Article

Improving the Arbitration Procedure under the EU Arbitration Convention (1)

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This article analyses the functioning of the arbitration procedure under the EU Arbitration Convention and whether improvements to this procedure are necessary and possible. The article thereby takes into account previous improvements to the arbitration procedure, as implemented by the (revised) Code of Conduct on the effective implementation of the EU Arbitration Convention, as well as current discussions within the EU Joint Transfer Pricing Forum relating hereto. Part I of this article analyses the establishment of the advisory commission and the process of appointment of its members, as well as the secrecy obligation and costs of the procedure. Part II will analyse in more detail the functioning of the advisory commission and the content of the opinion to be rendered. Each part ends with a conclusion.

1 INTRODUCTION

1.1 History EU Arbitration Convention

On 23 July 1990, EU Member States signed the Convention on the elimination of double taxation in connection with the adjustment of profits of associated enterprises (‘EU Arbitration Convention’).\(^1\) After ratification by each EU Member State, the EU Arbitration Convention entered into force for an initial five-year term ending on 31 December 1999. On 25 May 1999, EU Member States agreed on a protocol to prolong the convention’s running period with another five-year term, which is per end of each term automatically renewed for another five years, unless an EU Member State objects thereto. After ratification of the protocol, the EU Arbitration Convention re-entered into force on 1 November 2004 and has remained into force ever since.

1.2 Improvements to the EU Arbitration Convention

1.2.1 Period 2001–2010

On 23 October 2001, the European Commission issued a study relating to company taxation in the Internal Market.\(^2\) This study amongst others discussed the functioning of the EU Arbitration Convention.\(^3\) In its subsequent tax strategy, the European Commission suggested establishing a joint forum on transfer pricing, consisting of both EU Member States’ and business’ representatives, which should inter alia discuss improvements to the EU Arbitration Convention’s functioning. This EU Joint Transfer Pricing Forum (‘EU JTPF’) was established in July 2002.\(^4\) In the period 2002–2004, the EU JTPF examined measures to improve the convention’s functioning, which led to the development of a code of conduct.\(^5\) The European Commission subsequently proposed this code of conduct to the Council of the European Union (‘Council’). On 28 July 2006, the Council and EU Member States’ meeting within the Council formally adopted this code for the effective implementation of the EU Arbitration Convention (‘Code of Conduct’).\(^6\) A

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revised version was adopted on 22 December 2009.\textsuperscript{7} The Code of Conduct is, however, only a political commitment of EU Member States and it is up to each EU Member State to decide on its implementation (e.g., in its domestic legislation or administrative practice).\textsuperscript{8}

1.2.2 Period 2011–2014

As part of its continuing monitoring function, the EU JTPF included in its 2011–2015 work programme the examination of possible improvements of EU Arbitration Convention, including the arbitration procedure.\textsuperscript{9} These improvements may result in a revision of the Code of Conduct, for which the EU JTPF is currently preparing a proposal.\textsuperscript{10}

In this respect, the following issues were taken into account:

(a) Experiences with arbitration under the EU Arbitration Convention;
(b) Arbitration clauses included in double tax conventions between EU Member States; and
(c) Possible amendment of the current arbitration procedure in a so-called baseball arbitration procedure (or last-best offer approach).

With respect to ad (a), the EU JTPF invited persons that acted as independent members of an advisory commission under the EU Arbitration Convention so as to share their experiences as regards the functioning of the arbitration procedure.\textsuperscript{11} During the EU JTPF’s thirty-seventh meeting, the written replies of these persons were discussed and also two persons gave a short presentation about their experiences.\textsuperscript{12} Ad (b) and (c) are currently discussed or will be discussed in the future by the EU JTPF.\textsuperscript{13} In respect of option (c), baseball-arbitration is provided in the arbitration procedure incorporated in the OECD Model Convention and in the double tax conventions of the United States with inter alia Belgium, Canada, France, Germany, Spain and Switzerland.\textsuperscript{14} Under baseball arbitration, the arbitration panel decides on the basis of the proposals submitted by the disputing parties and does not itself prepare a solution. It is yet unknown what the EU JTPF will decide on this issue. It is submitted that such change is not easily performed and also not desirable in light of the EU Arbitration Convention’s principal objective, which is to eliminate double taxation arising from transfer pricing-related adjustments.\textsuperscript{15} The dispute in question is about what constitutes the correct application of the arm’s length principle in a specific case. In that regard, the advisory commission’s task is to provide for an opinion how the arm’s length principle is best approximated. Changing the instrument to baseball-arbitration would thus not adhere with the convention’s principal objective and for that reason, such change is not desirable. As the EU JTPF has not yet decided hereon, this issue is not further discussed in this article.

Apart from the work performed by the EU JTPF, the European Commission also renewed its interest for dispute settlement mechanisms in relation to taxation and the Internal Market. In a 2011 communication, the European Commission concluded that within the EU taxpayers still suffer from double taxation, whereby the existing dispute resolution mechanisms (e.g., the mutual agreement procedure under double tax conventions and the EU Arbitration Convention) are insufficient to eliminate this double taxation due to their non-binding nature respectively its limited scope.\textsuperscript{16} Because of the lack of an overall binding dispute resolution procedure within the EU, the European Commission announced in this communication that it envisages introducing such mechanism (including arbitration) on an EU-wide basis. During the EU JTPF’s thirty-ninth and fortieth meeting, the European Commission reported that it is currently working on an impact assessment on whether a

\textsuperscript{7} Revised 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 (2009/C 322/01), 30 Dec. 2009.

\textsuperscript{8} In this regard also, E. Sporken & P. Besten den, EU Council Adopts the Revised Code of Conduct for the Effective Implementation of the EU Arbitration Convention, International Transfer Pricing Journal May/June 2010, p. 213.

\textsuperscript{9} JTPF work programme 2011–2015 (JTPF/016/2011/EN), June 2011. EU JTPF’s monitoring function is described in this work program as: ‘monitoring will be conducted with the aim of establishing to what extent the previous works of the JTPF are implemented, to evaluate their effectiveness and to consider how improvements might be made.’ See also Monitoring overview and proposals (JTPF/018/2012/EN), November 2012, under A.

\textsuperscript{10} Draft report on improving the functioning of the Arbitration Convention (JTPF/004/2014/EN), June 2014 and Summary record of the fortieth meeting of the EU Joint Transfer Pricing Forum (JTPF/009/2014/EN), July 2014, para. 4.

\textsuperscript{11} These persons are Mr John Avery Jones, Mr Gammie, Mr Calderón Carrero and Mr Lodin. See Improving the ‘second phase of the Arbitration Convention: summary of suggestions made by members of the advisory commission (JTPF/010/2013/EN), May 2013.

\textsuperscript{12} Summary record meeting of the thirty-seventh meeting of the EU Joint Transfer Pricing Forum (JTPF/014/2013/EN), August 2013, para. 6.

\textsuperscript{13} See JTPF/014/2013/EN, para. 6, under 6(i); Revised discussion paper on the improvement of the functioning of the Arbitration Convention (JTPF/011/REV2/2013/EN), February 2014, para. 50; Compilation of comments received on the revised discussion paper on the improvement of the functioning of the Arbitration Convention following the JTPF meeting on 5 Nov. (JTPF/001/2014/EN), February 2014, and Summary record of the thirty-ninth meeting of the EU Joint Transfer Pricing Forum (JTPF/003/2014), May 2014, para. 4.19-4.20.

\textsuperscript{14} See for a discussion on the double tax conventions: H. M. Pit, Arbitration under the OECD Model Convention: Follow-up in Double Tax Conventions: An Evaluation, Intertax 2014/6-7, para. 5.2. Baseball-arbitration under the OECD Model Convention is to be found in para. 3-4 Annex to the commentary on Art. 25 OECD Model Convention.

\textsuperscript{15} See also doc. JTPF/011/REV2/2013/EN, para. 30 and doc. JTPF/001/2014/EN, para. 1. sub 13.

\textsuperscript{16} Commission communication on double taxation in the Single Market (COM (2013) 712 final), 11 Nov. 2011, paras 5.4 and 6. See also Roadmap on initiatives to address double taxation within the EU including arbitration on mechanism for double taxation disputes (TAXUD/D1), October 2011.
2 GENERAL OVERVIEW EU ARBITRATION CONVENTION AND ARBITRATION PROCEDURE

2.1 The EU Arbitration Convention

The EU Arbitration Convention provides for a mechanism to settle tax disputes relating to transfer pricing adjustments. In a general sense, if the tax authorities of an EU Member State adjust the profits of a taxpayer in respect of its dealings with an associated enterprise resident in another EU Member State, the profit under review is included in the tax base of both the taxpayer and this associated enterprise, which causes double taxation. In that situation, the case has to be submitted to the mutual agreement procedure. EU Member States thereby have two years to reach a solution – that is the elimination of double taxation – to the case at hand. If not, the case is mandatorily referred to the arbitration procedure. Following this procedure, an advisory commission is established that has to render an opinion on how to eliminate double taxation (e.g., the correct application of the arm’s length principle) for the specific case under review. This opinion has to be rendered within six months of the date on which the case was referred to the commission. After the commission has rendered its opinion, EU Member States have another six-month term to decide on the elimination of double taxation. If they fail to agree on this basis for this analysis. The current discussions within the EU JTTPF on improving the arbitration procedure are taken into account as well. The article is thereby split into two parts. The first part discusses the working of the EU Arbitration Convention and its arbitration procedure in general, followed by an analysis of the establishment of the arbitration commission, the appointment of its members, its secrecy obligation and the costs of the procedure. The second part of the article is discussed in the following issue of EC Tax Review and further analyses the functioning of the arbitration commission. This concerns several procedural aspects, such as the place of meeting, language to be used, etc. Further, the process for adoption of the opinion, the content of this opinion and the final decision phase are analysed in detail. Each part ends with a conclusion.

