

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

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on tax dispute resolution mechanisms in the European Union

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 115 thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national parliaments,

Having regard to the opinion of the European Parliament<sup>(1)</sup>,

Having regard to the opinion of the European Economic and Social Committee<sup>(2)</sup>,

Acting in accordance with a special legislative procedure,

Whereas:

- (1) Situations in which different Member States differently interpret or apply the provisions of bilateral tax agreements and conventions or the Convention on the elimination of double taxation in connection with the adjustments of profits of associated enterprises (90/436/EEC)<sup>(3)</sup> ('the Union Arbitration Convention'), can create serious tax obstacles for businesses operating across borders. They create an excessive tax burden for businesses, and are likely to cause economic distortions and inefficiencies and to have a negative impact on cross-border investment and growth.
- (2) For this reason, it is necessary that there are mechanisms in the Union that ensure the effective resolution of disputes concerning the interpretation and application of such bilateral tax treaties and the Union Arbitration Convention, in particular disputes leading to double taxation.
- (3) The mechanisms currently provided for in bilateral tax treaties and in the Union Arbitration Convention might not achieve the effective resolution of such disputes in all cases in a timely manner. The monitoring exercise carried out as part of the implementation of the Union Arbitration Convention has revealed some important shortcomings, in particular as regards access to the procedure and as regards the length and the effective conclusion of the procedure.
- (4) With a view to creating a fairer tax environment, rules on transparency need to be enhanced and anti-avoidance measures need to be strengthened. At the same time, in the spirit of a fair taxation system, it is necessary to ensure that mechanisms for dispute resolution are comprehensive, effective and sustainable. Improvements to dispute resolution mechanisms are also necessary to respond to the risk that the number

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of double or multiple taxation disputes will increase, with potentially high amounts being at stake, because tax administrations have established more regular and focused audit practices.

- (5) It is crucial to introduce an effective and efficient framework for the resolution of tax disputes which ensures legal certainty and a business-friendly environment for investments in order to achieve fair and efficient tax systems in the Union. The dispute resolution mechanisms should also create a harmonised and transparent framework for solving disputes and thereby provide benefits to all taxpayers.
- (6) The resolution of disputes should apply to different interpretation and application of bilateral tax treaties and of the Union Arbitration Convention — in particular to different interpretation and application leading to double taxation. This should be achieved through a procedure under which, as a first step, the case is submitted to the tax authorities of the Member States concerned, with a view to settling the dispute by using a mutual agreement procedure. Member States should be encouraged to use non-binding alternative dispute resolution forms, such as mediation or conciliation, during the final stages of the mutual agreement procedure period. In the absence of an agreement within a certain time frame, the case should be submitted to a dispute resolution procedure. The choice of the method for dispute resolution should be flexible, which could be either through ad hoc structures or through more permanent structures. Dispute resolution procedures could take the form of an Advisory Commission, consisting of both representatives of the tax authorities concerned and independent persons of standing, or could take the form of an Alternative Dispute Resolution Commission (the latter providing for flexibility in the choice of dispute resolution methods). Also, where appropriate, Member States could choose, through bilateral agreement, to use any other dispute resolution process, such as the ‘final offer’ arbitration process (otherwise known as ‘last best offer’ arbitration) to solve the dispute in a binding manner. The tax authorities should take a final binding decision by reference to the opinion of an Advisory Commission or Alternative Dispute Resolution Commission.
- (7) The improved dispute resolution mechanism should build on existing systems in the Union, including the Union Arbitration Convention. However, the scope of this Directive should be wider than that of the Union Arbitration Convention, which is limited to disputes over transfer pricing and the attribution of profits to permanent establishments. This Directive should apply to all taxpayers that are subject to taxes on income and capital covered by bilateral tax treaties and the Union Arbitration Convention. At the same time, individuals, micro, small and medium-sized enterprises should have less of an administrative burden when using the dispute resolution procedure. In addition, the dispute resolution phase should be strengthened. In particular, it is necessary to provide for a time limit for the duration of the procedures to resolve double taxation disputes and to establish the terms and conditions of the dispute resolution procedure for the taxpayers.
- (8) In order to ensure uniform conditions for the implementation of this Directive, implementing powers should be conferred on the Commission. Those powers should be

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exercised in accordance with Regulation (EU) No 182/2011 of the European Parliament and of the Council<sup>(4)</sup>.

- (9) This Directive respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union. In particular, this Directive seeks to ensure full respect for the right to a fair trial and the freedom to conduct a business.
- (10) Since the objective of this Directive, to establish an effective and efficient procedure to resolve disputes in the context of the proper functioning of the internal market, cannot be sufficiently achieved by the Member States but can rather, by reason of the scale and effects of the action, be better achieved at Union level, the Union may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty on European Union. In accordance with the principle of proportionality as set out in that Article, this Directive does not go beyond what is necessary in order to achieve that objective.
- (11) The Commission should review the application of this Directive after a period of 5 years, and Member States should provide the Commission with appropriate input to support this review,

HAS ADOPTED THIS DIRECTIVE:

### *Article 1*

#### **Subject matter and scope**

This Directive lays down rules on a mechanism to resolve disputes between Member States when those disputes arise from the interpretation and application of agreements and conventions that provide for the elimination of double taxation of income and, where applicable, capital. It also lays down the rights and obligations of the affected persons when such disputes arise. For the purposes of this Directive, the matter giving rise to such disputes is referred to as a ‘question in dispute’.

