



COMMISSION OF THE EUROPEAN COMMUNITIES

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**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 field of business taxation
from October 2002 to December 2003 and on a proposal for a Code of Conduct for the
effective implementation of the Arbitration Convention (90/436/EEC of 23 July 1990)**

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INTRODUCTION

1. BACKGROUND

1. The European Commission's Study "Company Taxation in the Internal Market"¹ examined whether the current application of company taxation in the Internal Market creates inefficiencies and prevents operators from exploiting its full benefits. It did so in response to the mandate given to the Commission by the Council of Ministers in July 1999 to investigate the impact of differentials in the effective level of corporate taxation in Member States on the location of economic activity and investment and the impact of tax provisions that constitute obstacles to cross-border economic activities in the Internal Market and remedies thereto.
2. This Study highlighted in detail (part III, chapter 5) the increasing importance of transfer pricing tax problems as an Internal Market issue. The obstacles and problems identified are varied in nature but all have become increasingly important in recent years and call for action. The deepening of the Internal Market and the growing number of new technologies and business structures at national and international level has aggravated these problems over the last few years. There is convincing evidence that applying transfer prices for tax purposes is complicated and often problematic in practice. A common feature of many of the specific individual problems is that closer co-operation between tax administrations and business could lead to solutions. The Study considers the improvement of co-ordination between Member States of major importance in the short term in order to reduce compliance costs and lessen the uncertainty relating to transfer pricing.
3. One of the possible methods of tackling the specific EU transfer pricing problems mentioned in the Study, and proposed by the Commission in its Communication "Towards an Internal Market without tax obstacles – A strategy for providing companies with a consolidated corporate tax base for their EU-wide activities"², was the establishment of a "EU Joint Transfer Pricing Forum" (Hereafter: JTPF).
4. Following the Council Conclusions of 11 March 2002 welcoming this initiative, the Commission established the JTPF. Its members consist of an expert of each Member State and 10 experts from business. Representatives from applicant countries and the OECD-Secretariat attend as observers. Details on the procedure followed for the selection of the Chairman and the JTPF Members are contained in Annex I of this Communication. The proceedings of the JTPF are available on the Commission's website.³

¹ "Company Taxation in the Internal Market" Commission staff working paper, SEC(2001) 1681 23.10.2001.

² "Communication from the Commission to the Council, the European Parliament and the Economic and Social Committee: Towards an Internal Market without tax obstacles – A strategy for providing companies with a consolidated corporate tax base for their EU-wide activities" COM(2001) 582 final, 23.10.2001.

³ http://europa.eu.int/comm/taxation_customs/taxation/company_tax/transfer_pricing.htm

2. ACTIVITIES OF THE EU JOINT TRANSFER PRICING FORUM FROM OCTOBER 2002 TO DECEMBER 2003

5. The JTPF met for the first time on 3 October 2002 and established a two-year work programme. An activity report of the JTPF, adopted by consensus and covering the first element of the work programme, is annexed to the present Communication (Annex III). The JTPF has so far mainly discussed the problems related to the application of the Arbitration Convention⁴. It has examined problems that have occurred in the last few years as a result of the fact that not all contracting states have ratified the Accession Convention of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden (Accession Convention) and the Protocol amending the original Convention (Prolongation Protocol). Furthermore, the JTPF has looked for clear definitions of the starting point of the three year (notification) and two-year (mutual agreement) periods enshrined in the first phase of the arbitration procedure established under the Arbitration Convention. It has also examined ways to improve the mutual agreement and arbitration phases and addressed issues such as the interaction of the mutual agreement and arbitration procedure with administrative and judicial appeals, the possibility of suspending tax collection during cross border dispute resolution procedures, the accession of EU Acceding States to the Arbitration Convention and the effect of interest charges and penalties. The activity report summarises the deliberations of the JTPF. It concludes by inviting the Commission to propose a Code of Conduct setting out detailed rules to ensure the effective implementation of the Arbitration Convention (Convention 90/436/EEC of 23 July 1990 on the elimination of double taxation in connection with the adjustment of profits of associated enterprises) and dealing with certain related issues of the mutual agreement procedures under double tax treaties between Member States. The report proposes that this Code could be adopted by the Council in the format of a Resolution.

3. COMMISSION CONCLUSIONS

6. Considering the aforementioned activity report of the JTPF, the Commission can only express its satisfaction with the work of the JTPF which has proved to be a constructive tool to tackle the challenges posed by transfer pricing policies in the EU.
7. The experts from the Member States and those from business have examined the different issues at stake in an open and constructive manner that has led to pragmatic non-legislative proposals and recommendations for solutions.
8. However, the Commission regrets that the JTPF had to spend much of its meeting time on issues linked to the fact that the Prolongation Protocol to the Arbitration Convention as well as the Accession Convention, signed in 1999 and 1995 respectively, have not yet been ratified by all Member States. Clearly this situation would not have arisen had the Council followed the original Commission proposal of adopting an instrument under Community law rather than a multilateral Convention.

⁴ Convention 90/436/EEC of 23 July 1990, on the elimination of double taxation in connection with the adjustment of profits of associated enterprises OJ L 255, 20.8.1990, p. 10-24.

