

INTERNATIONAL TAX DISPUTE RESOLUTION: NEW EU RULES

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International Tax Dispute Resolution: General Remarks

International tax disputes arise, in principle, where

- (i) there is a bilateral or multilateral treaty for the avoidance of double taxation (hereinafter “Double Tax Convention” or “DTC”) or an equivalent instrument¹ and
- (ii) the contracting jurisdictions exercise their taxing power in a manner resulting in violation of its provisions.

In addition, such disputes can also arise without violation of the DTC (including equivalent instruments), if there is disagreement or uncertainty in relation to the correct application of its provisions. In a nutshell, international tax disputes can arise, if there is a framework agreed between two or more jurisdictions regarding the exercise of their taxing power in cases involving both of them (in principle in a DTC).

In their vast majority, existing DTCs provide for the resolution of the above disputes through the so-called mutual agreement procedure or MAP, following the respective provisions of the OECD Model Tax Convention (hereinafter the “OECD Model”)². MAP aims at dispute resolution through agreement between the national tax authorities involved, on the basis of dialogue and cooperation, following request by the taxpayer affected.

MAP is of key relevance for taxpayers and in particular for the protection of their rights under DTCs, e.g. the right not to be taxed multiple times on the same income. It permits those who consider that such rights have not been respected by a certain state to invoke as their ally the other contracting state. Thus, the first state shall have to justify its conduct not only to the taxpayer but also to another sovereign state. It arises that MAP is critical for the integrity of the international tax system, encouraging states to abide by their contracting obligations in DTCs.

In the last few years, the MAP framework has changed substantially, always with a view to ensuring prompt and effective dispute resolution. From an international perspective, on the one hand, MAP was revisited in the context of the OECD’s Base Erosion and

¹An equivalent instrument is the EU Arbitration Convention, which establishes an EU tax dispute resolution framework for disputes following an upward adjustment of the taxable business profit of a multinational enterprise (transfer pricing disputes). Cf. Convention 90/436/EEC on the elimination of double taxation in connection with the adjustment of profits of associated enterprises (Arbitration Convention).

²OECD, Model Tax Convention on Income and on Capital: Condensed Version 2017, art. 25, OECD Publishing (Paris, 2017).

and Profit Shifting Project, under Action 14³ and Action 15⁴. The actions agreed to improve MAP are currently being implemented, in new DTCs following the 2017 version of the OECD Model and in existing DTCs through the Multilateral Instrument⁵. On the other hand, the EU took a drastic step to the same above end, by adopting a targeted directive on tax dispute resolution, at the close of 2017 (hereinafter the “Directive”)⁶. Such directive has to be transposed into Member States’ legislation within the first half of 2019, to be implemented to cross-border tax disputes arising in the EU from 1 July 2019 and in relation to tax years starting from 2018.

In light of the above, the following paragraphs provide an overview of the key changes the new directive brings to tax dispute resolution in the EU, compared to the existing framework. It is worth noting from the outset that the new directive promises a strong improvement of tax resolution in the EU, in favor of investment and growth in the Single Market.

New Framework: Key Changes

The Directive does not abolish the existing EU tax dispute resolution framework, based on DTCs between Member States and on the Arbitration Convention, but seeks to build thereon, by remedying the deficiencies of established mechanisms.

First of all, the Directive has an extended scope, including all international tax disputes arising between Member States, either on the basis of a DTC or the Arbitration Convention and in relation to their interpretation or application. This means that the same rules shall apply for the resolution of all such disputes, while before the Directive, there was a common framework only for transfer pricing disputes (under the Arbitration Convention). All other disputes were to be resolved as per the rules of the applicable DTC, i.e. different rules could apply between different Member States.

Secondly, the Directive promotes the effective resolution of tax disputes in the EU by providing for mandatory binding MAP arbitration, in case MAP does not lead to resolution within two years from its initiation. Under the previous framework, Member States had, in principle, an obligation only to make best endeavors to resolve a dispute, i.e. they were allowed to fail. Exception were the transfer pricing disputes falling under the Arbitration Convention, which provided for mandatory binding MAP arbitration as well. The Directive upgrades the exception into a rule for all tax disputes between Member States.

Thirdly, the Directive provides for the timely resolution of tax disputes by prescribing a strict timeframe for the several actions that need to be taken in the context and for the purpose of dispute resolution. Such a timeframe may be considered a novelty in relation to DTCs as well as to the Arbitration Convention, which provided a general timeframe only. Most importantly, the Directive ensures that such actions are taken on time by permitting taxpayers’ referral to national courts in case of delay. In essence, in such case and following taxpayers’ request, national courts can substitute the competent national authorities and take the necessary action themselves.

³OECD, Making Dispute Resolution Mechanisms More Effective, Action 14 - 2015 Final Report, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing (Paris, 2015).

⁴OECD, Developing a Multilateral Instrument to Modify Bilateral Tax Treaties, Action 15 - 2015 Final Report, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing (Paris, 2015).

⁵P. Valente, BEPS Action 15: Release of Multilateral Instrument, 45 Intertax 3 (Kluwer Law International, 2017).

⁶Council Directive (EU) 2017/1852 of 10 October 2017 on tax dispute resolution mechanisms in the European Union, OJ 265 (2017).

Furthermore, the Directive promotes publicity of the outcome of tax dispute resolution and hence transparency, predictability and tax certainty. Thus, where all parties (tax authorities and taxpayers) involved consent thereto, the whole resolution decision may be published - which was the case also under the Arbitration Convention for transfer pricing matters. In absence of such consent, an abstract of the decision is foreseen to be published, including a summary thereof. The publication of the abstract is a key innovation of the Directive.

Concluding Thoughts

The Directive is not flawless; there is margin for further improvement of the EU framework for tax dispute resolution. By way of an example, taxpayers are only allowed to present their case before the arbitral (or equivalent alternative dispute resolution) panel, with the prior consent of the tax authorities involved. Yet, fair trial and fair dispute resolution proceedings demand that taxpayers are effectively guaranteed such right. In any case, it is not questionable that the Directive signals significant progress for tax dispute resolution in the EU and subsequently, enhances tax certainty in the Single Market.

From an international perspective, the Directive follows a number of changes to the international tax dispute resolution rules, as a result of the BEPS Project and comes amidst their implementation. Although, overall, it moves in the same direction as such changes at the international level, the Directive may be praised for taking further steps compared with the latter towards prompt and effective tax dispute resolution. An example is the potential involvement of national courts to tax dispute resolution proceedings, in case of inaction of competent tax authorities. It could thus be the source of inspiration for additional improvement of the international rules as well.



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