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Without effective dispute resolution mechanisms between Member States of the European Union, companies will face the increasing possibility of unresolved double taxation. This is in particular due to new BEPS Actions that will provide Member States with expanding taxation opportunities. This article discusses whether the new Council Directive on Double Taxation Dispute Resolution Mechanisms in the European Union (the Directive) will resolve the areas of concern that companies currently face in dispute resolution procedures between Member States under tax treaties and the EU Arbitration Convention. Three areas of concern discussed here are (i) access to the procedure, (ii) length of the procedure and (iii) outcome of the procedure. The article concludes that the Directive will provide an overall improvement within these areas of concern because of the extended scope for qualifying disputes and the inclusion of clear deadlines and fall-back mechanisms in the Directive. However, this improved legal certainty for taxpayers is expected to come at a (high) price in the form of increased durations of already lengthy dispute resolution procedures.

1. Introduction

Companies expect that Base Erosion and Profit Shifting (BEPS) Actions will cause a further increase of the already high number of existing double taxation disputes within the European Union. These expectations seem quite legitimate because BEPS Actions will provide tax administrations with (i) increased transparency and (ii) new tools to challenge BEPS transactions. Transparency measures, such as the exchange of advance pricing agreements and tax rulings within the European Union (BEPS Action 5 and EU Council Directive 2015/2376) and implementation of “Transfer Pricing Documentation Requirements and Country-by-Country Reporting Obligations” (BEPS Action 13), will provide tax administrations with comprehensive information on taxpayers’ intercompany transactions. Once (alleged) BEPS transactions are identified, with the help of this increased transparency, the BEPS Actions will provide tax administrations with “improved” tools to challenge them (specifically BEPS Actions 8-10 “Aligning Transfer Pricing Outcomes with Value Creation” and BEPS Action 7 “Preventing the Artificial Avoidance of Permanent Establishment Status”).

In order to balance the increasing number of double taxation disputes with improved legal certainty for taxpayers, a more effective dispute resolution mechanism is urgently required. The Directive aims to meet this goal.

This article aims to analyse whether the Directive will resolve main areas of concern that companies face in relation to attempting to resolve double taxation (areas of concern). To that end, (avoiding) double taxation is discussed in section 2, and the companies’ areas of concern are elaborated on in section 3. Section 4. analyses whether the Directive will resolve these areas of concern, with a particular focus on the various aspects of the access to dispute resolution. Finally, suggestions will be given in section 5. for further improvements to the dispute resolution procedure.

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2. The terms “company(ies)” and “taxpayer(s)” are interchangeably applied throughout this article. These terms are intended to qualify as associated enterprises within the meaning of OECD Model Tax Convention on Income and on Capital art. 9, para. 1.
3. The 2015 Final Reports issued as a result of the OECD/G20’s Base Erosion and Profit Shifting Project.
5. Transfer pricing has always been an area of taxation that is quite sensitive to double taxation. This sensitivity is expected to further increase due to (i) the vague notions included in BEPS Actions 8-10, and (ii) the fact that the Council’s Anti-Tax Avoidance Directive ((EU) 2016/1164 of 12 July 2016) does not prevent diverging views on transfer pricing (whereas it does intend to harmonise implementation in the European Union of other BEPS Actions). Although the CCCTB proposal would eliminate transfer pricing disputes within the European Union, agreement on the proposal is far from certain and in its current form the proposal only covers multinationals active in the European Union with consolidated revenue of at least EUR 750 million.
6. The Directive will apply to disputes submitted as from 1 July 2019 and will cover cases of double taxation relating to tax years starting on or after 1 Jan. 2018.
2. Avoiding Double Taxation

This section illustrates the mechanisms available to companies attempting to resolve double taxation on the basis of a simple example of double taxation. The example involves a so-called case-specific\footnote{Art. 25 OECD Model provides for three types of MAP: (i) “case-specific MAP”, (ii) “interpretative MAP” and (iii) “legislative MAP”. The first type of MAP, which is discussed in this article, involves a procedure between the competent authorities upon request of the taxpayer in the case of a specific issue (such as a transfer pricing correction) resulting in double taxation. A solution reached under a case-specific MAP does not create precedent vis-à-vis other taxpayers. An interpretative MAP and legislative MAP are initiated at the request of the competent authorities where a solution is sought for double taxation due to different interpretation or application of certain tax treaty provisions (ad ii), or issues that are not covered for in the tax treaty (ad iii).} mutual agreement procedure (MAP) involving EU Member States.

