The EU Arbitration Convention

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Propositions to the dissertation of Harm Mark Pit

1. A proper default mechanism, which ensures that cases are resolved within the deadlines provided by its provisions, is missing in the institutional design of the EU Arbitration Convention. This in particular concerns the assurance to have cases referred to the arbitration procedure if competent authorities – after two years of negotiation under the mutual agreement procedure – have not reached an agreement that eliminates double taxation.

2. Given that the convention is a multilateral convention under international public law and not part of the acquis communuatiare, the accession of new signatory states to the EU Arbitration Convention has from a legal perspective not been correctly performed: the EU institutions should have refrained from taking legal actions in this field and Member States – as the convention's signatory states – should be the sole parties to adopt legal measures for the accession of new Member States to the convention.

3. The rules on the concurrence of the procedures of the EU Arbitration Convention and domestic legal proceedings are insufficient to protect taxpayers against non-elimination of double taxation occurred and are in conflict with the basic principle that the mutual agreement procedure is a procedure in addition to domestic legal proceedings and not a substitute for them.

4. Member States may take a final (deviating) decision on the case after the advisory commission has given its opinion. That decision has little significance, does not contribute to an efficient and effective dispute settlement procedure and deviates from the trend in international taxation to provide for a mandatory and direct binding arbitration procedure as a supplement to the mutual agreement procedure.

5. How to apply the convention's tax principles on attribution of profits to permanent establishments and on the application of the arm's length principle to thin capitalisation cases in practice has not been properly clarified in the EU Arbitration Convention nor in the Code of Conduct.

6. Timelines for the five successive phases, such as the absence of deadlines for the unilateral relief procedure and the implementation of an agreement reached, possibly through the arbitration procedure, have not been sufficiently defined in the EU Arbitration Convention, as also there is an incorrect definition of the commencement date of the two-year deadline of the mutual agreement procedure.

7. The provisions of the EU Arbitration Convention focus on bilateral disputes, whereas multiparty disputes are on the rise. The convention should therefore include more and detailed rules how to apply its procedure to (and thus to solve double taxation arising from) multi-party disputes.

8. The Proposal for a Council Directive on Double Taxation Dispute Resolution Mechanisms in the European Union, presented on 25 October 2016, will, apart from its political chances of adoption by all 28 Member States, not solve all bottlenecks identified in the current governance and functioning of the EU Arbitration Convention. As Milton Friedman noted: *'one of the great mistakes is to judge policies and programs by their intentions rather than their results'*.[1] The Commission should focus on solving the bottlenecks rather than focusing on institutionalizing the dispute settlement mechanism.

9. A perfect description of the problems with double taxation is made by Short: '*Die Doppelbesteuerung stellt bekanntlich einen Kampf dar, der nicht zwischen dem Steuereinnehmer und dem Steuerzahler, sondern zwischen den konkurrierenden Steuerhoheiten ausgetragen wird - die Steuerzahler bilden nur das Schlachtfeld und haben die Wunden davonzutragen'*.[2]

10. The problems related to the governance and functioning of the EU Arbitration Convention are not only caused by its design, but also by cultural differences between competent authorities; distrust of taxpayers and the lack of attitude to solve transfer pricing related disputes in a timely and satisfactory manner. But, when on this very day of 30 January in 1648, the rebellious Dutch Republic of the Seven Provinces were able to come to an everlasting peace with Spain after an 80-years war, Member States should more than be able to set aside their differences to agree on a strict, but functioning, dispute settlement mechanism.

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[1] Interview with Richard Heffner on The Open Mind on 7 December 1975.
[2] Quoted in Wolfswinkel, M., EG-Arbitrageverdrag, *Weekblad Fiscaal* 1990/1736.