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## **Draft protocol to the Convention on Mutual Administrative Assistance in Tax Matters (ETS No. 127)**

### **Report**

Committee on Economic Affairs and Development

Rapporteur: Mr Pieter OMTZIGT, Netherlands

### *Summary*

In the light of the ongoing financial and economic crisis, enhanced transparency and co-operation between states in tax matters are essential. The burden of the crisis must be shared fairly by all taxpayers. The Council of Europe and the Organisation for Economic Co-operation and Development (OECD) have therefore decided to update their joint Convention on Mutual Administrative Assistance in Tax Matters (ETS No. 127) by the means of a protocol. This process aims to align the convention to internationally agreed standards of transparency and information exchange in tax matters, and to open this multilateral legal instrument to accession by countries throughout the world.

In December 2009, the Committee of Ministers asked the Parliamentary Assembly for an opinion on the draft protocol to the convention. This request was referred to the Committee on Economic Affairs and Development for report.

The committee notes that the draft protocol is still under consideration and could be changed in the light of this opinion and any further developments. The Assembly's rapporteur, a member of both the Committee on Economic Affairs and Development and the Committee on Legal Affairs and Human Rights, paid special attention to the need to protect personal data, as well as administrative assistance in criminal tax matters and the compatibility of the text with European Union law.

The report expresses strong support for retroactivity with regard to data exchange in criminal tax matters and welcomes the wording of the clause on the relationship between the convention and European Union legislation, as agreed between the Council of Europe and the European Union.



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## A. Draft opinion

1. The Parliamentary Assembly welcomes the process launched with a view to amending the Convention on Mutual Administrative Assistance in Tax Matters (ETS No. 127), a joint instrument of the Council of Europe and the Organisation for Economic Co-operation and Development (OECD), and opening it to accession by states beyond these organisations' membership. This process provides a timely opportunity to align the convention to internationally agreed standards of transparency and information exchange in tax matters that have emerged with the new co-operative environment as a result of consultations among G7, G8 and G20 countries eager to tackle tax evasion more effectively.
2. Recalling that the convention originated in Parliamentary Assembly [Recommendation 833 \(1978\)](#) on co-operation between the Council of Europe member states against international tax avoidance and evasion, on the basis of a report by its Committee on Economic Affairs and Development ([Doc. 4098](#)), the Assembly reiterates its attachment to the rule of law and international co-operation that targets economic crime, including tax evasion.
3. The Assembly notes that the current text of the draft protocol is a fruit of compromise in an attempt to harmonise the positions of different stakeholders. It notes that most provisions have been agreed by consensus within the Committee of Ministers and trusts that the remaining open issues – concerning data protection and enhanced collaboration in information exchange on criminal tax matters – will be resolved in the spirit of co-operation and goodwill.
4. The Assembly underscores the importance of the convention as a major standard-setting step and is convinced that the added value of the draft protocol amending the convention rests on the multilateral drive to strengthen rather than dilute those standards. What is implicit in the convention should be clarified and rendered more explicit by the protocol. This holds in particular for provisions governing the application of the amended convention as regards criminal charges to tax. The Assembly expresses a strong preference for retroactivity with regard to data exchange in criminal tax matters, such as partially provided for in the Draft protocol via the provision in Article VIII, paragraphs 1 and 2, which relate to, respectively, Article 28 and Article 30, paragraph 1, of the convention.
5. The Assembly therefore:
  - 5.1. urges Austria, Liechtenstein, Luxembourg and Switzerland to show flexibility in accepting the proposed provisions on the entry into force of the draft protocol;
  - 5.2. asks the Committee of Ministers:
    - 5.2.1. as regards personal data protection standards, to adjust paragraph 1 of Article VI of the draft protocol to read as follows: “Any information obtained by a Party under this convention shall be treated as secret and protected in the same manner as information obtained under the domestic law of that Party and, to the extent needed to ensure the necessary level of protection of personal data, in accordance with the safeguards which may be specified by the supplying Party as required under its domestic law.”;
    - 5.2.2. to insert the words “in relation to earlier taxable periods or charges to tax” after the words “in respect of a Party” in paragraph 7 of Article VIII of the draft protocol;
    - 5.2.3. to end the possibility – foreseen in Article 29 of the convention – to restrict the application of the convention, as amended, to specified territory or territories in a country and to accept signature and ratification only for the whole territory of a country;
    - 5.2.4. to aim at the adoption of the so-called “disconnection clause” concerning the relationship between the convention and European Union legislation as proposed in document CM(2009)185 final and as agreed with the European Union;
    - 5.2.5. to seek the validation, if necessary by vote, of the proposed provisions governing the entry into force of the protocol, bearing in mind the considerations expressed by the Assembly in paragraph 4 above;
    - 5.2.6. to invite the Assembly’s rapporteur to a future meeting of the Rapporteur Group on Legal Co-operation (GR-J) when it deals with the finalisation of the text of the protocol in the light of this opinion.

