by the taxpayer suffering the double taxation and requesting the Mutual Agreement Procedure.

b) The scope of the Arbitration Convention includes all EU transactions involved in triangular cases amongst Member States

1.2 Thin capitalization[25]

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

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[25] **Reservations on the scope of the AC: Thin Capitalization**

Bulgarian reservation: Bulgaria holds the view that profit adjustments arising from an adjustment to the price of a loan (i.e. the interest rate) fall within the scope of the Arbitration Convention. On the contrary, Bulgaria considers that the Arbitration Convention does not cover cases of profit adjustments based on adjustments to the amount of financing. In principle the grounds for such adjustments lay in the domestic legislation of MS. The operation of varying national rules and the absence of an internationally recognized arms' length set of guidelines to be applied to a business' capital structure, to a great extent challenge the arms' length character of profit adjustments based on adjustments to the amount of a loan.

Czech reservation: The Czech Republic shall not apply the mutual agreement procedure under the Arbitration Convention in case that is a subject to the anti-abuse rules under the domestic law.

Dutch reservation: The Netherlands endorses the view that an adjustment of the interest rate (pricing of the loan) which is based on national legislation based on the arm's length principle falls within the scope of the Arbitration Convention. Adjustments of the amount of the loan as well as adjustments of the deductibility of the interest based on a thin capitalization approach under the arm's length principle or adjustments based on anti-abuse legislation based on the arm's length principle are considered to fall outside the scope of the Arbitration Convention. The Netherlands will preserve its reservation until there is guidance from the OECD on how to apply the arm's length principle to thin capitalization of associated enterprises.

Hungarian reservation: Hungary considers only those cases fall within the scope of the AC where double taxation is due to the adjustment of the interest rate of the loan and the adjustment is based on the ALP.

Italian reservation: Italy considers that the Arbitration Convention may be invoked in case of double taxation due to a price adjustment of a financial transaction not in accordance with the arm's length principle. Conversely, it cannot be invoked to solve double taxation arising from adjustments to the amount of loans, or double taxation occurred because of the differences in domestic rules on the allowed amount of financing or on interest deductibility

Latvian reservation: Our understanding is that the Arbitration Convention cannot be invoked in case of double taxation arising as a result of application of general national legislation on adjustments of the amount of a loan or on deductibility of interest payments, that is not based on the arm's length principle provided for in Article 4 of the Arbitration Convention.

Therefore, Latvia considers that only adjustments of interest deductions performed under national legislation based on the arm's length principle are within the scope of the Arbitration Convention.

Polish reservation: Poland considers that procedure stipulated by Arbitration Convention may be applicable only in the case of interest adjustments. While adjustments concerning amount of a loan should not be covered by the Convention. In our opinion it is quite impossible to define how capital structure should look in practice in order to be in line with arm's length principle.

Portuguese reservation: Portuguese Tax Administration considers that the Arbitration Convention is applicable to the remuneration of the loan but profit adjustments arising from corrections to the amount of a loan between associated companies are considered to be outside the scope of the Arbitration Convention.

Slovakian reservation: We are of the opinion that an adjustment of the interest rate which is based on national legislation based on the arm's length principle should fall within the scope of the Arbitration Convention but the adjustments to profits arising as a result of the application of anti-abuse rules under domestic legislation should fall outside the scope of the Arbitration Convention

2. Admissibility of a case

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

3. Serious penalties

As Article 8.1 provides for flexibility as regards the refusal to give access to the Arbitration Convention due to the existence of a serious penalty and considering the practical experience acquired since 1995, Member States are recommended to clarify or revise their unilateral statements in Annex of the Arbitration Convention in order to better reflect that a serious penalty should only be applied in exceptional cases like fraud.

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

The date of the "first tax assessment notice or equivalent which results or is likely to result in double taxation within the meaning of Article 1, e.g. due to a transfer pricing adjustment"[26] is considered as the starting point for the three-year period.

As far as transfer pricing cases are concerned, Member States are recommended to apply this definition also to the determination of the three-year period as provided for in Article 25 (1) of the OECD Model Tax Convention on Income and on Capital and implemented in the double tax treaties between EU Member States.

5. The starting point of the two-year period (Article 7 (1) of the Arbitration Convention)

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

a) identification (such as name, address, tax identification number) of the enterprise of the Contracting State that presents its request and of the other parties to the relevant transactions;

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

c) identification of the tax periods concerned;

[26] The tax authority Member from Italy considers 'the date of the first tax assessment notice or equivalent reflecting a transfer pricing adjustment which results or is likely to result in double taxation within the meaning of Article 1' as the starting point of the three-year period, since the application of the existing Arbitration Convention should be limited to those cases where there is a transfer pricing 'adjustment'.

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

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

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

g) an undertaking that the enterprise shall respond as completely and quickly as possible to all reasonable and appropriate requests made by a Competent Authority and have documentation at the disposal of the Competent Authorities; and

h) any specific additional information requested by the Competent Authority within two months upon receipt of the taxpayer's request.