1.3 Outlook of this Article

This article analyses the functioning of the arbitration procedure under the EU Arbitration Convention and whether improvements to this procedure are possible. The relevant provisions included in the EU Arbitration Convention and the Code of Conduct are used as the basis for this analysis. The current discussions within the EU JTTPF on improving the arbitration procedure are taken into account as well. The article is thereby split into two parts. The first part discusses the working of the EU Arbitration Convention and its arbitration procedure in general, followed by an analysis of the establishment of the arbitration commission, the appointment of its members, its secrecy obligation and the costs of the procedure. The second part of the article is discussed in the following issue of EC Tax Review and further analyses the functioning of the arbitration commission. This concerns several procedural aspects, such as the place of meeting, language to be used, etc. Further, the process for adoption of the opinion, the content of this opinion and the final decision phase are analysed in detail. Each part ends with a conclusion.

2.1 The EU Arbitration Convention

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these bilateral cases. However, not all cases are bilateral, but may be multilateral. For so-called triangular cases, the Code of Conduct includes in paras 6.2 and 7.2(c) Code of Conduct procedural rules for the mutual agreement and arbitration procedure. The situation of triangular cases is not further discussed in this article. The standard situation discussed in dealings between two associated enterprises, of which one of them is faced with a profit adjustment for not dealing at arm’s length.

Pursuant to Arts 1(1) 1 and 6(1) EU Arbitration Convention, a taxpayer can already submit a request for the convention’s application even if there is no actual profit adjustment yet.

Neither the taxpayer nor the involved competent authorities’ consent is required for initiation of the procedure. Further, unlike some double tax conventions with an arbitration clause or the proposed arbitration directive, no prior acceptance by the taxpayer of the arbitration decision is required. This appears logical, since under the EU Arbitration Convention the arbitration procedure is not the final stage. After the advisory commission has rendered its opinion, the involved EU Member States are still allowed to reach a (dissenting) mutual agreement on how to eliminate the double taxation of the case at hand. An acceptance in advance of with respect to the arbitration opinion is therefore not necessary. In this regard also M. Züger, Arbitration under Tax Treaties – Improving Legal Protection in International Tax Law, IBFD Amsterdam 2001, para. 3.2.2 and H. Velthuizen, Arbitrage in Nederlandse belastingverdragen, Weekblad fiscaal recht 2002/4.35, para. 4. See further L. Hinneken, The EU Arbitration Convention and its Legal Framework: Particle II, British Tax Review, 1996/3, p. 305.

17 Doc. JTPF/003/2014, para. 3 and doc. JTPF/009/2014/EN, para. 3.
18 Pursuant to Art. 4 EU Arbitration Convention this concerns dealings between associated enterprises as well as profit attribution to permanent establishments of enterprises residing in EU Member States.
19 In general, requests submitted under the EU Arbitration Convention concern bilateral cases: cases in which two EU Member States are involved. The rules enclosed in the EU Arbitration Convention and the Code of Conduct generally aim at
such decision within this term, the commission’s opinion becomes subsequently binding on them.  

2.2 Arbitration Procedure

As said, the advisory commission holds the task to render an opinion how to eliminate double taxation. For each case, a separate commission is to be established. There is thus no standard and permanent arbitration board. The rules that should be followed during the arbitration procedure are laid down in Article 9–11 EU Arbitration Convention. Further, paragraph 7 Code of Conduct includes specific rules to be followed by EU Member States during the arbitration procedure.

3 Establishing the Advisory Commission

3.1 Obligation to Establish the Advisory Commission

3.1.1 Provision EU Arbitration Convention/Code of Conduct

The advisory commission’s establishment is pursuant to Article 7(1) EU Arbitration Convention a joint obligation of the involved competent authorities. However, this paragraph does not specify which EU Member State should take the initiative to establish the advisory commission. In this respect, paragraph 7.2(a) Code of Conduct stipulates that:

Unless otherwise agreed between Member States concerned, the Member State that issued the first tax assessment notice (…) takes the initiative for the establishment of the advisory commission.

Belgium and Dutch unilateral policy – prior to the adoption of the Code of Conduct – used a different rule, namely the EU Member State to which the taxpayer’s request was submitted (generally the EU Member State that imposed the profit adjustment) holds the obligation to establish the advisory commission.  

3.1.2 Analysis

At first sight, the rule laid down in paragraph 7.2(a) Code of Conduct appears a logic and well-functioning mechanism. However, it is submitted that the Belgian and Dutch policy prior to the adoption of the Code of Conduct provided for a more easy-to-apply measure. Pursuant to Article 6(1) EU Arbitration Convention, the EU Member State that receives the request for the convention’s application is also responsible for initiating the mutual agreement procedure. It appears therefore more logical to also lay on this EU Member State the obligation to establish the advisory commission. Further, the fact that paragraph 7.2(a) Code of Conduct allows EU Member States to agree on a different obligation as to the advisory commission’s establishment bears the risk that the actual establishment is delayed, due to pending negotiations between EU Member States.

3.1.3 Suggestions for Improvement

As (former) Belgian and Dutch policy provides for a more workable solution, it is submitted that it is more practical and less time-consuming to follow this solution. To this end, paragraph 7.2(a) should be amended accordingly. In addition, it would be more efficient that the other involved EU Member States is only consulted in respect of the advisory commission’s establishment and that it should not be possible to agree otherwise. This latter should also be reflected in the Code of Conduct. By rewriting paragraph 7.2(a) Code of Conduct in such way, it is made clear that the advisory commission’s establishment is the sole obligation of only one EU Member State and as such possible discussions between EU Member States relating hereto are avoided.

3.2 Deadline for Establishment

3.2.1 Provision EU Arbitration Convention/Code of Conduct

The EU Arbitration Convention lacks a term within which the advisory commission should be established. Article 7(1) EU Arbitration Convention solely stipulates that EU Member States should establish the advisory commission after expiration of the two-year deadline of the mutual agreement procedure. In this respect, paragraph 7.2(b) Code of Conduct does include such term, which paragraph reads as follows:

Competent authorities should establish the advisory commission no later than six months following expiry of the period referred to in Article 7 of the Arbitration Convention.

25 The fact that EU Member States are allowed to agree on a deviating decision, hence that the decision of the advisory commission does not directly become final, may be a ground to argue that the EU Arbitration Convention does not provide for an arbitration procedure proper. As such discussion is out of the scope of this article, it is not further discussed.


27 Note that in most cases the request is submitted in the EU Member State that imposed the profit adjustment. This, however, is not always the case if for example deadlines in that specific EU Member States have already passed. For purpose of simplicity, this article uses the starting-point that the EU Member State that imposed the profit adjustment is also the EU Member State to which the request for the EU Arbitration Convention’s application is submitted.
3.2.2 Analysis
The inclusion of a deadline in the Code of Conduct provides taxpayers with more certainty as regards when the advisory commission shall be established and thus when its case is to be resolved. However, due to the inclusion of this deadline, the time necessary to have a double taxation eliminated under the EU Arbitration Convention is factually extended with six months to three and a half years. At first sight, such extension appears undesirable for taxpayers. Further, six months also appear to be rather long to establish an advisory commission. However, experience of France and Italy in the so-called Electrolux-case (today’s only publically known case) learned that the advisory commission’s establishment was quite time consuming (e.g., one and a half year). In my view, however, the delay in this case was mainly due to an incomplete and not up-to-date list of eligible independent persons, a lack of experience and the absence of a central coordinating organ. In other words, if these issues are resolved the commission’s establishment should not be that time-consuming. Further, I question whether a six-month term would actually be necessary in light of the work that has to be conducted for such establishment. The work that primarily has to be conducted namely is: (i) appointing members of the advisory commission, (ii) arrange for secretarial facilities, and (iii) sending documentation and information to the advisory commission. Issues (ii) and (iii) are in my view rather easy to perform. The time consuming factor thus lies in issue (i).

3.2.3 Suggestions for Improvement
Based on the above analysis, it becomes clear that if the appointment process of members of the advisory commission is made more streamlined, this issue should not be time-consuming anymore. By introducing such improvements, it is in my view possible to bring the deadline for the advisory commission’s establishment back to three months. Paragraph 7.2(b) Code of Conduct should be amended accordingly. In this respect, the three-month deadline should concern a real obligation. Compliance herewith can be achieved by granting the European Commission the right of establishment, in case EU Member States fail to do so. This is further discussed below.

3.3 Failure to Establish the Advisory Commission

3.3.1 Provision EU Arbitration Convention/Code of Conduct
The EU Arbitration Convention does not include a provision as what procedure to follow if EU Member States fail to meet its obligation to establish the advisory commission. In this respect, the second sentence of paragraph 7.2(b) Code of Conduct solely stipulates that:

Where one competent authority does not do this, another competent authority involved is entitled to take the initiative.