9. The specific problem of the accession of the EU Member States to the Arbitration Convention (3.1 of the JTPF report) is of particular concern to the Commission. As demonstrated by the previous enlargement of the EU, the time that the future 25 EU Member States could take to ratify this instrument might seriously jeopardise its added value for the new EU Member States and for corporate business as a whole in that geographic area. Moreover the network of bilateral double tax treaties between the new EU Member States themselves and between those States and the current Member States is not complete, despite the efforts made to complete it. This sometimes makes it impossible for business to request a mutual agreement procedure so as to obtain relief from double taxation. The Commission therefore endorses fully the recommendation of the JTPF that the Member States should commit to ratification of an Accession Convention for the new EU Member States before the end of the first half of 2006. Moreover, this Accession Convention should contain a provision permitting immediate bilateral application between ratifying Member States. The Commission is also in favour of including in the Arbitration Convention itself a legal provision that would avoid a repeat of the time consuming ratification process after each EU enlargement e.g by providing for automatic accession or accession by unilateral declaration.
10. The Commission looks forward to the Forum's work on the remainder of the work programme adopted in 2002. In this context, the Commission would like to dispel misunderstandings that may have arisen concerning the Forum's mandate to "identify possible non-legislative improvements to ... practical problems". The objective of this element of the mandate was to avoid any prejudice to the respective competencies of the EU institutions and the Member States and thus it concerns Community legislation. This element of the mandate should not in any way be considered to preclude the JTPF from identifying practical improvements that could imply legislative changes in certain Member States. Since the JTPF is a purely consultative expert group, the decision on any potential legislative changes would in any event remain solely with the Member States concerned.
11. Taking into account the remaining and important outstanding issues of the JTPF's working programme adopted in 2002, the Commission intends to extend from June 2004 until the end of 2004 the initial period of two years foreseen for the activities of the JTPF. Taking into account the overall results and further issues for discussion identified and proposed by the JTPF, the Commission might decide on a further extension of the JTPF mandate for another period of two years.
12. Deliberations in the JTPF have highlighted the difficulties encountered in the implementation of the Arbitration Convention. The conclusions and recommendations proposed by the JTPF would resolve many of its shortcomings and the Commission is of the opinion that their practical implementation could lead to important progress in achieving a proper tool to remedy double taxation related to transfer pricing in the E.U. In view of these considerations and in function of the follow-up given to the present Commission proposal by the Council, the Commission will assess the need for proposing an instrument of Community law at a later stage.

13. As an intermediate solution however, the Commission fully supports the conclusions and recommendations contained in the first activity report of the JTPF, and it therefore invites the Council to adopt as soon as possible the proposal for a Code of Conduct on the effective implementation of Convention 90/436/EEC of 23 July 1990, on the elimination of double taxation in connection with the adjustment of profits of associated enterprises, as laid down in annex II of this Communication.

ANNEX I: ESTABLISHMENT OF THE JTPF

Selection of Chair

The Council conclusions of 11 March 2002 stated that the Chair of the JTPF should be an independent personality with long standing experience in the field of transfer pricing who should be appointed by the Commission in agreement with a Selection Board composed of high level representatives of the Council Presidency, the Commission and the UNICE Tax Committee.

This Selection Board was composed of Mr. José Maria VALLEJO CHAMORRO, Deputy Director General for International Tax Affairs, representing the Spanish Presidency, Mr. Jan van der BIJL, Chairman of the UNICE Fiscal Affairs Committee, and Mr. Michel AUJEAN, Director of the Directorate for Tax Policy of the Commission's Directorate-General for Taxation and the Customs Union. The selection board unanimously agreed on Mr. Bruno GIBERT, partner of CMS Bureau Francis Lefebvre, as Chairman of the JTPF

Selection of business experts

Following the publication of the call for applications of interest for the establishment of the JTPF in the OJ C 90 of 16 April 2002, the above selection board, referred to in paragraph 1.2.1 §6, met on 28 June 2002 to consider the list of selected applications for participation as business representatives. These members would act in their own capacity and for a renewable period of two years.

The Commission received 60 applications of which six were received after the deadline fixed in the call for applications.

Taking into account the criteria laid down in the call, (proven abilities and experience in the field of transfer pricing, proven knowledge and experience with EU Community legislation and internal market and taxation issues in particular) and the need for a balanced composition in terms of geographical origin, size of business and type of activity, the selection board decided to select the following applicants (in alphabetical order:

Mr. Philip GILLET
Mr. Eduardo GRACIA
Mr. Guy KERSCH
Dr. Klaus KROPPE
Prof. Guglielmo MAISTO
Dr. Ulrich MOEBUS
Mrs. Sylvie PUECH
Mr. Chris ROLFE
Mr. Theo SCHMIT
Prof. Dirk VAN STAPPEN

Appointment of experts from Member States' tax administrations

A letter inviting Member States to appoint an expert to participate in the JTPF was sent out on 10 June 2002. All addressees replied positively and appointed an expert.

Appointment of observers from EU Candidate Member States' tax administrations and OECD

A letter inviting EU candidate countries and OECD to appoint an observer to the JTPF was sent out on 10 June 2002. Except for Romania all addressees replied positively and appointed an observer.

ANNEX II: DRAFT CODE OF CONDUCT

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

HAVING REGARD TO Convention 90/436/EEC of 23 July 1990, on the elimination of double taxation in connection with the adjustment of profits of associated enterprises,

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

NOTING the Commission communication on the report on the activities of the EU Joint Transfer Pricing Forum in the field of business taxation of2004,

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 more global level,

HEREBY ADOPT THE FOLLOWING CODE OF CONDUCT:

Without prejudice to the respective spheres of competence of the Member States and the Community, this Code of Conduct concerns the implementation of Convention 90/436/EEC of 23 July 1990, on the elimination of double taxation in connection with the adjustment of profits of associated enterprises and certain related issues of the mutual agreement procedure under double tax treaties between Member States.