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

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

b) the date on which the Competent Authority receives the request and the minimum information as stated under point 5 (i).

6. Mutual agreement procedures under the Arbitration Convention

6.1 General provisions

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

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

c) Any appropriate means for reaching a mutual agreement as expeditiously as possible, including face-to-face meetings, will be considered; where appropriate, the enterprise will be invited to make a presentation to its Competent Authority.

d) Taking into account the provisions of this Code, a mutual agreement should be reached within two years of the date on which the case was first submitted to one of the Competent Authorities in accordance with point 5 (ii) of this Code. It is however recognised that in some given situation (e.g. imminent resolution of the case or particularly complex transactions, or triangular cases) it may be appropriate to apply Article. 7(4) (extending time limits) to agree a short extension.

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

6.2 EU triangular transfer pricing cases

a) One of the following approaches may be adopted by the Competent Authorities involved to resolve double taxation arising from an EU triangular cases under the Arbitration Convention.

1. Competent Authorities can decide to take a multilateral approach (immediate and full participation of all Competent Authorities concerned); or

2. Competent Authorities can decide to start up a bilateral procedure and should invite the other EU Competent Authority (ies) to participate as (an) observer(s) to the Mutual Agreement Procedure discussions. The two parties of the bilateral procedure being the Competent Authorities having identified (based on the comparability analysis including a functional analysis and other factual elements) the associated enterprise situated in another Member State that had a significant influence in contributing to a non arm's length results in the chain of relevant transactions or commercial / financial relations; or

3. Competent Authorities can decide to start up more than one bilateral procedure in parallel and should invite the respective other EU Competent Authority (ies) to participate as (an) observer(s) to the Mutual Agreement Procedure discussions.

Considering the pros and cons of the above approaches Member States are recommended to apply a multilateral procedure to resolve the double taxation. However this should always be agreed by all Competent Authorities based on the specific facts and circumstances of the case. If a multilateral approach is not possible and a two (or more) parallel bilateral procedure is adopted, all relevant Competent Authorities should be involved in the Mutual Agreement Procedure stage one discussions either as a Contracting State to the initial Arbitration Convention application or as (an) observer(s).

b) As soon as Contracting States Competent Authorities have agreed that the case under discussion is to be considered a EU triangular case they should immediately invite the other EU Competent Authority(ies) to take part in the proceedings and discussions as (an) observer(s) or as (an) active stakeholder(s) and decide together which is their favoured approach . To that extent all information should be shared with the other EU Competent Authority(ies) through for example Exchange of Information. The other Competent Authority(ies) should be invited to acknowledge the actual or possible involvement of "his" taxpayer.

c) The other EU Competent Authority(ies) could be invited as (an) observer(s) during the first stage of the Arbitration Convention procedure (Mutual Agreement Procedure). The status of observer may then shift to that of stakeholder(s) depending on the development of the discussions and evidence presented. If that other Competent Authority (ies) want(s) to participate in the proceedings of the second stage (arbitration), it (they) has (have) to become (a) stakeholder(s).

If the other EU Competent Authority (ies) remain(s) throughout as (a) party(ies) to the discussions as (an) observer(s) only, that shall not have any consequence on the application of the provisions of the Arbitration Convention (e.g. timing issues and procedural issues).

Attendance in the role of observer does not bind the observer(s) Competent Authority (ies) to the final outcome of the Arbitration Convention procedure.

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

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

6.3 Practical functioning and transparency

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

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

c) The confidentiality of information relating to any person that is protected under a bilateral tax convention or under the law of a Contracting State will be ensured.

d) The Competent Authority will acknowledge receipt of a taxpayer's request to initiate a mutual agreement procedure within one month from the receipt of the request and at the same time inform the Competent Authorities of the other Contracting States involved in the case attaching a copy of the taxpayer's request.

e) If the Competent Authority believes that the enterprise has not submitted the minimum information necessary for the initiation of a mutual agreement procedure as stated under point 5 (i), it will invite the enterprise within two months upon receipt of the request, to provide it with the specific additional information it needs.

f) Contracting States undertake that the Competent Authority will respond to the enterprise making the request in one of the following forms:

(i) if the Competent Authority does not believe that profits of the enterprise are included, or are likely to be included, in the profits of an enterprise of

another Contracting State, it will inform the enterprise of its doubts and invite it to make any further comments;

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

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

g) If a Competent Authority considers a case to be well founded, it should initiate a mutual agreement procedure by informing the Competent Authority of the other Contracting State(s) of its decision and attach a copy of the information as specified under point 5 (i) of this Code. At the same time it will inform the person invoking the Arbitration Convention that it has initiated the mutual agreement procedure. The Competent Authority initiating the mutual agreement procedure will also inform - on the basis of information available to it - the Competent Authority of the other Contracting State(s) and the person making the request whether the case was presented within the time limits provided for in Article 6 (1) of the Arbitration Convention and of the starting point for the two-year period of Article 7 (1) of the Arbitration Convention.