3.3.2 Analysis
The rule laid down in paragraph 7.2(b) Code of Conduct brings forward some concerns. First, the impact of this provision is rather limited. The phrase ‘is entitled to take the initiative’ makes the commission’s establishment factually a non-obligatory recommendation to the other involved EU Member State. Clearly, the absence of such obligation, as well as the absences of a sanction-mechanism relating hereto is disadvantageous to taxpayers and also allows EU Member States to factually stall the advisory commission’s establishment. Second, it appears from the text of paragraph 7.2(b) Code of Conduct that the other involved EU Member State(s) solely is entitled to take the initiative after the six-month deadline for establishment has passed. In other words, if the first EU Member State does not establish the advisory commission within this six-month deadline, only then...
the other EU Member State becomes entitled to take the initiative. Last, the Code of Conduct is silent on how to proceed if none of the involved EU Member States takes the initiative to establish the advisory commission.

3.3.3 Suggestions for Improvement

Because the EU Arbitration Convention is a multilateral convention under international public law and not an instrument of (secondary) EU law, the ECJ does not hold any jurisdiction as regards this convention and further there is no central governance of the convention. In other words, there is no supranational organ that could enforce compliance with the EU Arbitration Convention’s procedures, if EU Member States fail to comply with their obligations under the convention. In order to avoid a risk of delay or of non-establishment, the advisory commission’s establishment as well as the appointment of its members should be laid in the hands of a third party if EU Member States fail to comply with their obligations within the given deadline. A similar solution is provided for in paragraph 5 of the OECD’s Sample Mutual Agreement on Arbitration. This paragraph provides OECD’s Centre for Tax Policy and Administration competence to appoint arbitrators if the involved states fail to do so. The European Commission could play this role, since it is via the EU JTPF already involved in the convention’s governance and further is independent towards each separate EU Member State.

A provision relating hereto should be included in the Code of Conduct, stipulating that if EU Member States fail to establish the advisory commission within the six-month deadline, the European Commission becomes entitled to do so. Such provision could read as follows:

If the EU Member State that holds the obligation to establish the advisory commission fails to do so within the six-month [or three-month\(^\text{31}\)] deadline, the European Commission shall establish the advisory commission within one month after ending of this six-month deadline.

By including this rule in the Code of Conduct, EU Member States are factually forced to establish the advisory commission within the given deadline, because otherwise their competence shifts towards the European Commission. Also, taxpayers have more security that their case is actually referred to the advisory commission and thus also that it will be resolved in the end. It remains to be seen whether EU Member States would agree to such limitation of their sovereignty. However, as some EU Member States incorporated paragraph 5 of the OECD Sample in their double tax conventions with each other, there appears to be room for such adjustment in respect of the EU Arbitration Convention.\(^\text{32}\)

4 Appointing Members of the Advisory Commission

4.1 Composition of the Advisory Commission

4.1.1 Provision EU Arbitration Convention/Code of Conduct

Pursuant to Article 9(1) EU Arbitration Convention the advisory commission shall consist of: (i) one chairman, (ii) two representatives per each involved EU Member State, and (iii) an even number of independent persons of standing.\(^\text{33}\) With respect to the number of independent persons, paragraph 7.2(c) Code of Conduct stipulates that an advisory commission will normally consist of two independent persons. Competent authorities may, however, agree on a higher number of independent persons, for example in complex cases, such as triangular cases.

4.1.2 Analysis

The advisory commission under the EU Arbitration Convention remains a commission established by the involved EU Member States, by which they initially do not give up any right or sovereignty. By appointing independent persons in the advisory commission, the risk of a deadlock is, however, avoided.\(^\text{34}\) Such deadlock is actually apparent, since EU Member States could not reach an agreement during the mutual agreement procedure. Further, independent persons add competence, knowledge and independency to the advisory commission. In theory, the inclusion of independent persons does not shift the balance of power, as EU Member States’ representative still hold the majority in the advisory commission. In practice, however, this balance of power is actually shifted, as the independent persons and the chairman can provide for the majority vote.\(^\text{35}\) The real power thus lies in the hands of the independent persons and the chairman. Since the total of independent persons and the chairman is uneven, a tied vote is always avoided.

In respect of the above, the preliminary question arises whether EU Member States’ representatives should be members of the advisory commission at all. Tillinghast argued that it is undesirable to have these members aboard, as such inclusion complicates resolving the case and may also impede open

\(^{31}\) In total the advisory commission thus normally consists of seven persons. Art. 9(1) EU Arbitration Convention, however, allows competent authorities to reduce EU Member States’ representatives to one per state. This is subject to mutual agreement by these competent authorities.

\(^{32}\) The origin of including independent persons can be found in the proposed Arbitration Directive, which stipulated that by including independent persons it becomes possible that the arbitration commission will actually render an opinion on the elimination of double taxable and it is avoided that a deadlock is created between the involved EU Member States. See para. 17 Addendum to the proposed Arbitration Directive.

\(^{33}\) See also Hinnelem 1996/3, p. 305.

\(^{34}\) See para. 3.2.3 of this article.

\(^{35}\) This concerns the double tax conventions of the Netherlands with Germany (2012), the United Kingdom (2008) and between Germany and the United Kingdom (2010).
discussions. Also former members of advisory commissions argued against the inclusion of these representatives, because it impedes the commission’s functioning and because these representatives have difficulties to alter their state’s initial positions. However, these members also remarked that the representatives play an important role in respect of providing information to the advisory commission.

The subsequent question is, if EU Member States’ representatives are to be members of the advisory commission, how many representatives should be appointed. It appears that seven members are too much for the advisory commission. Although it is likely that EU Member States want to keep the majority within the advisory commission and thus not agreeing to a reduction of their representatives, France and Italy nevertheless appointed one representative per EU Member State in the Electrolux-case. In practice, such reduction is thus actually possible.

4.1.3 Suggestions for Improvement

The most important issue is to address whether EU Member States’ representatives should be present in the advisory commission. I agree with Tillinghast and the former advisory commission’s members that their inclusion does not provide for a true and independent arbitration procedure. Moreover because EU Member States also hold decision power after the advisory commission’s rendered its opinion (discussed in part II of this article). The inclusion of these representatives is thus somewhat superfluous. One must, however, not forget that the concept of arbitration was only acceptable to EU Member States if they would be involved in the arbitration procedure itself. Clearly, a non-involvement would limit EU Member States’ sovereignty in tax matters too much and as such was not acceptable to them. Consequently, the sole way to have the EU Arbitration Convention adopted at all was to actively involve EU Member States in the arbitration procedure. It is submitted that this position has not changed in the mean time, and this is thus still the state of play to be dealt with.

In that regard, it is still possible to make the advisory commission more lean and mean. For example, Article 9(1) EU Arbitration Convention allows a lower number of EU Member States’ representatives. Based on the practical experience and for efficiency purposes, it is suggested to reduce the number of these representatives to one per EU Member State. The advisory commission would then consist of five persons. Currently, the EU JTPF considers including such recommendation in paragraph 7.2(c) Code of Conduct. This recommendation would read as follows:

For reasons of simplification, it is recommended that competent authorities appoint only one representative for their competent authorities.

Within the EU JTPF, the reason for suggesting such reduced number is that it would ensure that independent persons and the chairman could decide independently from EU Member States. In a response, non-governmental representatives as well as the UK representative within the EU JTPF agreed to this recommendation. The Danish and Swedish representatives, however, opposed to the recommendation. The Swedish representative argued that reducing the number would also reduce the competence and knowledge of the case as well as the efficiency of the arbitration procedure. Further, this representative argued that the reason put forward by the EU JTPF for such reduction is not convincing, as it is only an academic ambition to make sure that the chairman/independent persons can outvote EU Member States’ representatives. I agree with the Sweden representative that the independent decision-making argument is not convincing, as it is not the matter of deciding independently or achieving a majority vote (this is already the case), but to make it easier to adopt a majority opinion. The fewer members aboard, the less cumbersome it becomes to agree on a solution. However, do not agree to the Swedish argument that a reduction of EU Member States’ representatives would lead to a reduction in knowledge, as this knowledge can always be called-in. For these reasons, it is suggested to only appoint one representative per EU Member State. As things currently stand, the EU JTPF is not favouring to adopt the suggested recommendation into paragraph 7.2(c) Code of Conduct, but only to emphasize in that paragraph that one representative instead of two

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36. Doc. JTPF/001/2014/EN, para. II.
37. Doc. JTPF/001/2014/EN, para. II.
38. Doc. JTPF/001/2014/EN, para. II.
39. Doc. JTPF/001/2014/EN, para. II.
40. See para. 3.2 of this article.
41. See also doc. JTPF/004/2014/EN, para. 25.
representatives per EU Member State could be appointed. It is submitted that for efficiency purposes, the suggested recommendation should be included in the Code of Conduct.

4.2 Appointment Process

4.2.1 Appointing EU Member States’ Representatives

4.2.1.1 Provision EU Arbitration Convention/Code of Conduct

Article 9(1) EU Arbitration Convention addresses how the advisory commission is composed, but does not address the process of appointing EU Member States’ representatives. The Code of Conduct also remains silent on this issue.

4.2.1.2 Analysis

As Article 9 EU Arbitration Convention does not provide rules to appoint EU Member States’ representatives, it does not also provide for criteria that these representatives should possess in order be eligible as members of the advisory commission. The EU JTPF briefly discussed which persons could be appointed as EU Member States’ representatives, but could eventually reach consensus on such criteria. It is therefore at each EU Member State’s discretion which person to appoint as their representative. Theoretically, persons of the tax/audit department that were involved in the previous stages of the case could also be appointed as members of the advisory commission. Needless to say that this does not contribute to an independent functioning advisory commission.