1. 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” 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.

2. 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 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;
 - 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 2 (i).

3. Mutual agreement procedures under the Arbitration Convention

3.1 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 2 (ii) of this Code.
- 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.

3.2 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 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 2 (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 of its decision and attach a copy of the information as specified under point 2 (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 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.

3.3 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 2 (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 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 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 2 (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).

3.4 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.

4. Proceedings during the second phase of the Arbitration Convention

4.1 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.

4.2 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.
- b) The advisory commission will normally consist of two independent persons of standing in addition to its Chairman and the representatives of the competent authorities.
- c) 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.
- d) 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.
- e) 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.

4.3 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 4.2 e).

- 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.

4.4 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 original copies, two to be sent to the competent authorities of the Contracting States 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 Secretariat General of the Council will request publication in the Official Journal of the European Union.

5. 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.

6. 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.

7. 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.

**ANNEX III: REPORT ON THE ACTIVITIES OF THE EU JOINT TRANSFER
PRICING FORUM IN THE FIELD OF BUSINESS TAXATION
OCTOBER 2002 – DECEMBER 2003**

**1. SUMMARY OF THE PROCEEDINGS OF THE MEETINGS OF THE EU JOINT TRANSFER
PRICING FORUM**

1.1. Inaugural meeting

The inaugural meeting of the EU Joint Transfer Pricing Forum (hereafter: JTPF) under the Chairmanship of *Mr. Bruno Gibert*, was held on 3 October 2002 and was mainly devoted to the discussion and adoption of internal rules of procedure, the election of Vice-Chairpersons for the Member States and business representatives and the discussion of an issues paper in order to establish a two-year working programme as suggested by the Council conclusions of 11 March 2002.

The internal rules of procedure were adopted by consensus. Business experts elected *Mr. Guy Kersch*, Director European Taxes of Pharmacia S.A., Luxemburg, and tax administration experts elected *Mrs. Montserrat Trape Viladomat*, Deputy Head of the International Taxation Unit from Spain as Vice-Chairpersons.

The draft two-year working program was discussed and with some minor amendments subsequently approved in the second meeting. The discussion showed that most Members were of the opinion that, in line with the Council conclusions of 11 March 2001, the highest priority should be attributed to practical solutions for a more uniform application of the Arbitration Convention in order to achieve more certainty as regards the procedural issues of the Arbitration Convention.⁵ That included both the first phase of the Arbitration Convention, i.e. the mutual agreement procedure, and the second phase, i.e. the arbitration itself.

The prevailing view of the Members of the JTPF was that the issue of documentation requirements for transfer prices should also be addressed by the JTPF.

It was also concluded that despite the demand for Advance Pricing Agreements (APA) from businesses, APAs faced quite some scepticism and criticism because of the shortcomings linked to them. The JTPF should therefore in the first place study other procedural means to enable taxpayers to achieve greater certainty and in particular the possibility of prior consultation between tax administrations before making adjustments. Both issues should be examined together but were attributed lower priority.

⁵ Convention 90/436/EEC of 23 July 1990 on the elimination of double taxation in connection with the adjustment of profits of associated enterprises, OJ L 255, 20.8.1990, p. 10-24.

1.2. Subsequent meetings

Following its agreed two-year working program, the JTPF examined during its meetings on 4 December 2002, 2 April 2003, 19 June 2003, 11 September 2003 and 11 December 2003 procedural issues related to the improvement of the practical functioning of the Arbitration Convention and certain related aspects of mutual agreement procedures (MAP) under double tax treaties between Member States. Discussions included the procedures to be followed during the interim period when not all Member States have ratified the 1999 Protocol extending the Convention (of which the application ended on 31 December 1999), the starting point of the three-year period, which is the deadline to present a case to a competent authority (Art. 6.1), the starting point of the two-year period foreseen for the mutual agreement procedure, i.e. the first phase provided for in the Arbitration Convention, (Art. 7.1), proceedings during this mutual agreement procedure (expediting the procedure, suspension of tax collection, interest charges and refunds, transparency and taxpayer participation), proceedings of the arbitration i.e. after the MAP the second phase of the Arbitration Convention (Art. 7 to 11) and the interaction of the mutual agreement procedure and arbitration with administrative and judicial appeals.(Art. 7.3)

In accordance with its two-year working program, the JTPF began to discuss in December 2003, the issue of transfer pricing documentation requirements.

1.3. Conclusions

The JTPF made substantial progress on the procedural issues related to the improvement of the practical functioning of the Arbitration Convention and related issues of the mutual agreement procedures under double tax treaties between Member States. Taking into account the potential benefit both for businesses and national tax administrations of a rapid implementation of its conclusions and recommendations, the JTPF decided to submit to the Commission an interim report on its activities so far.

Having regard to what follows, the JTPF was of the opinion that the best way to deal with its various conclusions and recommendations, was to propose a Code of Conduct for the implementation of Convention 90/436/EEC of 23 July 1990 on the elimination of double taxation in connection with the adjustment of profits of associated enterprises and on certain aspects of the mutual agreement procedures under Double Tax Treaties between Member States, as presented in Annex II to this report. The Commission could propose to the Council to adopt this Code of Conduct.