## B. Explanatory memorandum by Mr Omtzigt, rapporteur

### 1. Introduction

1. Council of Europe member states are confronted with extraordinary economic hardships that have put an enormous strain on public finances in order to stabilise national budgets, help vulnerable enterprises and save jobs. Their economic situation ranges from precarious stability to recession or even depression.
2. In these circumstances it is vital to ensure that state tax revenues are collected fully and that any tax avoidance – by individuals or business entities – is tackled in a prompt and effective manner. The burden of the crisis must be shared fairly by all taxpayers. There should be no legal loopholes, nor safe havens for tax evasion. Our countries can no longer afford to tolerate bank secrecy for tax matters. In fact, the current crisis is also an opportunity to improve tax transparency and compliance generally.
3. To combat tax evasion, information exchange between states is paramount. If bilateral treaties can be viewed as a useful step in the right direction (over 3 000 bilateral tax agreements currently exist throughout the world), a comprehensive multilateral convention offers far greater advantages, as has been made clear in the G20 discussions. A multilateral approach has an obvious benefit in setting a uniform standard for information exchange, harmonising interpretations of the terms and conditions governing information exchange, as well as providing adequate guarantees for the respect of taxpayer rights.
4. The existing multilateral instrument – the joint Council of Europe/OECD Convention on Mutual Administrative Assistance in Tax Matters (ETS No. 127) – has therefore received a new impetus with a view to aligning it to internationally agreed standards of transparency and opening it up for signature worldwide by the means of an amending protocol. The ambition is to finalise such a protocol by April 2010 when the next meeting of G20 ministers of finance and central bankers should take place.

### 2. Background

5. At their meeting on 9 and 14 December 2009, the Committee of Ministers' Deputies invited the Parliamentary Assembly to submit an opinion on a draft protocol to the Convention on Mutual Administrative Assistance in Tax Matters (ETS No. 127), as contained in CM(2009)165. This request was transmitted to the Committee on Economic Affairs and Development for report and I was designated as rapporteur, taking into account that I am a member of both the Committee on Economic Affairs and Development and the Committee on Legal Affairs and Human Rights.
6. The Committee on Economic Affairs and Development has followed the process relating to the revision of the convention by means of a draft protocol from an early stage, notably by appointing me to take part as its representative at the joint meeting of the co-ordinating body of the convention (operating under the aegis of the OECD) and the Council of Europe Ad hoc Committee on the Revision of the Convention on Mutual Administrative Assistance in Tax Matters (CAHTAX), held in Paris on 22 and 23 October 2009. That meeting and the ensuing written consultation produced the first version of the draft protocol, which was subsequently submitted for discussion, first in the Rapporteur Group on Legal Co-operation (GR-J) and then in the Committee of Ministers' Deputies.
7. We should recall, in this context, that the convention as such originated in Assembly [Recommendation 833 \(1978\)](#) on co-operation between the Council of Europe member states against international tax avoidance and evasion, on the basis of a report by the Assembly Committee on Economic Affairs and Development ([Doc. 4098](#)).
8. The convention, opened for signature in 1988, was prepared jointly by the Council of Europe's Committee of Experts on Legal Co-operation and the OECD's Committee on Fiscal Affairs. It was a major step – ahead of its time – towards more structured international collaboration on information exchange to combat tax evasion. The convention was designed to cover all taxes (except for customs duties)<sup>1</sup> and to facilitate mutual administrative assistance on a broad range of tax matters, including tax recovery and certain aspects of tax evasion that may lead to judicial prosecution.