4.2.1.3 Suggestions for Improvement

Although the exclusion of certain persons (e.g., persons working in EU Member States’ tax assessment or audit department) would contribute to a more independent character of the advisory commission, the advantage of allowing persons that were previously involved in the case at hand is that these representatives are already aware of all ins and outs of the specific case under review. Further, these persons often have experience in the transfer pricing area, which could help to facilitate, expedite and speed-up the arbitration procedure. Last, by allowing persons that were previously involved in the case to act as EU Member States’ representatives, it is possible to build-up experience within a competent authority, which may also contribute to an efficient arbitration procedure. Apart from that, because the chairman and the independent persons are the persons that have to provide for the breakthrough in the case at hand (further discussed in part II of the article), it is not of utmost importance to exclude certain government employees from acting as members of the advisory commission. Further, from a practical viewpoint, it appears also not feasible that EU Member States would agree on certain restrictions. For that reason, no suggestions are made in this respect. This also goes for criteria for EU Member States’ representatives. This remains an issue to be decided by the EU Member States themselves.

4.2.2 Appointing Independent Persons

4.2.2.1 Provision EU Arbitration Convention/Code of Conduct

4.2.2.1.1 Appointment Procedure

The rules for appointing independent persons are laid down in Article 9(1–4) EU Arbitration Convention. Pursuant to Article 9(1), independent persons are appointed by mutual agreement between the involved EU Member States. These independent persons must thereby be appointed from a pre-fixed list of eligible independent persons. It is thereby not per se necessary that EU Member States appoint their own nominees. Nominees of other EU Member States may also be appointed. Each EU Member State is pursuant to Article 9(4) obliged to nominate five independent persons on this list, which must be communicated to the Council’s Secretariat-General. The Council, pursuant to paragraph 7.1(c) Code of Conduct, subsequently publishes the aggregated list on its website. In principle, the list of independent persons is of a permanent nature and is not altered as per each arbitration procedure. However, EU Member States are allowed to make alterations to the list by nominating other persons. In that regard, paragraph 7.1(d) Code of Conduct, puts an obligation on the Council’s Secretariat General to annually request each EU Member State to (re)confirm the names of their nominees.

4.2.2.1.2 Criteria for Independent Persons

A nominee should pursuant to Article 9(4) meet the following three criteria: (i) being a national of an EU Member State, (ii) resident within the territory to which

* Further, for each appointed independent person an alternate must pursuant to Art. 9(2) be appointed. These alternates will act as a member of the advisory commission if the appointed independent person is prevented for carrying out their duties. This is not further discussed in this article.

* In this regard also Züger 2001, para. 3.3.1

the EU Arbitration Convention applies, and (iii) being competent and independent. In respect of criterion (ii), paragraph 7.1(f) Code of Conduct stipulates that an independent person should not per se be a national of the nominating EU Member State, but it is already sufficient that the person is a resident within the territory to which the EU Arbitration Convention applies. Further, as regards the competence criterion paragraph 7.1(b) Code of Conduct stipulates that each nominated person’s curriculum vitae has to be provided to the Council’s Secretariat-General. This curriculum vitae should inter alia include the person’s legal, tax and (especially) transfer pricing experience. Last, in respect of the independency criterion, the EU JTPF agreed that persons from the business community as well as person from EU Member States’ tax administrations could not serve as an independent person, as these persons cannot be considered independent. In respect of this independency criterion, paragraph 7.1(g) Code of Conduct stipulates that:

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

4.2.2.1.3 Disagreement on Appointment – Drawing of Lots

If EU Member States are unable to reach an agreement on the appointment of the nominated independent persons, Article 9(1) EU Arbitration Convention obliges them to draw lots, whereby the independent persons still have to be selected from the list of independent persons. However, pursuant to the criteria laid down in Article 9(3), EU Member States are allowed to object to the result of a draw. As the taxpayer is not a direct party to the dispute, he is not granted any rights in respect of appointing independent persons.

4.2.2.2 Analysis

4.2.2.2.1 Appointment Procedure

Apart from the rules relating to which persons can be appointed as independent persons, which parties are involved in this appointing process and the list of independent person from which these persons are to be appointed, the EU Arbitration Convention does not include rules how the appointment process is to be performed. The absence hereof makes it that EU Member States are at liberty to choose the procedure of appointment they deem appropriate. Although this provides EU Member States with flexibility, the process itself is non-transparent and also bears the risk of delay in the situation EU Member States cannot agree on which persons to appoint as independent members.

4.2.2.2.2 List of Independent Persons

Neither the EU Arbitration Convention nor the Code of Conduct stipulates whether independent persons are nominated for a limited period. Consequently, these persons are nominated until the moment they report themselves as no longer available or until they are replaced. An examination of the list of nominees learns that up till now still not all EU Member States informed the Council’s Secretary-General of their five nominees. First, Cyprus, Latvia and Lithuania did not submit a list at all, whereas Slovenia only listed four instead of five nominees. Consequently, these EU Member States do not act fully in line with Article 9(4) EU Arbitration Convention and paragraph 7.1(a) Code of Conduct, whereas they legally and politically committed themselves to do so. Second, the list of independent persons appears to be somewhat outdated, as the current list included nominees that have been nominated in 1993 (Denmark), 1994 (Italy and Luxembourg), 1995 (Belgium) and 1996 (France). Third, Austria, Belgium, France and Luxembourg did not submit the curriculum vitae’s at all or for not all their representatives.

51 Sass clarified that this requirement was included in order to determine which EU Member States’ sanction system will apply in case this persons breaches its secrecy obligation. See Sass, G., Effectiveness of current competent authority procedures for relief of international double taxation: future developments, Intern. Tax 1988/4, p. 113. The secrecy obligation is further discussed in s. 5.1.1 of this article.

52 Summary record of the twenty-second meeting of the EU Joint Transfer Pricing Forum (JTPF/018/REV1/2008/EN), November 2008, para. 4.1.

53 This provision was copied from Art. 4(2) of the proposed Arbitration Directive, which provided for an equal rule. Pursuant to para. 20 Addendum to the proposed Arbitration Directive, the reason to include the procedure of drawing of lots was to avoid a deadlock the moment no agreement could be reached on the appointment of independent persons.

54 These are: ‘where lots are drawn, each of the competent authorities may object to the appointment of any particular independent person of standing in any circumstance agreed in advance between the competent authorities concerned or in one of the following situations:

- Where that person belongs to or is working on behalf of one of the tax administrations concerned;
- Where that person has, or has had, a large holding in or is or has been an employee of or adviser to one of each of the associated enterprises; or
- Where that person does not offer a sufficient guarantee of objectivity for the settlement of the case or cases to be decided.’

55 Former Eurocommissioner Goergen explained that granting any rights to the taxpayer in respect of appointing independent persons would give the arbitration commission a too judicial character, for which the European Commission feared it would (politically) not be acceptable to EU Member States. In this regard, Editorial, Interview R. Goergen, Tax Planning International Forum 1978/4, p. 63.

56 In 2011 and 2012, the Council’s Secretariat-General already requested Cyprus, Latvia and Lithuania to supply the names and curriculum vitae of their nominees. This has not been followed-up. In this regard, Summary record of the thirty-first meeting of the EU Joint Transfer Pricing Forum (JTPF/015/2011/EN), June 2011, para. 8 and Summary record of the thirty-third meeting of the EU Joint Transfer Pricing Forum (JTPF/007/2012/EN), March 2012, paras 3 and 8.
nominees, as is required pursuant to paragraph 7.1(h) Code of Conduct. It is submitted that an incomplete and not up-to-date list bears the risk that nominated persons are actually not eligible anymore (for example one nominee has deceased), which subsequently may lead to a delay in the advisory commission’s establishment. The Electrolux-case actually learned that one of the main reasons of delay of the advisory commission’s establishment was such incomplete and the not up-to-date list of independent persons.

4.2.2.2.3 Criteria for Independent Persons

The criteria of nationality and residency appear to be reasonable and should not lead to any practical problems, also because paragraph 7.2(f) Code of Conduct provides sufficient guidance in this respect. Further, it is submitted that the inclusion of the criteria of competence and independency is an important protection for the taxpayer that the advisory commission truly consists of independent persons that can render an impartial opinion for the case at hand. With respect to the competence criterion, the EU JTPF discussed, but could not agree on minimum standards that each nominee should meet before it can added to the list of independent persons. The EU JTPF instead agreed to examine this issue at a later stage when more cases have been referred to an advisory commission. However, the current self-assessment system for defining a nominee’s competence and independency bears the risk that EU Member States have a different interpretation of these terms, which may result in an objection to the appointment of an independent person to the advisory commission. Consequently, the establishment of the advisory commission itself may (unnecessary) be delayed. In that regard it is submitted that the current rules enclosed in the Code of Conduct – providing a curriculum vitae and signing of a standard declaration of independence – are insufficient to avoid disagreement on nominee’s competence and independency. The EU JTPF stressed that this declaration should not be considered as a standard and mandatory document, but more as an example of best practice. The forum further addressed that each assessment whether a person can actually be considered as independent and competent should be performed for each specific case and on its own merits. The usage of such standard declaration is in my view a good step forward. It contributes to a more streamlined and efficient selection procedure, because a part of the selection is done upfront. There are, however, some ambiguities in the declaration itself. Further, the status of the declaration can be questioned as the declaration is solely a declaration of the nominated person itself. It does not provide for a declaration of the involved EU Member State that they consider the person as actually independent from the case at hand. It may therefore still be that EU Member States disallow a person to act as a member of the advisory commission, because they consider the person as not independent. In other words, the declaration itself has no practical value. Second, if the content of the standard-declaration is analysed, it appears that it does not solely concern a declaration of independence, but also a declaration of acceptance. This, however, concerns different declarations. It can therefore be concluded that using of a standard-declaration is a good step forward, but the current design of the declaration is ambiguous and as such does not contribute to a streamlined and efficient process of appointing of independent persons.

