

Code of conduct for the effective implementation of the Convention on the elimination of double taxation in connection with the adjustment of profits of associated enterprises

(2006/C 176/02)

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

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

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

NOTING the Commission communication of 23 April 2004 on the report on the activities of the EU Joint Transfer Pricing Forum in the field of business taxation including a proposal for a Code of Conduct,

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

ACKNOWLEDGING that the implementation of this Code of Conduct should not hamper solutions at 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 the Arbitration Convention 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' ⁽¹⁾ is considered as the starting point for the three-year period.

⁽¹⁾ 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'.

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).
- 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.

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.
- 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.

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.
- 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 EUR 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 Commission for archiving. If there is agreement on the publication of the opinion, the latter will be rendered public in the original language(s) on the website of the Commission.

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, accept or approve 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.