2.1. Double taxation

Suppose a company in Member State A (“Company A”) granted an interest-free loan to a (associated) company in Member State B (“Company B”). Following a tax audit of the tax administration in Member State A, the arm’s length character of the interest-free loan was challenged and an (upward) transfer pricing correction (the Correction) of the interest rate was imposed. If, however, the tax administration in Member State B has a diverging view on the application of the arm’s length principle by Member State A (a Dispute), they may deny application of the corresponding (downward) adjustment at the level of Company B in Member State B. In the absence of other measures, the result of the Dispute will be (economic) double taxation.\footnote{Naturally, Company A may also lodge an objection to a decision regarding such a request for reduction. Experience in the Netherlands shows that taxpayers facing (non-

2.2. Unilateral adjustment

Resolving the Dispute in Member State B is in practice hindered due to the difference in timing between (i) the tax audit in Member State A and (ii) the tax compliance phase of Company B in Member State B. In general, the tax audit in Member State A (and the additional assessments which include the Corrections that are raised as a result of such an audit) will cover a period of four or five years in the past (e.g. the period 2008 up to and including 2012). However, at the time of imposing the Correction, the corresponding income will already have been reported in the tax return of Company B. Furthermore, final assessments generally have been issued in respect of these years and Company B will often have paid tax on such assessments. Consequently, the manner in which double taxation can be (unilaterally) resolved\footnote{The tax administration in Member State B, to the extent domestic formal law allows so, may decide to apply a unilateral corresponding adjustment if they agree with the interpretation of the arm’s length principle of the tax administration in Member State A, which resulted in the Correction. In such a case, the tax administration in Member State B will issue (reduced) ex-officio assessments for the relevant financial year in which it would substantiate the (downward) corresponding adjustment on the basis of the arm’s length principle.} (meaning the way in which the corresponding adjustment is formalized) depends on the tax compliance phase of Company B (i.e. “open years” or “closed years” as discussed below).

2.2.1. Open years

“Open years” are financial years for which (i) the final tax assessment has not yet been issued or (ii) the final assessment has been issued, but the term for lodging an objection against the assessment has not yet expired. If the Correction relates to an open year, Company B can file an amended tax return which includes the (downward) corresponding adjustment (substantiated on the basis of the arm’s length principle).\footnote{It may also lodge an objection to the final assessment for the relevant financial year in which it would substantiate the (downward) corresponding adjustment on the basis of the arm’s length principle.} In such a case, Company B will only be able to request the tax administration in Member State B to reduce the final assessments by way of an “ex-officio reduction”.\footnote{A taxpayer generally cannot lodge an objection to a decision regarding such a request for reduction. However, as these measures fall outside the scope of this article, they will not be further discussed.} The tax administration in Member State B, to the extent domestic formal law allows so, may decide to apply a unilateral corresponding adjustment if they agree with the interpretation of the arm’s length principle of the tax administration in Member State A, which resulted in the Correction. In such a case, the tax administration in Member State B will issue (reduced) ex-officio assessments for the relevant financial years and, if tax was paid on these assessments, provide for a cash refund (which may include interest).

2.2.2. Closed years

For “closed years”, the period for lodging an objection to the relevant assessments has expired. In a Dispute, the financial years covered in the audit in Member State A will often be closed in Member State B.\footnote{In the Netherlands, taxpayers are allowed to file a request for an ex-officio reduction within a five-year period after the end of the relevant financial year. Based on the Dutch MAP Decree (Decree of 29 Sept. 2008, IFZ2008/248M), this five-year period does not apply to adjustments that are the result of the implementation of a resolution reached in the scope of a MAP or arbitration (under a tax treaty or the EU Arbitration Convention). Furthermore, no objection can be lodged against the response of the tax inspector on such a request for reduction and it is not subject to a term (in contrast, a Dutch tax inspector has to render a decision on an objection within six weeks after it was filed). In such a case, Company B will only be able to request the tax administration in Member State B to reduce the final assessments by way of an “ex-officio reduction”.} In such a case, Company B will often have paid tax on such assessments. Consequently, the manner in which double taxation can be (unilaterally) resolved (meaning the way in which the corresponding adjustment is formalized) depends on the tax compliance phase of Company B (i.e. “open years” or “closed years” as discussed below).
2.3. Bilateral adjustment

If domestic laws prevent the tax administration in Member State B from providing a (full) unilateral adjustment (or if it is unwilling to do so because it does not agree with the Correction), Company B may request the competent authority in Member State B to initiate a MAP with the competent authority in Member State A.