2. CONCLUSIONS AND RECOMMENDATIONS ON ISSUES RELATED TO THE ARBITRATION CONVENTION AND ON CERTAIN RELATED ISSUES OF MUTUAL AGREEMENT PROCEDURES UNDER DOUBLE TAX TREATIES BETWEEN MEMBER STATES

2.1. Proceedings during the interim period when not all contracting states have ratified the Accession Convention of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden (Accession Convention) and the Protocol amending the original Convention (Prolongation Protocol)

In spite of the signature of the relevant instruments on 25 May 1999 and 21 December 1995 respectively, so far, Italy and Portugal still have not ratified the Prolongation Protocol and Greece has not ratified the Accession Convention.

The Arbitration Convention has therefore not been in force since 1 January 2000. Associated companies are thus unable to rely on this instrument to avoid or remedy double taxation.

The JTPF examined the different practical situations and problems which can occur during this interim period and the possible consequences on the implementation of the Arbitration Convention when it re-enters into force.

2.1.1. Procedure in cases where a request has been made by a taxpayer before 1 January 2000

All Member States except *Denmark* will complete cases, which have been initiated under the Arbitration Convention prior to 1 January 2000, according to the rules of the Arbitration Convention. *Denmark*, however, continues MAP procedures under the pertinent double tax treaty. Two other Member States also consider that the procedures under the Arbitration Convention are suspended while the Convention is not in force but have no cases that were submitted before 1 January 2000.

2.1.2. Procedure in cases where a request is made by a taxpayer after 1 January 2000

There is consensus that a taxpayer's request to invoke the Arbitration Convention is in principle valid under the Prolongation Protocol. This means that an enterprise may present a case to a competent authority but that in practice there is no time limit for the MAP nor for initiating the arbitration phase.

The multitude of possible positions as regards the implementation of the Arbitration Convention during the interim period, including both the MAP and arbitration phase, reflected in Annex I to this report, highlights the legal uncertainty for companies to make use of the Arbitration Convention and in particular to see the arbitration phase applied.

All Member States, however, initiate a MAP either under the rules of the Arbitration Convention (if the other Member State agrees, see Annex I) or under the double tax treaty with the other Member State.

The majority of Members supports the idea that time spent on a MAP under a double tax treaty should be subtracted from the 2-year period foreseen in Article 7 (1) of the Arbitration Convention once the competent authorities initiate or continue the MAP under the Arbitration Convention.

A detailed overview of Member States positions can be found in Annex I to this report.

2.1.3. *Conclusions*

Although the JTPF found it useful to clarify the approaches of the different national tax authorities during the interim period, Members concluded, considering the transitional nature and the limited impact of the interim period, not to issue any proposals or recommendations having regard to this period.

2.2. **The starting point of the three- and two-year periods enshrined in the first phase of the Arbitration Convention**

2.2.1. *The starting point of the three-year period (deadline for submitting the request according to Article 6 (1) of the Arbitration Convention and Article 25 (1) of the OECD Model Tax Convention)*

Article 6 (1) of the Arbitration Convention provides that “...*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.*”

All Member States favour: “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”⁶ as the definition for the relevant action that triggers the starting point for the three-year period.

Member States’ definitions of this relevant event in the national language and in English are set out in the Annex to the draft Code of Conduct as presented in Annex II to this report.

The OECD Model Tax Convention on Income and Capital, which is the basis of all double tax treaties between EU Member States, contains in its Article 25 (1) a similar wording as the Arbitration Convention in its Article 6 (1) as regards the time limits to present a case of double taxation to the competent authorities.

As a matter of coherence and as far as transfer pricing cases are concerned, the JTPF therefore recommends Member States to apply the definition of the start of the three-year period, as specified in the Annex to the draft Code of Conduct, also to double tax treaties between Member States.

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

The Arbitration Convention does not provide in its Articles 6 (1) nor 7 (1) for any specific requirement, except the “presentation or submission of a case”, to start the two-year mutual agreement period. During this period, the relevant competent authorities should seek, under a MAP, an agreement to eliminate the double taxation without the need to initiate the arbitration phase of the Arbitration Convention.

⁶ 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”.

The JTPF has recognised that for “a case” to be considered as being “presented” or “submitted” and in order to provide a sufficient base to permit the competent authority to assess whether a complaint is “well-founded” (which is, as defined under Article 6.2 of the Arbitration Convention, a prior condition to initiate a mutual agreement procedure), a minimum of information, as defined in chapter 2 of the Code of Conduct, from the taxpayer is necessary. Besides this minimum information, the competent authority should be entitled, within two months from the receipt of the taxpayer's request, to ask for specific additional information before the two-year period starts. In case the competent authority does not issue such a request, the two-year period starts on the date as indicated in the Code of Conduct.

Without questioning the reliability and good faith of the information provided by a large majority of enterprises, the JTPF would also like to stress the need for taxpayers’ full co-operation to maximise the possibilities of reaching a mutual agreement as quickly as possible. This co-operation should not only be limited to the initiation of the procedure but should be ensured throughout the whole mutual agreement procedure. The JTPF is also of the opinion that this co-operation should not only be ensured by the enterprise that has presented the case, but also by the other parties to the relevant transactions, and that failure to do so could result in the procedure taking longer than would otherwise have been the case.

2.3. Proceedings during the first phase of the Arbitration Convention

Once the competent authorities have received all necessary information to enable a decision to be made as to whether the case appears to be well founded (see 2.2.2), the two-year period during which a mutual agreement between the competent authorities on the elimination of double taxation should be reached starts.

The JTPF is of the opinion that the proposal of a tentative time scale for MAPs, including the moment of exchange of position papers, could be useful to improve timing of the different actions, co-ordination and speeding-up of proceedings.

Furthermore it is agreed as a general principle, that all appropriate means for reaching a mutual agreement as expeditiously as possible should be considered and that standards of best practice as regards the use of language and information of the taxpayer should be set.