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1. This issue is dealt with separately via the international Convention on mutual administrative assistance for the prevention, investigation and repression of customs offences under the auspices of the World Customs Organization.

9. This pioneering step in standard-setting has largely contributed to triggering international efforts for managing cross-border data exchange more effectively, even if certain countries with strong (and quite excessive) bank secrecy traditions continued to oppose the global shift towards more transparency. The proposed protocol to the convention seeks to remove the remaining obstacles to international co-operation in this area, in particular as regards bank secrecy for tax matters, and constitutes valuable progress in global standard-setting.

10. At present the convention has been ratified by 14 states out of 54 to which it is potentially applicable (i.e. member states of the Council of Europe and of the OECD), three more states (Canada, Germany and Spain) have signed but not yet ratified the convention<sup>2</sup> and other states (notably, Slovenia) are expected to sign it soon. Among the states that have ratified the convention in recent years are France (2005), Italy (2006), the United Kingdom (2008) and Ukraine (2009).

11. In the light of the ongoing financial and economic crisis, fiscal problems, tax transparency and the convention in question have received renewed attention from G7, G8 and G20 countries eager to improve international co-operation standards and pressing “grey-” or “black-” listed countries to become more co-operative. We note in particular the statement of the G20 Summit in London on 2 April 2009 declaring that “the era of banking secrecy is over” and confirming the readiness of states “to take action against non-co-operative jurisdictions, including tax havens”. As matters now stand, only two G8 members – Japan and the Russian Federation – have not signed the convention. The rapporteur regrets that a number of Council of Europe member states that have a long history of protecting bank secrecy have not signed the convention.

12. Encouraged by this new resolve, the OECD initiated, in July 2009, a process aimed at amending the existing Council of Europe/OECD convention in order to allow for the opening of this multilateral instrument to accession by states beyond these organisations’ membership. With the draft protocol intended to amend the convention, the parties also seek to adjust some key provisions, such as those relating to personal data protection, safeguards on taxpayer rights and the need to take account of essential developments in international standards of co-operation in the tax field, notably as regards the specific grounds for refusing a request to supply information. An ambitious timetable agreed for this process seeks to finalise the draft protocol by April 2010, in time for the next G20 meeting of finance ministers and central bankers in South Korea, and the G20 Summit (to be held in Canada in June 2010).

13. The Committee of Ministers’ Deputies, when transmitting the proposed draft protocol to the Assembly for opinion, indicated that some issues had not been agreed by consensus. These concern the date of effect of the amended convention, the reference to data protection standards, and the so-called “disconnection clause” relating to the compatibility between the convention as amended and the application of European Union legislation.

14. An Assembly debate will give members the opportunity to provide a parliamentary view on the draft protocol, as it currently stands, and will enable them, in due course, to contribute to the promotion of the convention, as amended, through national parliaments.

### 3. The draft protocol

15. With a view to preparing a draft protocol to the convention, the co-ordinating body met on 22 and 23 October 2009. It worked on the draft text prepared by the OECD secretariat on the basis of the OECD model tax convention and initial comments provided by national experts from finance ministries and the Council of Europe Secretariat. As Assembly representative, I highlighted on that occasion the role of our Assembly in serving as the parliamentary forum on the OECD’s activities and the political challenges pertaining to the draft protocol from the point of view of Council of Europe values and activities in standard setting.

16. The main concern was to ensure that the “joint venture” of the Council of Europe and the OECD in producing the draft protocol was consistent with their legal standards. From the Council of Europe angle particular attention was paid to the issues of privacy and data protection, safeguards on fundamental human rights and freedoms, administrative assistance in criminal matters, the modalities of opening the convention to accession by non-member states of the two organisations and compatibility with anti-money-laundering

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2. See Council of Europe Treaty Office, ETS No. 127, chart of signatures and ratifications at: <http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=127&CM=8&DF=08/02/2010&CL=ENG>.

action. This rapporteur appreciated the good co-operation with, and valuable input by, the Council of Europe's MONEYVAL Committee, the Treaty Office, the Law Reform Department and the Consultative Committee of the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (T-PD).