The MAP is aimed at allowing the competent authorities to reach an agreement on the Dispute in order to eliminate (any remaining) double taxation (in line with the Directive, the request to initiate a MAP is referred to in this article as Complaint). Within the European Union, a Complaint can be filed on the basis of (i) a MAP clause included in the applicable bilateral tax treaty or (ii) the EU Arbitration Convention. Considering that the procedures to access and initiate a MAP under the Arbitration Convention are very similar to those under article 25(1) of the OECD Model, the “Complaint stage” and the “MAP stage” are discussed together for these mechanisms. The “Arbitration stage” is discussed separately for the OECD Model and Arbitration Convention because these mechanisms contain more diverging elements.

2.3.1. The Complaint stage

A taxpayer can request the competent authority in his state of residence to initiate a MAP if:

1. the actions of one or both jurisdictions give rise to (probable) risk of double taxation; and
2. the request is filed within a three-year period after the “first notification” of such double taxation.

The main difference between both mechanisms concerns the admissibility of Disputes. Under the Arbitration Convention, Disputes are only admissible if they relate to (i) transfer pricing adjustments or (ii) the allocation of profit to a permanent establishment (PE). Under the OECD Model (as well as under most tax treaties), eligible Disputes are not limited to transfer pricing issues (and “PE profit allocation”), but may also include issues such as the recognition of a PE, residency of a taxpayer, classification of a legal entity or income and taxation rights as regards income from foreign employment or pension.

2.3.2. The MAP stage

Subsequently, upon admissibility of the Dispute and if the three-year period is respected, the competent authority to which the Complaint was made will initiate the MAP if:

- the Dispute “appears to be justified”; and
- the competent authority is not itself able to arrive at a “satisfactory solution” for the Dispute (i.e. it denies a full unilateral corresponding adjustment).

The Arbitration Convention allows Member States to deny access to the MAP (as well as arbitration) where one, or both of the Member States have imposed a “serious penalty” in respect of the transaction for which the Correction was made. In respect of what constitutes a “serious penalty”, each Member State has been allowed to include its own definition in the Arbitration Convention. The Commentary on article 25 of the OECD Model also allows contracting states to conclude tax treaties in which access to the MAP and arbitration is denied in case of “significant penalties”.

2.3.3. Arbitration stage (OECD Model)

On the basis of article 25(5) of the OECD Model, the taxpayer has the right to request initiation of the arbitration stage if:

- unresolved issues under the Dispute remain (for which double taxation has occurred) after the end of the two-year period; and
- no decision on these issues was rendered under domestic legal proceeding in either contracting state.

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13. In the Netherlands, officials of the Ministry of Finance act as the competent authorities in respect of MAPs.
14. Supra n. 7.
15. Most Member States concluded tax treaties with all other Member States. Currently, 371 tax treaties are in force within the European Union. Notable exceptions are Cyprus (no tax treaty in force with Luxembourg and the Netherlands) and Denmark (no tax treaty with France, Spain and Sweden). Although most of these tax treaties contain a MAP clause in line with art. 25(1) OECD Model, fewer than 20 tax treaties also contain an arbitration clause in line with art. 25(5) OECD Model.
17. This article will refer to the OECD Model Arbitration in the meaning of art. 25(5) OECD Model and the relevant Commentary on the OECD Model. For illustrative purposes, it may also refer to individual tax treaties concluded by Member States.
18. Para. 14 OECD Model: Commentary on Article 25 provides “an active examination of a specific taxpayers reporting position in the scope of an audit” as an example of such “first notification”. Furthermore, note that under the Dutch MAP Decree (Decree of 29 Sept. 2008, IFZ2008/248M), the “first notification” is the latest of (i) the date of the assessment in which the correction is included and (ii) the date of the substantiation of the correction.
19. Member States’ unilateral definition of a “serious penalty” are included in the Arbitration Convention in the “Individual Declarations of the Contracting States on Article 8”.
20. Although this request is worded in the OECD Model as a decision of the taxpayer only, individual tax treaties may provide that this decision is only made with the consent of (i) one of the competent authorities, (ii) both of them, (iii) both together with the taxpayer or (iv) after the end of the two-year period.
21. Under the OECD Model, the two-year period commences after the date of receipt of the complete MAP request by the competent authority in the other contracting state. The Arbitration Convention provides that this period starts after the date of submission of a complete MAP request to one of the competent authorities.
The Commentary on the OECD Model[22] provides that a commission (the Arbitration Commission) needs to be appointed in principle within eight months[23] of the arbitration request. As a fall-back mechanism, if its arbiters are not appointed within the terms required, these will be appointed by the Director of the OECD Centre for Tax Policy and Administration. The decision of the Arbitration Commission needs to be rendered within a six-month period after its appointment. The Arbitration Commission’s decision is (directly) binding to the competent authorities involved. However, the taxpayer has the possibility to reject the decision and, if still available, to continue domestic legal proceedings. If accepted by the taxpayer, the Arbitration Commission’s decision will need to be implemented by the competent authorities regardless of domestic law time limits.