There is consensus that taxpayers should not be granted the right to be present at competent authority discussions. Most Members agree that on the request of a taxpayer, a presentation to its competent authority should be granted.

As far as transfer pricing cases are concerned, and without prejudice to arrangements on a more global level, the JTPF recommends Member States to apply the provisions of the Code of Conduct related to MAPs under the Arbitration Convention also to double tax treaties between Member States.

2.4. Proceedings during the second phase of the Arbitration Convention: establishment and functioning of the advisory commission

The JTPF concluded that Articles 7, 9, 10, 11 and 12 of the Arbitration Convention, which relate to the functioning of the arbitration procedure (the second phase of the Convention), are not sufficiently detailed to guarantee a smooth functioning of this procedure.

According to information provided by the Council's Secretariat General, the JTPF established that in September 2003, five Contracting States (Greece, Finland, Ireland, Portugal and Sweden) have so far not nominated their independent persons of standing, eligible to become a Member of the advisory commission as referred to in Article 7 (1) of the Convention. Other Contracting States' nomination lists date from shortly after the adoption of the Convention in 1990 which puts into question their current value.

There are no detailed rules on the practical organisation of the arbitration phase, e.g. which competent authority takes the initiative to establish the advisory commission, where does the advisory commission meet, who provides the facilities for a secretariat, when is a case considered as being referred to the advisory commission, what is the level of fees of the Members and Chairman, what will be the content of the opinion and what are the conditions for its publication, etc.

Based on the work already undertaken by the Council working group on financial questions in 1996/1997 and the recent experience of certain Contracting States, the JTPF agreed by consensus on a *modus operandi* for the arbitration phase, as reflected in chapter 4 of the draft Code of Conduct presented in Annex II to this report.

2.5. Interaction of the mutual agreement and arbitration procedure with administrative and judicial appeals

The JTPF also examined the links between both types of procedures as reflected in the Article 7 of the Arbitration Convention.

A first point of concern was the provision of Article 7 (1) second subparagraph which provides that "*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 judgement of the final court of appeal was given*".

Business experts were of the view that the independence of the two remedies is very limited insofar as – in the event that the domestic judicial remedy is activated – the most important phase of the Arbitration Convention (the setting up of the advisory commission) may be pursued only after the domestic judicial remedy has been exhausted and the two-year mutual agreement period has elapsed. Moreover, some national tax authorities do not seem to make a distinction between administrative and judicial appeal, only the latter being determined in the aforementioned Article 7 (1) as being a reason to defer the start of the two-year period. This might create a significant drawback to the operation and effectiveness of the Arbitration Convention since it can make the total duration of the Arbitration Convention proceedings equal to: (i) the duration of the domestic administrative/judicial proceedings ending with a final judicial judgement; (ii) plus two years; (iii) plus the six months available to the advisory commission to deliver its opinion.

A similar concern was expressed by business as regards the application of Article 7 (3) of the Arbitration Convention which stipulates that "*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”. Although France and the United Kingdom are the only Contracting States that made a formal declaration that this provision applies in their countries, a survey demonstrated that a large majority of the Contracting States (and EU Acceding Countries) apply/would apply the same rules in practice. In this respect it needs to be noted that Art 7 (3) of the Arbitration Convention is self-executing and does not specifically require a formal declaration to be applicable.

Business members claimed that the aforementioned provision in many cases lead taxpayers to withdraw their domestic judicial remedies. Considering the potential of the Arbitration Convention to eliminate double taxation, this should not necessarily create disadvantages to the taxpayer. However, the choice of the enterprises to opt for cross-border dispute resolution procedures instead of domestic judicial remedies can have an important financial impact as discussed under 2.6 hereafter.

Considering the complexity of the issue, the JTPF decided to limit its recommendations to the suspension of tax collection during cross-border dispute resolution procedures discussed hereafter.

2.6. Suspension of tax collection during cross-border dispute resolution procedures

The JTPF examined the existing rules in Member States and Acceding Countries in relation to the suspension of tax collection during administrative and judicial appeals/litigation. In almost all countries, the suspension of tax collection is regulated at legal level in so far as domestic procedures are concerned. These rules differ however widely as regards prior conditions, application, duration, amount of suspension etc.

When it comes to rules in relation to cross-border dispute resolution procedures, specific legal or administrative provisions exist only in few countries. However, a significant number of tax administrations can suspend the collection of taxes on a discretionary basis in order to avoid double payment even if specific provisions for suspension during mutual agreement or arbitration procedures do not exist.

The absence of specific or general rules enabling the suspension of tax collection during cross-border dispute resolution, at least under the same conditions as those applicable for domestic appeal/litigation, creates an additional financial burden for companies facing double taxation at Community level. In combination with the provisions of Article 7 of the Arbitration Convention on the interaction between administrative/judicial appeal and cross-border dispute resolution procedures as discussed under 2.5, this is regarded by the business Members of the JTPF and most tax authority Members as an impediment for taxpayers to request the application of the Arbitration Convention or mutual agreement procedures under double tax treaties between Member States.