4.2.2.2.4 Disagreement on Appointment – Drawing of Lots

There are a few objections to the system chosen in case of disagreement on the appointment of independent persons. It is submitted that the system of drawing of lots is not an appropriate system to break the deadlock on the appointment of independent persons, as it provides for a too arbitrary outcome. There are more appropriate systems available in this respect. Second, the current right of objection to the drawing of lots, as laid down in Article 9(3) EU Arbitration Convention, factually comes down to a right of veto, which bears the risk that in the end no independent person is appointed. Thereby, the criteria for invoking the right of objection/ veto are subjective in nature. This especially concerns the third criterion (e.g., where that person does not offer a sufficient guarantee of objectivity for the settlement of the case or cases to be decided). This criterion is rather vague, non-transparent and leaves room for random reasoning. Another issue is that EU Member States are pursuant to Article 9(3) EU Arbitration Convention at liberty to agree in advance on other circumstance by which they can call-in their veto, which also bears the risk of random reasoning. In such situation, it could then be very difficult to have independent persons appointed at all, reinforced by the fact that the list of independent persons only consists of five persons per EU Member State. It could thus well be that the full list...
is run down by invoking the veto.\textsuperscript{61} In this respect, the Netherlands' representative within the EU JTPF correctly addressed that if EU Member States disagree on the independent persons of standing, it is unlikely that drawing of lots may provide for an outcome. The appointment process may thus be very time-consuming or even stalled indefinitely.\textsuperscript{62} To this end, neither the EU Arbitration Convention nor the Code of Conduct addresses how to proceed if all five nominees are vetoed. Which persons should then be appointed and how should the advisory commission then be established? Although it is unlikely that such situation occurs regularly, it could happen for a specific case if for instance an EU Member State is negligent to refer a case to the arbitration procedure.

In sum, the process of drawing of lots is surrounded with too many uncertainties to provide for a satisfactory outcome. This is reinforced by the fact that the EU Arbitration Convention and the Code of Conduct do not address how, where and within what timeframe lots have to be drawn and who should judge whether the drawing of lots is done fairly. Last, it is not determined how to proceed if EU Member States veto all nominated persons. These downsides make the drawing of lots an inappropriate measure to have nominees appointed as independent persons. In other words, the system of drawing of lots is not a well-balanced measure to break the deadlock.

4.2.2.3 Suggestions for Improvement

4.2.2.3.1 Appointment Procedure

In order to streamline the appointment process of independent persons, it is suggested adopting the procedure included in OECD’s Sample on Arbitration. Pursuant to paragraph 5 of this Sample, each state appoints its own arbitrator. These arbitrators together will appoint a third arbitrator that act as the chairman. If states fail to appoint one or all three arbitrators, the Director of the OECD Centre for Tax Policy and Administration is assigned competence to appoint these arbitrators. Paragraph 14 of the commentary to this Sample stipulates that it ‘seems important to provide for an independent appointing authority to solve any deadlock in the selection of arbitrators’. I fully agree hereto. The analysis of section 4.2.2.2 learns that the system used under the EU Arbitration Convention has too many uncertainties and bears the risk of a non-appointment of independent persons. The system of drawing of lots is thereby also not suitable, as EU Member States still have the opportunity to veto the outcome of the drawing of lots.

The system envisaged could be as follows. EU Member States remain competent to appoint their independent persons. However, if they fail to do so within a certain time limit (e.g., three months), the European Commission will be assigned competence to appoint the independent persons. The system of appointing members from a list is generally working well, so there is no need to change this. By introducing this system, the system of drawing of lots can be deleted and Article 9 EU Arbitration Convention should be amended accordingly.

4.2.2.3.2 List of Independent Persons

There are a number of improvements to be made to the current list of independent persons. As discussed, it is under the current system unclear whether an independent person is appointed for a limited period. In this respect, some forum members suggested a five-year term, whereby a nominated person could be re-nominated for a subsequent five-year term. The EU JTPF did eventually not agree hereon, but instead informally agreed that EU Member States should review their list of independent persons at regular intervals and at least each five years. The purpose of such review is to examine whether the nominated persons are still available to act as an independent member of the advisory commission. In my opinion, the suggestion made by a forum member should be adopted in the Code of Conduct, whereby the term of nomination should be reduced to three years. After this three-year term, the nominated persons could be re-nominated, whereby the nominated person should declare he accepts this re-nomination. A three-year term is specifically chosen, because the list of independent persons is then more up-to-date and better reflects which person is actually available to act as an independent person, whereby three years is also a sufficient term to provide for consistency and contingency. In this respect, paragraph 7.1(d) Code of Conduct should be amended accordingly.

Further to the above, because some EU Member States did not provide for a complete list of independent persons, there is a risk an EU Member State is unable to appoint an independent person (e.g., Latvia) if a case to which it is involved is to be referred to arbitration. To avoid such situation and thus to avoid the non-establishment of the advisory commission, a sanction-mechanism should be introduced. This mechanism should be as follows: if an EU Member State does not submit the (full) list of independent persons, the European Commission, until the moment the EU Member State completes the list gains competence to nominate these persons and to appoint independent persons as members of an advisory commission.

\textsuperscript{61} This situation could easily occur in triangular cases, where more parties are involved and thus the risk of invoking the veto is also higher.

\textsuperscript{62} Dutch contribution on the question whether persons of standing to an advisory commission are independent (JTPF/015/RACK/2007/EN), 18 Sep. 2007, p. 3.
4.2.2.3.3 Criteria for Independent Persons

**Competence**

Although the submission of a curriculum vitae can be considered a good step forward, it is submitted that so as to avoid any discussions on whether a person can be considered competent, a provision hereto should be included in the Code of Conduct. Business representatives within the EU JTPF already suggested some minimum standards that could be used: (a) specific knowledge in transfer pricing, (b) international experience, and (c) knowledge of one or more foreign languages. These criteria are to be addressed in the nominee's curriculum vitae.

In respect of the above, Hinnekens questioned whether five nominees are not too low a number to cover specific industry-knowledge, other transfer pricing related expertise/experience and to provide for a sufficient guarantee of competence in all cases. In my view, five nominees are sufficient, moreover because it would also be difficult to select persons on the basis of their industry-specific knowledge, since there are many industries to cover. More importantly, however, is that the advisory commission is not prohibited to call-in the help of third persons that posses specific expertise and experience in certain industries. The nominees should thus not per se possess expertise for certain industries. In my view, nominees should first and foremost be competent so as to be able to function as an independent person of the advisory commission. It is thereby important that this person possesses knowledge of international taxation and transfer pricing. Economic knowledge is thereby not per se a requirement to function as an independent person, but of course is desirable. Further the instruction of the advisory commission is to render an opinion on the correct application of the arm's length principle for the case at hand. EU Member States' positions in this respect are known, the taxpayer's position is (or can be) known and the studies relating hereto are also known. It is thus not a matter of economic knowledge, but rather a matter of sufficient juridical knowledge, skills and experience to guide the process. Hence, it is important that the nominated persons have juridical knowledge, skills and expertise. However, as it concerns transfer pricing discussions it is also important that nominees have knowledge and experience in this field as well. This mixture should constitute the core of the nominated person's competence and should be reflected in the Code of Conduct.

**Independency**

Based on the analysis of section 4.2.2.2, it can be concluded that using of a standard-declaration is a good step forward, but the current design of the declaration is ambiguous and consequently does not contribute to a streamlined and efficient selection process of independent persons. For that reason, it is suggested amending the system in such way that a person's independency can be better assessed, which also smoothen the appointment of independent persons. In this regard, the following declarations could be used:

- Declaration of acceptance and independency: in which the person declares that he is independent from the involved EU Member States and as such is able to function as a member of the advisory commission and further that he accepts the nomination: (the moment a person is nominated on the list of independent persons);
- Declaration of independence: in which the person declares that he is truly independent to the case at hand: (the moment a person is selected to be appointed as member of the advisory commission), and
- Declaration of acceptance and compliance with the secrecy obligation: in which the person declares he accepts his appointment and that he shall comply with the secrecy obligation: (the moment a person is appointed as member of the advisory commission).

4.2.2.3.4 Disagreement on Appointment – Drawing of Lots

As already suggested in the process of appointing independent persons, the system of drawing of lots is not a well-balanced measure to break the deadlock. It should therefore be deleted from the EU Arbitration Convention and to be replaced by an appointment process involving the European Commission.

4.2.3 Appointing the Chairman

4.2.3.1 Provision EU Arbitration Convention/Code of Conduct

4.2.3.1.1 Appointment Procedure

Pursuant to Article 9(5) EU Arbitration Convention EU Member States’ representatives and the appointed independent persons jointly have to appoint a chairman. In other words, first EU Member States’ representatives and independent persons are appointed and following thereon these persons together appoint the advisory commission’s chairman. The chairman must thereby also be elected from the list of independent persons and must further possess the qualifications required for an appointment to the highest judicial offices in his country.