17. Regarding privacy and data protection, the Council of Europe representatives sought a fair balance between the public and private interests involved by proposing that references be included, in the draft protocol (Article VI, paragraph 1), to internationally recognised data protection standards, such as the Council of Europe Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (ETS No. 108),<sup>3</sup> relevant OECD guidelines and United Nations instruments. Participants provisionally agreed that a general reference to "internationally recognised data protection standards" could be included in the draft protocol (under Article I, paragraph 1, and Article VI, paragraph 1), whilst specific legal instruments could be mentioned in the Explanatory Report of the convention, but later – during a written consultation – rejected this approach.

18. The subsequent consultations with eminent data protection specialists have shown that the current text of the convention (Article 22.1) is preferable because it refers to both the laws of requesting and requested state in conformity with binding data protection and privacy standards set out in Convention No. 108 and European Union law. A compromise proposal therefore suggested a formula that would explicitly refer, in Article VI, paragraph 1, to "the necessary level of protection of personal data under the domestic law of the supplying party" or "in accordance with the safeguards required to ensure the necessary level of protection of personal data under the domestic law of the supplying party". Whilst fully sharing this point of view, the rapporteur noted that a number of countries represented on the co-ordinating body (including the United States, Canada, Belgium, Finland, France, Norway, Poland and Sweden) objected to the proposed formula.

19. This, however, does not necessarily mean that these countries' other authorities – representing political decision-making circles – share the same position. A similar rift in national positions can be observed in the context of discussions at the Council of Europe Development Bank between the members of the Administrative Council, on the one hand, and of the Governing Board, on the other. Aware of these difficulties, the rapporteur organised an informal consultation of all stakeholders and is now able to propose a compromise formula that meets the concerns of all parties in the negotiating process. Article 22.1 of the amended convention (paragraph 1 of Article VI in the draft protocol) should read as follows: "Any information obtained by a Party under this convention shall be treated as secret and protected in the same manner as information obtained under the domestic law of that Party and, to the extent needed to ensure the necessary level of protection of personal data, in accordance with the safeguards which may be specified by the supplying Party as required under its domestic law."

20. Corresponding clarifications should be added in the explanatory report of the amended convention in order to refer explicitly to the OECD Guidelines on the Protection of Privacy and Transborder Flows of Personal Data and the Council of Europe Convention No. 108. These clarifications will also help rule out any abusive interpretation of the data protection clauses. In particular, bank secrecy cannot serve as a reason for declining a request for data exchange.

21. The current version of the draft protocol (under Article VI, paragraph 2) also foresees that information obtained by a Party to the convention may be disclosed "in public court proceedings or in judicial decisions relating to ... taxes" without prior authorisation by the competent authority of the data supplying Party<sup>4</sup> – thus amending the procedure currently laid out in the convention – unless the domestic law of the requested state provides for such a notification of taxpayers (see also paragraph 24 below). This provision could be completed by adding a mention of "criminal investigations" to the enumeration of circumstances for disclosure.

22. In considering personal data protection imperatives, it may also be useful to bear in mind the case law of the European Court of Human Rights concerning the protection of personal data and the explanations relating to Article 8 of the Charter of Fundamental Rights of the European Union which entered into force in December 2009 with the Lisbon Treaty. The latter explanations notably refer to Article 8 (Right to respect for private and family life) of the European Convention on Human Rights and Convention No. 108.

23. As regards safeguards on fundamental human rights and freedoms, the draft protocol proposes, under Article V, a revised wording of the convention's Article 21 on the protection of persons and limits to the obligations to provide assistance. Two new paragraphs ("g" and "h") were added to paragraph 2 in order to refer to the principle of proportionality in providing administrative assistance, including in tax recovery, under the domestic laws or administrative practice of the requested state. Moreover, two new paragraphs (3 and 4)

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3. This convention has been ratified to date by 41 member states; 3 member states have signed it.

4. The new formula is in line with provisions for information disclosure provided for in the OECD's model tax agreement.

have been added to clarify the obligations of the requested state for supplying information that it may not need for its own tax purposes or that is held by financial institutions. The alternative wording, proposed by the Council of Europe Secretariat, to include explicit mention of the supremacy of safeguards provided for in the Council of Europe Convention for the Protection of Human Rights and Fundamental Freedoms, the 1966 United Nations International Covenant on Civil and Political Rights and other applicable international human rights instruments, was not retained but reference to these instruments could be added to the Explanatory Report of the protocol to the convention.