6.4 Exchange of position papers

a) Contracting 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 Authorities of the other Contracting States involved in the case setting out:

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

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

(iii) 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.

c) The position paper will be sent to the Competent Authorities of the other Contracting States 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 (i).

d) Contracting 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. 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 (i).

f) Contracting States will further undertake any appropriate steps to speed up all procedures wherever possible. In this respect, Contracting 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).

6.5 Double tax treaties between Member States

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

7. Proceedings during the second phase of the Arbitration Convention

7.1 List of independent persons

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

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

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

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

e) The aggregate list of all independent persons of standing will be published on the Council's web-site.

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

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

7.2 Establishment of the advisory commission

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

b) Competent Authorities should set up the advisory commission no later than 6 months following the expiration of the period mentioned in article 7 of the Arbitration Convention. Where one Competent Authority does not take the necessary actions another Competent Authority involved is entitled to take the initiative.

c) The advisory commission will normally consist of two independent persons of standing in addition to its Chairman and the representatives of the Competent Authorities. For triangular cases, where an advisory commission is to be set up under the multilateral approach, the Contracting States will have regard to the requirements of Article 11(2) of the Arbitration Convention, introducing as

necessary additional rules of procedure, to ensure that the advisory commission, inclusive of its Chairman, is able to adopt its opinion by a simple majority of its members**.**

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

e) The place where the advisory commission meets and the place where its opinion is to be delivered may be determined in advance by the Competent Authorities of the Contracting States concerned.

f) Contracting States will provide the advisory commission before its first meeting, with all relevant documentation and information and in particular all documents, reports, correspondence and conclusions used during the mutual agreement procedure.

7.3 Functioning of the advisory commission

a) A case is considered to be referred to the advisory commission on the date when the Chairman confirms that its members have received all relevant documentation and information as specified under point 7.2 f).

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

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

d) Whilst respecting the provisions of Article 10 of the Arbitration Convention, the advisory commission may request the Contracting States and in particular the Contracting State that issued the first tax assessment notice, i.e. final decision of the tax administration on the additional income, or equivalent which resulted or may result in double taxation within the meaning of Article 1, to appear before the advisory commission.

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

f) Unless the Competent Authorities of the Contracting States concerned agree otherwise:

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

ii) the fees of the independent persons of standing will be fixed at Euro 1000 per person per meeting day of the advisory commission, and the Chairman will receive a 10% higher fee than the other independent persons of standing.

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

7.4 Opinion of the advisory commission

Contracting States would expect the opinion to contain:

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

b) the request; the request contains:

- the names and addresses of the enterprises involved;
- the Competent Authorities involved;
- a description of the facts and circumstances of the dispute;
- a clear statement of what is claimed;

c) a short summary of the proceedings;

d) the arguments and methods on which the decision in the opinion is based;

e) the opinion;

f) the place where the opinion is delivered;

g) the date on which the opinion is delivered;

h) the signatures of the members of the advisory commission.

The decision of the Competent Authorities and the opinion of the advisory commission will be communicated as follows:

i) Once the decision has been taken, the Competent Authority to whom the case was presented will send a copy of the decision of the Competent Authorities and the opinion of the advisory commission to each of the enterprises involved.

ii) The Competent Authorities of the Contracting States can agree that the decision and the opinion may be published in full, they can also agree to publish the decision and the opinion without mentioning the names of the

enterprises involved and with deletion of any further details that might disclose the identity of the enterprises involved. In both cases, the enterprises' consent is required and prior to any publication the enterprises involved must have communicated in writing to the Competent Authority to whom the case was presented that they do not have objections to publication of the decision and the opinion.

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

8. Tax collection and interest charges during cross border dispute resolution procedures

a) Member States are recommended to take all necessary measures to ensure that the suspension of tax collection during cross-border dispute resolution procedures under the Arbitration Convention can be obtained by enterprises engaged in such procedures, under the same conditions as those engaged in a domestic appeals/litigation procedure although these measures may imply legislative changes in some Member States. It would be appropriate for Member States to extend these measures to the cross-border dispute resolution procedures under double tax treaties between Member States**.**

b) Considering that during Mutual Agreement Procedure negotiations a taxpayer should not be adversely affected by the existence of different approaches on interest charges and refunds during the time it takes to run and complete the Mutual Agreement Procedure process, Member States are recommended to apply one of the following approaches:

– Tax to be released for collection and repaid without attracting any interest, or

– Tax to be released for collection and repaid with interest, or

– Each case to be dealt with on its merits in terms of charging or repaying interest (possibly during the Mutual Agreement Procedure process).

9. Accession of new EU Member States to the Arbitration Convention

Member States will endeavour to sign and ratify the Accession Convention of new EU Member States to the Arbitration Convention, as soon as possible and in any event no later than two years after their accession to the EU.

10. Final provisions

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