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63 Hinnekens 1996/3, p. 306. Similar suggestions were made by the Confederation Fiscale Europeenne in Paper CFE on the future progress on the harmonization of taxation within the European Union, European Taxation February 1996, p. 66.

64 The secrecy obligation is discussed in para. 5.1 of this article.
or is a jurisconsult of recognized competence. These persons can for instance be judges of a domestic Supreme Court or a judge of the ECJ. Further, pursuant to Article 9(5) EU Arbitration Convention, the chairman does not per se have to be resident of one of the nominating EU Member State, but it is sufficient if he is a resident of an EU Member State and he is included on the list of independent person. In this regard, paragraph 7.1(c) Code of Conduct stipulates that EU Member States may indicate on their list whether these persons also fulfil the requirements to be elected as a chairman.

4.2.3.2 Disagreement on the Appointment

Each EU Member State is pursuant to Article 9(5) EU Arbitration Convention allowed to object to the appointment of the chairman. Paragraph 5 thereby refers to Article 9(3) for the criteria on the basis of which EU Member States may object to the appointment of a chairman. The EU Arbitration Convention thus does not provide for drawing of lots in appointing the chairman. Further, similar as to the appointment of independent persons, the taxpayer is also not provided the right to object to the advisory commission’s chairman appointment.

4.2.3.2 Analysis

An examination of the list of nominees in respect of the chairman learns that Austria, Estonia, Finland, Luxembourg and Romania did not indicate for all their nominees whether they are eligible to act as chairman. Further, Cyprus, Latvia and Lithuania did not submit a list of nominees at all. It is submitted that this should not have adverse consequences, since it is allowed that the chairman is a resident of another (non-involved) EU Member State, so that there are still sufficient eligible persons. Besides, the allowance for a ‘foreign’ chairman has actually a positive effect on his independent status, since this person is not connected with one of the involved EU Member States in the case under review.

With respect to the criteria for a chairman, as laid down in Article 9(5) EU Arbitration Convention, there is a risk that EU Member States differently interpret or apply these criteria, as each EU Member State has their own criteria for appointing persons to the highest judicial offices. This may lead to disagreement whether a person is actually competent to act as a chairman. Further, an analysis of the list of eligible chairman leads to the conclusion that not all these persons meet the criteria as laid down in Article 9(5) EU Arbitration convention. With respect to the appointment process of the chairman no rules are included in the EU Arbitration Convention. It is submitted that a simple majority should in principle be sufficient for such appointment. However, EU Member States’ right of objection bears the risk of disagreement and as such may cause delay in establishing the advisory commission.

4.2.3.3 Suggestions for Improvement

In my view, the different qualifications for appointment to the highest judicial offices is difficult to solve under the EU Arbitration Convention, since the criteria are unilaterally determined and harmonization hereof at the level of the EU is absent. Nevertheless, it should be possible to use a single criterion, such as the competence criterion to be appointed as a judge of the CJEU. Further, in my view it is also possible to define the phrase ‘jurisconsult of recognized competence’ as used in Article 9(5) EU Arbitration Convention. A definition hereof should be included in the Code of Conduct, or should be clarified by each EU Member State. In general, this would in any case concern professors of tax law, with high knowledge of transfer pricing.

Further, the Electrolux case learned that it has been difficult to find a chairman for the advisory commission. In that specific case, several persons turned down the request to act as a chairman after finding out about the time needed to study the documents and to attend the commission’s meetings. In this respect, the indication on the list whether a person is willing to act as a chairman is a good step forward and practice learns that nowadays sufficient eligible chairmen are available. Further, the allowance of a foreign chairman – i.e., a chairman that is not resident in or a national of the involved EU Member States – even enlarges the pool of possible chairmen. It is submitted that the allowance of a foreign chairman contributes to a more independent character of the advisory commission and that it is in that regard more likely that EU Member States accept a foreigner as a chairman rather than a resident of their own. For this reason, it is suggested to always appoint a foreigner as chairman.

What, however, remains are the ambiguities as regards the process of appointment. In this respect, it is suggested to leave the system intact with the following additions (which should be reflected in the Code of Conduct):

(a) Within one month after the independent persons are appointed, the advisory commission chooses three persons who may act as chairman;

65 Van Raad questioned whether the term ‘country’ concerns the EU Member State in which the person is resident or the EU Member State of which he is a national. See K. Raad van, Het fiscale Arbitrageverdrag van 1990, Tijdschrift voor Arbitrage 1998/1, p. 9.

66 It is submitted that the phrase ‘his country’ concerns residency and consequently it concerns the EU Member State in which the eligible chairman is a resident, regardless of nationality.

67 This is, however, not required under the Code of Conduct, since para. 7.1(c) Code of Conduct includes the term ‘may’ and not ‘are obliged’ or ‘shall’.

68 See also van Stappen 2003, p. 27 and van Honsté & Bostyn 2004, p. 2.
(b) EU Member States hold their right of objection pursuant to the criteria of Article 9(3). Within one month after the nomination of the three persons, EU Member States have to decide on which person will be the chairman;

(c) If EU Member States fail to make this decision, or if they object to all three nominees, the European Commission shall decide in their place within two weeks thereafter.

4.3 Secretarial Assistance

4.3.1 Provision EU Arbitration Convention/Code of Conduct

Pursuant to paragraph 7.2(d) Code of Conduct the advisory commission will be assisted by a secretariat and the facilities for this secretariat will – unless otherwise agreed by the involved EU Member States – be provided by the EU Member State that initiated the advisory commission’s establishment. Further, for reasons of independency, paragraph 7.2(d) stipulates that the secretariat will function under the chairman’s supervision and that it is also bound by the secrecy obligation as laid down in Article 9(6) EU Arbitration Convention (discussed in section [5.1] of this article).

4.3.2 Analysis

The inclusion of a provision in the Code of Conduct in respect of secretarial assistance can be considered a good step forward, as it may contribute to a more streamlined and efficient functioning of the advisory commission. The content of paragraph 7.2(d) Code of Conduct is thereby sufficient clear as regards which EU Member State is obliged to provide for secretarial assistance and also aligns with the rule laid down in paragraph 7.2(a) Code of Conduct (e.g., which EU Member State holds the obligation to establish the advisory commission). Further, the secrecy obligation also provides for sufficient guarantee that the secretariat is able to act independent from the EU Member State that established the secretariat. There are, however, two points of criticism. First, paragraph 7.2(d) allows EU Member States to agree on a different rule in respect of the secretarial assistance (e.g., ‘unless otherwise agreed by the Member States concerned’). It can be questioned why it is necessary to add this phrase to paragraph 7.2(d), since the standard rule already provides for a clear, workable and efficient solution. It is in my view therefore not necessary to deviate from this standard rule, other than in exceptional cases, also because EU Member States are pursuant to Article 11(2) EU Arbitration Convention already allowed to agree on this issue on a case-by-case basis. Second, paragraph 7.2(d) does not include a deadline within which the secretariat should be established.

4.3.3 Suggestions for Improvement

The secretariat plays a central role in the functioning of the arbitration procedure. For that reason, and also because the secretariat’s experience may provide for relevant input on the arbitration procedure’s functioning, it may be more efficient to provide for a central secretariat that deals with all arbitration procedures under the EU Arbitration Convention. The advantages hereof are that it can gain experience with the arbitration procedure, which may further streamline the procedure. With today’s technology it is not per se necessary to provide for a secretariat that is physically present at the place where the advisory commission meets. Hence it should be possible to provide for a central secretariat that virtually assists the advisory commission. I believe the European Commission can provide for such central secretariat, as this would align with the EU JTPF’s monitoring functioning (currently performed under the European Commission’s auspices). Next to that, such secretariat can also be considered truly independent.69

As an interim solution, if the above would be for EU Member States a bridge too far, for example because there would not be that many arbitration procedures under the EU Arbitration Convention, it is suggested to delete the last particle of paragraph 7.2(d) Code of Conduct (‘unless otherwise agreed by the Member States concerned’). This to avoid any discussions on which EU Member State should provide for the secretariat. Second, to avoid that EU Member States loiter with the establishment of the secretariat, paragraph 7.2(d) Code of Conduct could include as a rule that the secretariat shall be established the moment the advisory commission is established. As from that moment, the secretariat can arrange all practical issues, thereby avoiding any delays in respect of the commission’s functioning.

5 Other Issues

5.1 Secrecy Obligation

5.1.1 Provision EU Arbitration Convention/Code of Conduct

Article 9(6) EU Arbitration Convention puts an obligation on members of the advisory commission to keep secret all matters that they learn as a result of the

68 The text of para. 7.2(d) Code of Conduct is written in such manner that EU Member States are allowed to agree on a alternative for the secretarial assistance, not to agree on which EU Member State establish the advisory commission, although the aim of this paragraph concerns this latter.

69 EU JTPF’s secretariat already opted the creation of a permanent secretariat, but this suggestion was not further discussed. See in this regard also doc. JTPF/002/2013/EN, para. B.4.

70 See in this regard also Hinnekens 2010, para 4.1.
proceedings. To this end paragraph 6 obliges EU Member States to adopt ‘appropriate provisions’ so as to penalize a breach of this secrecy obligation and subsequently to notify the European Commission of these provisions. In addition, EU Member States’ joint declaration in respect of Article 9(6) stipulates that:

The Member States shall be entirely free as regards the nature and scope of the appropriate provisions they adopt for penalizing any breach of secrecy obligations.