24. Concerning administrative assistance in criminal (tax) matters, the convention implicitly provides for some retroactivity in the use of data obtained because information exchanged by definition relates to matters that have occurred in the past. Thus paragraph 2 of Article 4 indicates that “a Party may use information obtained ... as evidence before a criminal court” subject to prior authorisation by the Party which supplied the information. It also specifies that “two or more Parties may mutually agree to waive the condition of prior authorisation”. The draft protocol proposes to delete this paragraph and lifts the obligation for the applicant state to seek prior authorisation of the requested state in case it intends to use data obtained as evidence before a criminal court.

25. At the meeting of the co-ordinating body, several participants proposed to include, in the draft protocol under Article VIII relating to the amended convention’s entry into force, a provision specifying that for tax matters involving intentional conduct which is liable to prosecution under the criminal laws of the applicant Party, the provisions of the convention, as amended, should have effect from the date of entry into force in respect of a Party and apply to administrative assistance related to earlier taxable periods. This would enable the draft protocol to effectively extend the scope of the convention in the field of administrative assistance in criminal (tax) matters.

26. Thus, paragraph 6 of Article VIII, paragraph 1, of the current draft protocol foresees the possibility of a voluntary arrangement whereby “any two of more Parties may mutually agree that the convention, as amended by the 2010 protocol, shall have effect for administrative assistance related to earlier taxable periods or charges to tax” than the moment of entry into force in respect of a Party. The next paragraph (paragraph 7 of Article VIII, paragraph 1) relating to administrative assistance in criminal tax matters should be read in conjunction with new paragraph f (coming under paragraph 1 of Article 30 of the convention which deals with reservations) so as to allow for the application of these provisions to administrative assistance for periods of up to three years preceding the entry into force of the amended convention in respect of a Party.

27. Several countries, notably Austria, Liechtenstein, Luxembourg and Switzerland, had objected to such an addition despite the fact that an overwhelming majority of member states of the Council of Europe and the OECD wish to go forward with the current draft text. The Jurisconsult of the Council of Europe has estimated that the issue requires clarification as regards the exact scope of paragraph 7 either through the text of the draft protocol or in the explanatory report.

28. The rapporteur welcomes the current formula (with paragraphs 6 and 7 under Article VIII plus paragraph f described above) that would enable enhanced – including retroactive to a certain extent – co-operation among the interested parties to the convention as amended, subject to the mutually agreed terms between those parties, while also allowing the newly acceding parties to notify their reservation with regard to retroactive application of certain provisions. The rapporteur believes that the retroactive application of the amended treaty to administrative assistance in civil and criminal tax matters could further be strengthened and trusts that any necessary clarification of current provisions in that sense can be done through the explanatory report of the protocol.

29. Regarding countries that are not members of the Council of Europe or the OECD, the draft protocol sets out a procedure whereby any such state may ask to be invited to accede to the convention as amended by the protocol. It explains that such requests should be addressed to one of the depositaries (Secretaries General of, respectively, the Council of Europe or the OECD) who would in turn inform the parties, the Committee of Ministers of the Council of Europe and the OECD Council, and transmit the request to the co-ordinating body for consideration.

30. In respect of the Council of Europe and OECD member states, new accessions would imply the signature and ratification of the convention as amended by the protocol, unless otherwise notified to one of the depositaries in a written form by those states wishing to become a party to the convention.

31. As for the so-called “disconnection clause” currently contained in Article VII of the draft protocol, the rapporteur proposes that the Parliamentary Assembly endorse the formula that the Council of Europe and the European Commission agreed as early as 2005 and which is reiterated by the Committee of Ministers’ Deputies in document CM(2009)185final. In this context, the rapporteur also refers to the report prepared by

Mr Prescott, rapporteur of the Committee on Legal Affairs and Human Rights, and notably the contribution made by the expert Mr David Anderson at a hearing on 1 October 2009 before the Committee on Legal Affairs and Human Rights.<sup>5</sup>

#### 4. Conclusion

32. In conclusion, the rapporteur proposes that the Parliamentary Assembly support the current provisions of the draft protocol (as it appears in CM(2009)165) to Convention No. 127. The rapporteur then asks the Committee of Ministers to seek to ensure that the compromise wording concerning personal data protection as set out in paragraphs 19 and 21 and the so-called “disconnection clause” as set out in CM(2009)185 final be included in the final text of the draft protocol.