### *Article 2*

#### **Definitions**

- 1 For the purposes of this Directive, the following definitions apply:
  - a ‘competent authority’ means the authority of a Member State which has been designated as such by the Member State concerned;
  - b ‘competent court’ means the court, tribunal or other body of a Member State which has been designated as such by the Member State concerned;
  - c ‘double taxation’ means the imposition by two or more Member States of taxes covered by an agreement or convention referred to in Article 1 in respect of the same taxable income or capital when it gives rise to either: (i) an additional tax charge; (ii) an increase in tax liabilities; or (iii) the cancellation or reduction of losses that could be used to offset taxable profits;

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- d 'affected person' means any person, including an individual, that is a resident of a Member State for tax purposes, and whose taxation is directly affected by a question in dispute.

2 Any term not defined in this Directive shall, unless the context requires otherwise, have the meaning that it has at that time under the relevant agreement or convention referred to in Article 1 that applies on the date of receipt of the first notification of the action that resulted in, or that will result in, a question in dispute. In the absence of a definition under such agreement or convention, an undefined term shall have the meaning that it had at that time under the law of the Member State concerned for the purposes of the taxes to which the said agreement or convention applies, any meaning under the applicable tax laws of that Member State prevailing over a meaning given to the term under other laws of that Member State.

### *Article 3*

#### **Complaint**

1 Any affected person shall be entitled to submit a complaint on a question in dispute to each of the competent authorities of each of the Member States concerned, requesting the resolution thereof. The complaint shall be submitted within 3 years from the receipt of the first notification of the action resulting in, or that will result in, the question in dispute, regardless of whether the affected person has recourse to the remedies available under the national law of any of the Member States concerned. The affected person shall simultaneously submit the complaint with the same information to each competent authority, and shall indicate in the complaint which other Member States are concerned. The affected person shall ensure that each Member State concerned receives the complaint in at least one of the following languages:

- a one of that Member State's official languages in accordance with national law; or
- b any other language that such a Member State accepts for this purpose.

2 Each competent authority shall acknowledge receipt of the complaint within 2 months from the receipt of the complaint. Each competent authority shall also inform the competent authorities of the other Member States concerned of the receipt of the complaint within 2 months of such receipt. The competent authorities shall inform each other at that time also about the language or languages they intend to use for their communications during the relevant proceedings.

3 The complaint shall only be accepted if, as a first step, the affected person making the complaint provides the competent authorities of each of the Member States concerned with the following information:

- a the name(s), address(es), tax identification number(s) and any other information necessary for identification of the affected person(s) who presented the complaint to the competent authorities and of any other person concerned;
- b the tax periods concerned;
- c details of the relevant facts and circumstances of the case (including details of structure of the transaction and of the relationship between the affected person and the other parties to the relevant transactions, as well as any facts determined in good faith in a mutual binding agreement between the affected person and the tax administration, where applicable) and more specifically, the nature and the date of the actions giving rise to the question in dispute (including, where applicable, details of same income received in the other Member State and of inclusion of such income in the taxable income in the other Member State, and details of the tax charged or that will be charged in relation to

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- such income in the other Member State), as well as the related amounts in the currencies of the Member States concerned, with a copy of any supporting documents;
- d reference to the applicable national rules and to the agreement or convention referred to in Article 1; where more than one agreement or convention is applicable, the affected person making the complaint shall specify which agreement or convention is being interpreted in relation to the relevant question in dispute. Such agreement or convention shall be the applicable agreement or convention for the purposes of this Directive;
  - e the following information provided by the affected person who presented the complaint to the competent authorities, together with copies of any supporting documents:
    - (i) an explanation of why the affected person considers that there is a question in dispute;
    - (ii) the details of any appeals and litigation initiated by the affected person regarding the relevant transactions and of any court decisions concerning the question in dispute;
    - (iii) a commitment by the affected person to respond as completely and quickly as possible to all appropriate requests made by a competent authority and to provide any documentation at the request of the competent authorities;
    - (iv) a copy of the final tax assessment decision in the form of a final tax assessment notice, tax audit report or other equivalent document leading to the question in dispute and a copy of any other documents issued by the tax authorities with regard to the question in dispute where relevant;
    - (v) information on any complaint submitted by the affected person under another mutual agreement procedure or under another dispute resolution procedure as defined in Article 16(5) and an express commitment by the affected person that he will abide by the provisions of Article 16(5), if applicable;
  - f any specific additional information requested by the competent authorities that is considered necessary to undertake the substantive consideration of the particular case.

4 The competent authorities of each of the Member States concerned may request the information referred to in point (f) of paragraph 3 within 3 months from the receipt of the complaint. Further requests for information may be made during the mutual agreement procedure under Article 4 if the competent authorities consider this to be necessary. National laws regarding the protection of information and the protection of trade, business, industrial or professional secret or trade processes shall apply.

An affected person that receives a request in accordance with point (f) of paragraph 3 shall reply within 3 months of receiving the request. A copy of this reply shall also be sent simultaneously to the competent authorities of the other Member States concerned.

5 The competent authorities of each of the Member States concerned shall take a decision on the acceptance or rejection of the complaint within 6 months of the receipt thereof or within 6 months of the receipt of the information referred to in point (f) of paragraph 3, whichever is later. The competent authorities shall inform the affected person and the competent authorities of the other Member States of their decision without delay.

Within the period of 6 months from the receipt of a complaint, or within 6 months of the receipt of the information referred to in point (f) of paragraph 3, whichever is later, a competent authority may decide to resolve the question in dispute on a unilateral basis, without involving the other competent authorities of the Member States concerned. In such case, the relevant competent authority shall notify the affected person and the other