5.1.2 Analysis
As will be discussed in part II of this article, the taxpayer is – different than EU Member States – not provided the right to refuse to submit the requested information by the advisory commission on the basis of the three exceptions laid down in Article 10(1) EU Arbitration Convention. In order to protect the taxpayer’s (secret) business information and transfer pricing policy from becoming public, it should thus be guaranteed that all information shared with the advisory commission is treated as confidential.71 In other words, inclusion of the secrecy obligation is indispensable for taxpayer’s confidence in the EU Arbitration Convention as a proper tool to settle transfer-pricing disputes. For this reason Article 9(6) EU Arbitration Convention includes a secrecy obligation for members of the advisory commission.

The content of the secrecy obligation learns that advisory commission’s members must keep secret all types of information (e.g., documentation, evidence and other information) received on their account as a member of the advisory commission, as well as the advisory commission’s deliberations. As regards the penalty for a breach of this secrecy obligation, EU Member States are at liberty as regards the nature and scope of the appropriate provisions. As a consequence thereof, there are twenty-seven different sanction-mechanisms in force.72 This, however, directly follows from the EU Arbitration Convention’s legal nature as a multilateral convention under international public law, by which here is thus no supranational legislation in force and as such EU Member States’ domestic legislation forms the capstone of the convention’s implementation. It is submitted that twenty-seven different sanction-mechanisms should not be problematic, as long as they all provide for penalizing a breach of secrecy obligation. This is, however, uncertain, as the European Commission has not made public whether EU Member States have introduced appropriate provisions and what the content is of these provisions.73

5.1.3 Suggestions for Improvement
It is submitted that the content of Article 9(6) – along with paragraph 7.2(d) Code of Conduct – provides sufficient guarantee that confidentiality is guaranteed and that in the event there is a breach of the secrecy obligation, a proper sanction-mechanism applies. However, in order to provide for full transparency, the European Commission should publish each EU Member States’ penalty clause in case of a breach of the secrecy obligation.

5.2 Costs of the Arbitration Procedure
5.2.1 Provision EU Arbitration Convention/Code of Conduct
Paragraph 11(3) EU Arbitration Convention stipulates that all costs incurred in respect of the arbitration procedure – except those costs incurred by the taxpayer and/or its associated enterprises – have to be shared equally by the EU Member States involved in the case at hand. Paragraph 7.3(e) Code of Conduct defines the costs of the arbitration procedure as: ‘the administrative costs of the advisory commission and fees and the expenses of the independent persons of standing’. These fees and expenses are further specified in paragraph 7.3(f) Code of Conduct and concern:

(a) Fees: fixed at EUR 1,000 per person per advisory commission’s meeting day (the advisory commission’s chairman receives a 10% higher fee); and
(b) Reimbursement of expenses: limited to the reimbursement of high-ranking civil servants of the EU Member State that has taken the initiative to establish the advisory commission.

Further to the above, paragraph 7.3(g) Code of Conduct stipulates that the EU Member State that has taken the initiative to establish the advisory commission will initially pay the costs of the arbitration procedure. Paragraph 7.3(f) and (g) Code of Conduct thereby allow EU Member States to agree on different rules as regards the amount of fees and remuneration of expenses as well as the actual payment of costs.

72 Croatia – as the 28th EU Member State – is not (yet) a signatory state to the EU Arbitration Convention.

Pistone reported that Italy never adopted any provision penalizing breaches of the secrecy obligation. Further, Steichen reported that Luxembourg also did not adopt such provisions, as the Luxembourg government did not consider this necessary, because members of the advisory commission all have professions where strict secrecy rules exist. See Pistone, P., Settlements of disputes in Italian tax treaty law in: Lang, M. & Zuger, M., Settlement of disputes in tax treaty law, Kluwer Law International 2003, p. 335 and Steichen, A., Settlement of disputes in Luxembourgian tax treaty law in: Lang, M. & Zuger, M., Settlement of disputes in tax treaty law, Kluwer Law International 2003, p. 378
5.2.2 Analysis
5.2.2.1 Costs Incurred by Taxpayers to Be Included in the Cost-basis?

In literature discussions arose on whether costs incurred by taxpayers also needed to be included in the arbitration procedure’s cost-basis. In this respect, Killius, Andriesse and the International Chamber of Commerce argued that is unfair that these costs are excluded from this cost-basis. Others, as van Raad and Hinnekens, argued that it appears reasonable that the taxpayer has to bear his own costs. Although I understand the arguments put forward by the first mentioned authors, I agree with view put forward by Van Raad/Hinnekens, because if a taxpayer lodges an appeal before a court, it also has to bear its own costs. It is submitted that this should thus not be different for the arbitration procedure under the EU Arbitration Convention. Further, costs incurred by the taxpayer in respect of the arbitration procedure shall mainly relate to information requests of the advisory commission. In my view, these requests shall not be that substantial that the costs will be unreasonably high.

5.2.2.2 Definition of the Term ‘Administrative Costs’

Although paragraph 7.3(c) Code of Conduct defines the term ‘costs’, it does not specify what should be considered as ‘administrative costs of the advisory commission’. The absence of a proper definition of this term may trigger discussions between EU Member States as to what can be considered administrative costs, which also does not lead to a streamlined and efficient arbitration procedure. In perspective, the Electrolux case learned that all fees, administrative expenses, travel expenses and translation expenses were considered costs of the arbitration procedure.

5.2.2.3 Reimbursement of Expenses

Paragraph 7.3(f)(i) Code of Conduct stipulates that expenses of independent persons (not of EU Member States’ representatives, as they are subject to the employee arrangement in their respective EU Member State) are reimbursed on the basis of the rules of the EU Member State that took the initiative to establish the advisory commission. There is some criticism to be made as to the content of this paragraph. First, the chairman is not mentioned. It is submitted that this is a slip of the pen rather than a well-thought measure. As the chairman is chosen amongst the list of independent persons, the reimbursement of the chairman’s expenses should be covered by paragraph 7.3(f)(i) as well. Second, paragraph 7.3(f)(i) Code of Conduct refers to reimbursement of high-ranking civil servants of the EU Member State that established the advisory commission. This rule is in principle sufficiently clear as to which regime applies, but in theory there could be twenty-seven different rules on the reimbursement of expenses, which does in any case not provide for a transparent rule and also does not provide for a uniform application of the EU Arbitration Convention.

5.2.2.4 Amount of Fees

Paragraph 7.4(f)(ii) Code of Conduct is based on a compromise within the EU JTPF, which at first sight appears reasonable and well defined. Also the fact that the chairman receives a higher remuneration appears reasonable, since this person also holds more responsibilities. However, the amount of fees itself and the fact that it only concerns a fee per meeting day, has raised some criticism by former member of advisory commissions. These members mentioned that the amount of fees does not take into account that the bulk of the work performed is done prior to the advisory commission’s meetings (e.g., reading documents, exchanging e-mails, preparing questions for a hearing, etc.).

5.2.2.5 Payment of Costs

The provision in respect of the payment of the arbitration procedure provides for a clear and workable solution. The EU Member State that established the advisory commission also holds the task to organize its meetings and arrange for secretarial assistance. It is thus logical that this EU Member State also (initially) pays the costs of the arbitration procedure. By doing so, there is no doubt which party initially should pay these costs and as such the rule avoids discussions between EU Member States hereon.


75 Van Raad 1998, p. 10 and L. Hinnekens, The Tax Arbitration Convention. Its Significance for the EC Based Enterprise, the EC Itself and for Belgian and International Tax Law, EC Tax Review, 1992/2, pp. 101–102. Van Raad, however, suggested that it appears reasonable that taxpayers should be granted partial compensation in case he incurs costs to comply with information requests by the advisory commission.

76 The total costs of this arbitration procedure amounted to approximately EUR 100,000. In this regard, doc. JTPF007/2003/EN, para 14. See further Editorial Tax Management Transfer Pricing Report 2004/09, p. 473.

Doc. JTPF/010/2013/EN, Annex – respondent 1 (under panel remuneration), respondent 2 (under 5 and 6) and respondent 4. Also Lodin 2014, para. 4. See further M. Desax & M. Veit, Arbitration of Tax Treaty Disputes: the OECD Proposal, Arbitration International 2007/3, para. VII, sub j. These authors argued that the current fee-structure does not make it attractive for nominees to accept the appointment as members of the advisory commission and does not even cover the costs incurred by these nominees.
5.2.2.6 Agreement on Deviating Rules
The rules laid down in paragraph 7.3(f) and (g) Code of Conduct allow EU Member States to agree on deviating rules as regards the amount of fees as well as reimbursement of expenses. Similar to the conclusion for other provisions of the Code of Conduct, by which EU Member States are allowed to agree on deviating rules, this does not contribute to an efficient and streamlined rule. Also, any (deviating) agreement reached may lead to such low fees, that no person is willing to act as an independent member or chairman of the advisory commission, which – as the Electrolux case learned – may delay proceedings.

5.2.3 Suggestions for Improvement

5.2.3.1 Definition of the Term ‘Administrative Costs’
To avoid any discussions on what can be considered ‘administrative costs’, the Code of Conduct should include a list of these costs. This list should include those costs that are necessary to have the advisory commission functioning, which are in any case costs for translating documents, using office spaces for meetings, hiring expert opinions and costs for the secretariat.