2.7. The accession of EU Acceding States to the Arbitration Convention

With the accession to the EU of Austria, Finland and Sweden, a new Convention allowing these new Member States to accede to the Arbitration Convention, was signed on 21 December 1995. However since one Member States still has not ratified this Accession Convention (see 2.1), the Arbitration Convention has not fully entered into force with the Member States which joined the EU in 1995

In order to avoid another lengthy process during which the Arbitration Convention would not be applicable throughout the whole (enlarged) EU, the JTPF examined ways to speed up the entry into force of the Arbitration Convention in the new EU Member States following the forthcoming enlargement of the EU in May 2004. In this respect, the possibilities of “provisional application” (application of Article 25 of the UN Vienna Convention on the Law of Treaties) or “entry into force upon signature” (Article 24 (1) of the aforementioned Vienna Convention) were envisaged. However since both possible solutions would require, in a majority of both current and future Member States, ratification by national parliament they would not really speed up the process.

Regrettably there seems to be no legal means to speed up the entry into force of the Arbitration Convention by the Acceding States. The JTPF has agreed therefore by consensus to recommend Member States to commit to ratify the accession treaties to the Arbitration Convention not later than two years⁷ after the accession of new EU Member States. This recommendation is also contained in the proposed Code of Conduct.

2.8. Conclusions

In view of paragraphs 2.1 to 2.7 of this chapter, the JTPF agreed by consensus to invite the Commission to propose to the Council the adoption of a Code of Conduct for the implementation of Convention 90/436/EEC of 23 July 1990, on the elimination of double taxation in connection with the adjustment of profits of associated enterprises, and on certain related issues of the mutual agreement procedures under double tax treaties between Member States, as presented in Annex II to this report.

3. OTHER ISSUES EXAMINED BY THE JTPF IN RELATION TO DOUBLE TAXATION RESULTING FROM TRANSFER PRICING ADJUSTMENTS

3.1. Interest charges for back taxes and interest on tax refunds

Most Member States and Acceding States have specific provisions concerning interest charges in relation to additional back taxes for previous years and interest on tax refunds. The interest rates are contained in civil/commercial law or specific tax law and are, with some exceptions, regularly being revised based on different criteria. Most countries apply flat interest rates.

Starting points for the calculation of the interest (both on additional back taxes and tax refunds) vary widely between countries but seem coherent at national level. Tax authorities which allow the deduction of interest payments on additional back taxes as business expenses also consider interest received on tax refunds as taxable income. For a majority of national tax administrations, however, interest is treated as being tax neutral (no deduction/no taxation).

⁷

The tax authority Member from the UK is in favour of deleting the reference to the two-year period since Ministers sitting in the Council may not be in a position to deliver such commitment if it depends on action by their legislature and procedures could be completed in significantly less than two years and it could be unhelpful to suggest that two years might be an acceptable norm.

A more important finding in an EU context concerns corresponding adjustments resulting from cross-border dispute resolution procedures (MAP or arbitration). None of the countries, except for the Netherlands, provides for the possibility to agree in a MAP for corresponding interest to be paid to the company on its overpaid taxes, having regard to the interest charges on additional back taxes in the other Contracting State (and vice versa) so as to balance the interest paid and received by the company concerned.

Whereas the Arbitration Convention and double tax treaties between Member states aim to eliminate double taxation, they do not provide for a balance of interest paid on back taxes and interest received on tax refunds.

JTPF business members made a proposal on the suspension of the accrual of interest for late payment in mutual agreement and arbitration procedures under the Arbitration Convention.

Considering, however, the complexity of the issue, the JTPF decided to defer more in-depth discussions on this to a later stage.

3.2. Penalties

A specific penalty regime in relation to transfer pricing adjustments exists in only a few countries. In all other countries, the general penalty regime applies. The criminal nature of those penalties depends in most cases on the circumstances, except in one country, where transfer pricing penalties are always considered to be of a criminal nature. So-called “monetary no-fault” penalties do not seem to be common practice in Member States nor Acceding States. The rules for interpretation and specification of the amount of penalties are somewhat mixed; some countries regulate these issues in detail whereas other countries leave the application of general penalty principles to the discretion of the tax authorities. However, most countries provide for appeal procedures. None of the tax authorities allow the deduction of penalty payments as business expenses.

Again, considering the complexity of the issue and the potential impact on domestic legislation, the JTPF decided to defer more in-depth discussions on this to a later stage.

4. CONCLUSIONS

The JTPF will continue its activities in 2004 on the basis of its agreed two-year working programme.

In accordance with the Council conclusions of 11 March 2002, the JTPF invites the Commission to transmit this activity report to the Council with a view to appropriate follow-up action.

ANNEX I: MEMBER STATES' POSITION DURING THE INTERIM PERIOD

ANNEX I				
Member States' positions during the interim period (request filed after 1 January 2000)				
Arbitration Convention				
Mutual Agreement Procedure (first phase)		Arbitration Procedure (second phase)		
Accept request and continue under AC if other MS agrees	Accept request but continue under DTA	AC suspended so only taken up when it re-enters into force	Continue procedure if other MS agrees **	
Austria		X*		X
Belgium		X		X
Denmark		X*		X
Finland		X		X
France		X		X
Germany	X			X
Greece	X			X
Ireland	X			X
Italy		X*		X
Luxembourg	X			X
Netherlands	X			X
Portugal		X		X
Spain	X			X
Sweden		X		X
UK	X			X
* Only if specifically requested by the taxpayer				
** If the other Member State does not agree, those Member States will - with the taxpayer's consent - continue the MAP under the double taxation agreement with the other Member State				

ANNEX II: DRAFT CODE OF CONDUCT

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

HAVING REGARD TO Convention 90/436/EEC of 23 July 1990, on the elimination of double taxation in connection with the adjustment of profits of associated enterprises,

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

NOTING the Commission communication on the report on the activities of the EU Joint Transfer Pricing Forum in the field of business taxation of2004,

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 more global level,

HEREBY ADOPT THE FOLLOWING CODE OF CONDUCT:

Without prejudice to the respective spheres of competence of the Member States and the Community, this Code of Conduct concerns the implementation of Convention 90/436/EEC of 23 July 1990, on the elimination of double taxation in connection with the adjustment of profits of associated enterprises and certain related issues of the mutual agreement procedure under double tax treaties between Member States.