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*Reporting committee:* Committee on Economic Affairs and Development

*Reference to committee:* Reference 3617 of 20 November 2009

*Draft opinion* adopted on 26 January 2010

*Members of the Committee:* Mr Paul **Wille** (Chairperson), Mr Ertuğrul **Kumcuoğlu** (Vice-Chairperson), Mr Albrecht **Konečný** (Vice-Chairperson), Mr Giuseppe **Galati** (Vice-Chairperson), Mr Ruhi **Açikgöz**, Mr Miguel **AriasCañete**, Mr Robert Arrigo (alternate: Mrs Marie-Louise **Coleiro Preca**), Mr Viorel Riceard Badea, Mrs Doris **Barnett**, Mrs Maryvonne **Blondin**, Mr Fernand **Boden**, Mr Márton **Braun**, Mr Patrick **Breen**, Mr Erol Aslan **Cebeci**, Mr Per Dalgaard, Mr Kirtcho Dimitrov, Mr Tuur **Elzinga**, Mr Relu Fenechiu, Mr Erich Georg **Fritz**, Mr Guiorgui Gabashvili, Mr Marco Gatti, Mr Paolo **Giaretta**, Mr Francis **Grignon**, Mrs Arlette Grosskost (alternate: Mr Michel **Hunault**), Mrs Azra **Hadžiahmetović**, Mrs Karin Hakl, Mr Stanisław **Huskowski**, Mr Igor Ivanovski, Mr Čedomir Jovanović, Mrs Nataša Jovanović, Mr Antti **Kaikkonen**, Mr Oskars **Kastēns**, Mr Serhiy Klyuev, Mr Bronisław **Korfanty**, Mrs Athina **Kyriakidou**, Mr Bob **Laxton**, Mr Harald Leibrecht, Ms Anna **Lilliehöök**, Mr Arthur **Loepfe**, Mr Denis MacShane (alternate: Mr Jim **Hood**), Mr Dirk van der Maelen (alternate: Mr Geert **Lambert**), Mr Yevhen **Marmazov**, Mr Jean-Pierre Masseret (alternate: Mrs Josette **Durrieu**), Mr Silver Meikar, Mr Miloš **Melčák**, Mr José Mendes Bota, Mr Andrey Molchanov (alternate: Mr Nikolay **Shaklein**), Mr Juan Moscoso del Prado Hernández, Mrs Lilja **Mósesdóttir**, Mr Alejandro **Muñoz Alonso**, Mrs Olga Nachtmannová, Mrs Hermine Naghdalyan, Mr Gebhard **Negele**, Mrs Mirosława **Nykiel**, Mr Mark Oaten (alternate: Mr James **Clappison**), Mrs Vassiliki **Papandreou**, Mrs Ganira Pashayeva, Mrs Marija **Pejčinović-Burić**, Mr Petar Petrov, Mr Viktor **Pleskachevskiy**, Mr Jakob Presečnik, Mr Maximilian **Reimann**, Mr Andrea Rigoni (alternate: Mrs Anna Maria **Carloni**), Mrs Maria de Belém Roseira, Mr Giuseppe Saro, Mrs Ingjerd **Schou**, Mr Predrag Sekulić, Mr Samad Seyidov, Mr Leonid Slutsky, Mr Serhiy **Sobolev**, Mr Christophe Steiner, Mr Vyacheslav Timchenko, Mr Joan **Torres Puig**, Mrs Arenca Trashani, Mr Mihai Tudose, Mr Arpád Velez, Mrs Biruté **Vėsaitė**, Mr Oldřich Vojříř (alternate: Mr Tomáš **Jirsa**), Mr Konstantinos **Vrettos**, Mr Harm Evert Waalkens (alternate: Mr Pieter **Omtzigt**), Mr Robert **Walter**, Mr Karl Georg **Wellmann**, Mrs Maryam Yazdanfar.

NB: The names of the members who took part in the meeting are printed in **bold**

*Secretariat of the committee:* Mr Newman, Ms Ramanauskaite, Mr de Buyer and Mr Pfaadt

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5. See document AS/Jur (2010) 01, as from paragraph 16.