5.2.3.2 Reimbursement of Expenses
In order to provide for more uniformity, instead of twenty-seven different rules for reimbursement of expenses, reference could be made to the rules of an international organization relating hereto. For example, the US-Germany treaty refers to the International Centre for Settlement of Disputes’ schedule of fees for reimbursement of expenses. Such system could also be considered for the EU Arbitration Convention, for which the rules of the EU could be used. In any case, reimbursement should include all travel, communication and accommodation costs incurred by the independent persons and the chairman.78

5.2.3.3 Amount of Fees
Based on the criticism of advisory commission’s former members, the EU JTPF analysed whether improvements to the system are necessary.79 The EU JTPF did, however, not reach agreement hereon.80 In this respect, forum members provided for the following suggestions:

– Cyprus: using the principle one meeting day is one-day preparation and remunerate the independent members and the chairman accordingly;
– Denmark/United Kingdom: increasing the fees on the basis of the Euro Area Inflation Rate,81 and
– Bulgaria: changing the system to time-based remuneration, whereby each advisory commission’s member would record their time spent.

In addition, EU JTPF’s secretariat suggested to increase the remuneration to EUR 1,250.

Germany opposed to the suggestion of the Bulgarian representative, as, in its view it was from the outset clear that members of the advisory commission had to spend more time than just meeting days.82 Hence, the appointment in the commission is an honorary appointment and the remuneration should therefore not be considered as compensation for missed-income in the private sector. For these reasons the Germany representative concluded that there is no reason to increase the fees and also from a practical perspective there is no need to do so. Further, Germany argued that it is difficult to keep track of the actual time spent and that this may lead to a different remuneration of the commission’s members. Also, the total costs of the advisory commission may become high in that situation.

Last, Germany mentioned that the persons on the list of independent persons have an interest in being on the list and that fact does not make it necessary to raise the fees for being a member of an advisory commission.

I do not agree with all of the arguments put forward by the German representative. The amount of EUR 1,000 per meeting day stems from previous policy of the Netherlands and discussions by some EU Member States in the early nineties. At that time there was no experience with arbitration in international tax law. Nowadays, the concept of arbitration is more accepted and an increasing number of double tax conventions include an arbitration clause. In that regard, the Germany – US tax treaty includes a fee structure of USD 2,000 per arbitrator per day (not per se per meeting day), which makes clear that Germany is willing to agree on a higher fee structure.83 Further, it is submitted that the role of the arbitrator is more than an honorary appointment. Its task is to deliver an opinion on the correct application of the arm’s length application in a specific case, which may have severe impact on the taxpayer’s transfer pricing policy. I therefore agree with the remarks made by former members of the advisory commission. Most of the work in respect of the arbitration procedure is indeed preparatory and is not performed during the meetings. Adhering only to the meeting days for determining the fees appears unrealistic. As a solution, these former members

78 See also para. 29 of the OECD’s Sample Mutual Agreement on Arbitration. See further Desaux & Veit 2007, para. VII, sub j.
79 See Doc. JTPF/011/REV2/2013/EN, para. 30 and Annex III and doc. JTPF/001/2014/EN. See also doc. JTPF/014/2013/EN, para. 6(i).
80 Doc. JTPF/003/2014/EN, para. 4.10 and doc. JTPF/004/2014/EN, para. 30.
81 According to the EU JTPF this would come down to a fee of EUR 1,177.57 per meeting day, instead of EUR 1,000. See doc. JTPF/011/REV2/2013/EN, para. 30.
suggested to base the fees on the actual time spent.\textsuperscript{84} Although in essence I can agree to such solution, it is submitted that it is difficult to check each person’s time spent. In my view, it therefore appears more realistic increasing the amount of fees, whereby these increased fees also cover the preparatory work or work outside the advisory commission’s meetings. This should be reflected in the Code of Conduct and could be based on Cyprus’ suggestion, as this provides for an easy-to-apply measure. Subsequently, the fees should also annually be increased for inflation for which the Euro Area Inflation Rate can serve as the common standard.

5.2.3.4 Agreement on Deviating Rules

As EU Member States in practice do not use the option to agree on a different fee-structure or reimbursement of expenses, and because of the previously discussed objections to such possibility, this option should be deleted from paragraph 7.3(f) and (g) Code of Conduct.

6 Conclusion

6.1 Recapture of this Article

This article discussed and analysed in detail some issues of the functioning of the arbitration procedure under the EU Arbitration Convention. This concerned the advisory commission’s establishment, its composition and the appointment process of its members. Further, it analysed the secrecy obligation for commission’s members and the costs of the arbitration procedure. Based on this analysis, it can be concluded that the Code of Conduct has provided for valuable improvements to the arbitration procedure. However, it is submitted that part of the provisions included in the Code of Conduct concern the ‘low-hanging fruit’. The more difficult issues, such as competence criteria for independent members, have not been further addressed. That said, the analysis of this article also learns that the provisions of the Code of Conduct themselves are also not always sufficient clear and easy-to-apply. This, for example, concerns the provision on when another involved EU Member State is allowed to establish the advisory commission. T o achieve this, the Code of Conduct should be referred to a different remuneration of independent members. Stand-alone this should not be considered a hindering provision. However, the provision itself combined with other provisions included in the Code of Conduct allow EU Member States quite some leeway, which in any case does not contribute to a uniform application of the EU Arbitration Convention and also not to a streamlined dispute resolution procedure. For this reason, this article included several suggestions for improving the Code of Conduct (or the EU Arbitration Convention). These are further discussed below.

6.2 Suggestions for Improvement

The EU JTPF is currently examining whether inter alia the arbitration procedure under the EU Arbitration Convention should and could be further improved. The first question is whether improvement is necessary. In literature, authors also questioned whether the arbitration procedure would be invoked often. In their view, the threat of arbitration already constitutes a sufficient safeguard to have EU Member States settle the cases during the mutual agreement procedure.\textsuperscript{85} Although this view is widely expressed, I do not believe this is the actual situation, as EU JTPF’s annual publication of pending cases under the EU Arbitration Convention clearly shows the difference.\textsuperscript{86} The number of cases is steadily rising as of the convention’s re-entry into force in 2004. As per the end of 2013 (e.g., the last published figures), there were 983 cases pending under the EU Arbitration Convention, of which 329 cases were already pending for more than two-years under the mutual agreement procedure, whereby approximately 192 cases should already have been referred to the arbitration procedure.\textsuperscript{87} It is submitted that this figure makes clear that cases are not steadily and timely solved during the mutual agreement procedure. Rather it makes clear that there is need for a mandatorily and automatically reference of a case to arbitration in case EU Member States fail to do so after expiration of the two-year deadline of the mutual agreement procedure. In this article, it is therefore suggested that such sanction-mechanism could consist of transferring competence to the European Commission – as a third and neutral party – to establish the advisory commission.

Further to the above, as more and more cases need to be referred o the arbitration procedure, it is indispensable to have a well-functioning arbitration procedure. To achieve this, the Code of Conduct should and could be improved. This article thereby strived at providing for an analysis of the procedure’s bottlenecks

\textsuperscript{84} Doc. JTPF/010/2013/EN, para. 5 and Annex – remarks made by respondent 1 under panel remuneration, remarks made by respondent 2 under 5) and 6) and remarks made by respondent 4. Also Ledin 2014, para. 4.


\textsuperscript{86} Inter alia 2011 Statistics on the number of MAP pending cases under the AC DOC (JTPF/013/2012/EN), June 2012; Statistics on Pending Mutual Agreement Procedures (MAPs) under the Arbitration Convention at the end of 2012 (JTPF/012/2013/EN), August 2013; and Statistics on Pending Mutual Agreement Procedures (MAPs) under the Arbitration Convention at the end of 2013 (JTPF/008/2014/EN), October 2014. See for a similar view also Monsellato 2003, pp. 22–23.

\textsuperscript{87} See doc. JTPF/0082014/EN, p. 8. In 19% of the 432 pending cases, the two-year deadline was waived with the taxpayer’s agreement on the basis of Art. 7(4) EU Arbitration Convention.
and included suggestions for improvement as regards the advisory commission's establishment, appointment of members, secretarial assistance, secrecy obligation and costs of the arbitration procedure. In short, these are:

- The EU Member State to which the request was submitted – and thus which initiated the mutual agreement procedure – should establish the advisory commission;
- The advisory commission should be established within three months after expiration of the two-year deadline of the mutual agreement procedure;
- In case of non-compliance, the European Commission should be assigned competence to establish the advisory commission and appoint the independent members and the chairman;
- The advisory commission should consist of one representative per EU Member State, two independent persons and a chairman;
- EU Member States should each appoint their own independent member, based on the system used in the OECD's Sample on Arbitration and also on the basis of the pre-fixed list of independent persons as already provided for;
- Independent persons and EU Member States' representatives should select three possible chairmen. EU Members States must choose a chairman amongst these selected persons. If they fail to do so, the European Commission is assigned competence to take this decision;
- As a sanction-mechanism for an incomplete list of independent persons, the European Commission gains (temporarily) competence to nominate and appoint independent persons;
- Certain competence-criteria for independent persons/chairman should be included in the Code of Conduct;
- Nominated and appointed independent members/chairman should sign a declaration of independency and eligibility and (when nominated) a declaration of acceptance and a declaration of compliance with the secrecy obligation (when appointed);
- The European Commission should provide for a central secretariat for all future advisory commission's;
- The European Commission should publish a list of the sanction-mechanisms per EU Member State for breaching the secrecy-obligation, and
- The Code of Conduct should provide for a definition of the term 'administrative costs', a uniform mechanism for reimbursement of expenses, and provide for a higher amount of fees to reflect the preparatory work done outside the advisory commission's meeting (e.g., on the basis of the principle one meeting day one preparation day).