1. 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”⁸ is considered as the starting point for the three-year period.

Member States’ definitions of the relevant event in the national language and in English are set out in the Annex to this Code

As far as transfer pricing cases are concerned, Member States are recommended to apply these definitions 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.

⁸

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”.

2. 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 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;
 - 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 2 (i).

3. Mutual agreement procedures under the Arbitration Convention

3.1 General provisions

- a) The arm's length principle will be applied, as promulgated 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 2 (ii) of this Code.
- 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.

3.2 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 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 2 (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 of its decision and attach a copy of the information as specified under point 2 (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 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.

3.3 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 2 (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 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 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 2 (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).

3.4 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.

4. Proceedings during the second phase of the Arbitration Convention

4.1 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.

4.2 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.
- b) The advisory commission will normally consist of two independent persons of standing in addition to its Chairman and the representatives of the competent authorities.
- c) 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.
- d) 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.
- e) 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.

4.3 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 4.2 e).

- 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.

4.4 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) If the competent authorities of the Contracting States concerned agree that the decision and the opinion may be published, they will only do so if both of the enterprises involved communicate 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. With the consent of the enterprises involved, the competent authorities of the Contracting States concerned 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.
- iii) The opinion of the advisory commission will be drafted in three original copies, two to be sent to the competent authorities of the Contracting States 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 Secretariat General of the Council will request publication in the Official Journal of the European Union.

5. 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.

6. 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.⁹

7. 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 will report to the Council and may propose a review of the provisions of the Code.

⁹ The tax authority Member from the UK tax authorities is in favour of deleting the reference to the two-year period since Ministers sitting in the Council may not be in a position to deliver such commitment if it depends on action by their legislature and procedures could be completed in significantly less than two years and it could be unhelpful to suggest that two years might be an acceptable norm.

ANNEX TO THE DRAFT CODE OF CONDUCT

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

Member State	<u>Implementation of the definition in national legislation</u>	<u>Member States' translation in EN of their implementation of the definition in national legislation</u>
Austria	Die Zustellung des Steuerbescheides [<i>der zu einer Doppelbesteuerung, z.B. aufgrund einer Verrechnungspreiskorrektur, führt</i>]	The date on which the taxpayer <u>receives</u> the tax assessment notice or equivalent [<i>that results in double taxation, e.g. due to a transfer pricing adjustment</i>]
Belgium	La date d' <u>envoi</u> de l'avertissement-extrait de rôle comportant l'imposition ou le supplément d'imposition /en NL. : de <u>verzendingsdatum</u> van het aanslagbiljet dat de aanslag of de aanvullende aanslag omvat	The date on which the notice of assessment is <u>sent</u> containing the assessment or the supplementary assessment
Denmark	<p>Såfremt skattemyndighederne agter at foretage en skatteansættelse på et andet grundlag end det, der er selvangivet, skal den skattepligtige underrettes skriftlig herom. Det skal samtidig underrettes om, at skattemyndighederne har en frist på mindst 15 dage regnet fra skrivelsens datering, til at fremkomme med en udtalelse imod den forelåede ændring af skatteansættelsen, jf. Skattestyrelseslovens §§ 3, stk. 4 og 12A. Har den skattepligtige udtalt sig inden fristens udløb, skal skattemyndighederne give skriftlig underretning om skatteansættelsen (kendelse).</p> <p>I Danmark vil den første endelige underretning fra skattemyndighederne om armslængde reguleringen blive givet ved modtagelsen af kendelsen, hvorfor treårsfristen i henhold til Voldgiftskonventionens art. 6.1 begynder at løbe fra dette tidspunkt.</p>	<p>The date on which the taxpayer <u>receives</u> the final assessment from the tax authorities</p> <p><i>[If the tax authorities intend to make an assessment not in accordance with a tax return, a notice specifying the amendment and the reason for it must be sent to the taxpayer. The taxpayer must be given a period of at least 15 days from the date of the notice to submit its comments on the amendment. Hereafter the tax authorities send the final assessment to the taxpayer.]</i></p>

Member State	<u>Implementation of the definition in national legislation</u>	<u>Member States' translation in EN of their implementation of the definition in national legislation</u>
Finland	<p>Se päivä, jona verovelvollinen on saanut tiedon verotuspäätöksestä tai vastaavasta toimenpiteestä, jolla siirtohinnoittelua on oikaistu. (Suomessa kysymyksessä voi olla säännönmukainen verotus, oikaisuvaatimuksen johdosta annettu päätös tai jälkiverotuspäätös.)</p> <p>på svenska:</p> <p>Dagen då den skattskyldige fått kännedom om skattebeslutet eller motsvarande åtgärd, genom vilken den interna prissättningen har korrigerats. (I Finland: ordinarie beskattning, beslut om skatterättelse eller beslut om efterbeskattning)</p>	<p>The date on which the taxpayer <u>receives</u> the tax assessment notice or equivalent [<i>that reflects the transfer pricing adjustment</i>]</p> <p>(<i>In Finland: tax decision, notice of tax adjustment or notice of re-assessment</i>)</p>
France	<ul style="list-style-type: none"> • La date de réception de la notification de redressements en cas de procédure contradictoire, • La date de réception de la notification des bases ou éléments d'imposition en cas de procédure d'office 	<p>The date of <u>receipt</u> of the notification of adjustments or the notification of basis of elements of assessments in case of estimated assessment</p>
Germany	<p>Die <u>Bekanntgabe</u> des ersten Bescheides, der zu einer Doppelbesteuerung führt</p>	<p>The date on which the taxpayer <u>receives</u> the first tax assessment notice or equivalent that results in double taxation</p>
Greece	<p>από την ημερομηνία επίδοσης του φύλλου ελέγχου</p>	<p>From the date of <u>service</u> (receipt) of the tax assessment notice</p>
Ireland	<p>The date of the <u>issue</u> to the taxpayer of a notice of an assessment, or of an amended assessment [<i>reflecting the determination by an inspector of taxes of a transfer pricing issue</i>]</p>	

Member State	<u>Implementation of the definition in national legislation</u>	<u>Member States' translation in EN of their implementation of the definition in national legislation</u>
Italy¹⁰	<p>"Avviso di accertamento"</p> <p>Per avviso di accertamento si intende l'atto scritto con il quale l'Amministrazione fiscale comunica al contribuente di aver accertato un reddito imponibile maggiore del reddito dichiarato oppure un reddito imponibile non dichiarato.</p>	<p>The date on which the taxpayer <u>receives</u> the notice of assessment that reflects the transfer pricing adjustment</p> <p>[«Avviso d'accertamento» means a formal written act through which the tax administration notifies the taxpayer to have assessed taxable income that resulted to be higher than the declared income or that was not declared at all.]</p>
Member State	<u>Implementation of the definition in national legislation</u>	<u>Member States' translation in EN of their implementation of the definition in national legislation</u>
Luxembourg	<p>« Bulletin », effet: le troisième jour ouvrable qui suit la remise de l'envoi à la poste</p> <p>Das Datum des dritten Arbeitstages nach <u>Absendung</u> des Bescheids</p> <p>[Les différents bulletins (bulletin d'impôt, bulletin de fixation, bulletin d'établissement séparé, bulletin provisoire, définitif, rectificatif.....) émis par l'administration des contributions du Luxembourg peuvent être désignés dans le contexte de la convention d'arbitrage par le mot « bulletin », en anglais « assessment », en allemand « Bescheid ».]</p>	<p>The date of the third working day following the <u>sending</u> of the assessment</p>
Netherlands	<p>Navorderingsaanslag, of primaire aanslag indien de verrekenprijscorrectie hierin is begrepen"</p>	<p>The date of the tax re-assessment notice, or original assessment [<i>if it includes the transfer pricing adjustment</i>]</p>

¹⁰ The definition does not apply to requests according to Article 25 (1) of the OECD Model Tax Convention, as the relevant "action" triggering the starting point of the three-year period could be other than a transfer pricing adjustment.

Portugal	Data da notificação legal do acto de liquidação efectuado pela Administração Fiscal ou data da liquidação efectuada pelo contribuinte, quando incluir o ajustamento do lucro tributável que origine ou seja susceptível de originar uma dupla tributação. Constitui notificação o recebimento pelo contribuinte de cópia do assento do acto da liquidação	Date of legal notification of the assessment or re-assessment act made by the tax administration or the date of the self-assessment, if it includes the taxable profit adjustment which results or is likely to result in double taxation Notification means the receipt by the taxpayer of the tax assessment or re-assessment notice
Spain	La fecha de la recepcion de la notificacion del acto de liquidación	The date on which the taxpayer <u>receives</u> the tax assessment notice or equivalent [<i>that reflects the transfer pricing adjustment</i>]
Member State	<u>Implementation of the definition in national legislation</u>	<u>Member States' translation in EN of their implementation of the definition in national legislation</u>
Sweden	“Grundläggande beslut om årlig taxering” “Omprövningsbeslut” “Eftertaxering”	The date of <u>sending</u> of: <ul style="list-style-type: none"> • the basic decision on the annual taxation; • the re-assessment decision; or • the additional assessment. [<i>In Sweden the relevant decision would be the first decision of the tax authorities that results or is likely to result in double taxation, e.g. due to a transfer pricing adjustment</i>]
United Kingdom	Whichever is the more appropriate of the date of <u>issue</u> of: <ul style="list-style-type: none"> • a statutory notice required to conclude an assessment and related appeal procedures for the period in question; or • a letter of acceptance by an officer of the Board to settlement terms for the period in question 	

Acceding EU Countries

Country	<u>Implementation of the definition in national legislation</u>	<u>Member States' translation in EN of their implementation of the definition in national legislation</u>
Czech Republic	Doručení prvního platebního výměru nebo jiného rozhodnutí, které vede ke dvojímu zdanění.	The date on which the taxpayer <u>receives</u> the first tax assessment notice or equivalent that results in double taxation
Malta	Id-data tan-notifika ta' l-istima.	The date of the <u>service</u> (receipt) of the notice of assessment [<i>reflecting the transfer pricing adjustment</i>]
Poland	Dzień, w którym podatnik otrzyma decyzję o wymiarze podatku powodującą powstanie podwójnego opodatkowania	The date on which the taxpayer <u>receives</u> the tax assessment notice or equivalent that results in double taxation
Slovakia	Doručenie protokolu o daňovej kontrole sa považuje za úkon smerujúci na vyrubenie dane."	The delivery (<u>receipt</u>) of the record (protocol) from the tax inspection is referred as the action resulting in the tax assessment.