2.3.4. Arbitration stage (Arbitration Convention)

The Arbitration Convention requires the competent authorities to appoint the Advisory Commission if they do not reach an agreement on the (full) Dispute within the two-year period. The Arbitration stage is not subject to a request by the taxpayer. It is noted in this respect that:

- if domestic legal proceedings are pursued simultaneously with the MAP under the Arbitration Convention, the two-year period will only commence upon the date of the judgment of the final court in respect of these domestic legal proceedings; and
- if domestic law does not allow Member States’ competent authorities to deviate from judicial decisions,[24] a Complaint cannot be submitted to the Arbitration stage if a domestic court has rendered a final decision. Therefore, in order for a Complaint to be admissible, domestic legal proceedings need to be revoked or the initiation period has to have expired.

The Arbitration Convention does not provide for a period within which the Advisory Commission needs to be established. The Code of Conduct[25] does provide for a six-month period for the establishment of the Advisory Commission, starting at the end of the two-year (MAP) period. However, the Code of Conduct does not legally bind Member States and, therefore, taxpayers do not have recourse to domestic law in order to force the competent authorities to comply with the content of the Code of Conduct. Once established, the Advisory Commission is required under the Arbitration Convention to provide its opinion within a six-month period after the “date on which the matter was referred to it”. The Code of Conduct specifies this date as the date of confirmation by the Advisory Commission of receipt of all relevant information. After the Advisory Commission has provided its opinion, the competent authorities still have (a further) six-month period to agree on the Dispute (the “renegotiation period”). If they fail to reach an alternative agreement during this period, they are bound by the advice of the Advisory Commission. Also here the taxpayer has the possibility to reject the alternative agreement of the competent authorities or the opinion of the Advisory Commission and, if still available, to continue domestic legal proceedings.

3. Areas of Concern

This article aims to analyse whether the Directive will resolve areas of concern that companies face when attempting to prevent double taxation. The areas of concern discussed below are access to dispute resolution, length of dispute resolution and outcome of dispute resolution.[26]

3.1. Access to dispute resolution

Various elements of the Arbitration Convention and the OECD Model may effectively block access to dispute resolution. The main elements discussed below are qualifying disputes, access to MAPs, access to arbitration, domestic legal proceedings and serious penalties.

3.1.1. Qualifying disputes

Disputes admissible under the Arbitration Convention can only relate to transfer pricing adjustments and PE profit allocation issues.[27] Other Disputes (see section 2.3.1.) may be resolved under the OECD Model. However, as most tax treaties concluded between Member States do not provide for arbitration,[28] these Disputes may in the end not be resolved by Member States. In addition, the competent authorities in the Member State may also consider that a Dispute does not qualify for a MAP if the Correction is based on the application of a (domestic) anti-abuse clause.

22. The OECD Model: Commentary on Article 25(5) provides for procedural rules in respect of the arbitration stage in the “Sample Mutual Agreement”. Only a limited number of tax treaties also provide for such procedural rules.
23. These time-frames are subject to extensions if for example “terms of reference” are not communicated, arbiters are not appointed and/or requests for additional information are made by the Arbitration Commission.
24. Only Germany, Finland, the Netherlands, Sweden and the United Kingdom allow for their competent authority to derogate from final judicial decisions (see an EU JTPF Questionnaire on the interaction between MAP and Judicial Appeals under art. 7.3 of the Arbitration Convention, of 30 Apr. 2008 (JTPF/024/BACK/REV2/2007/EN).
26. This article does not intend to provide an exhaustive list of (potential) issues in relation to dispute resolution. Instead, it intends to analyse certain areas of concern that companies have been faced with when attempting to prevent double taxation.
27. It is questionable whether all PE profit allocation issues are effectively dealt with under the Arbitration Convention. Generally, an issue on PE profit allocation will only arise after the recognition of the PE itself. If Member States do not agree on that primary question, the Arbitration Convention cannot be applied to resolve the Dispute. Instead, a MAP under a tax treaty will need to be applied. However, if the relevant tax treaty does not provide for arbitration, the issue of recognising the PE may not be resolved and therefore the profit allocation question will also not be dealt with.
28. Supra n. 15.
3.1.2. Access to MAPs

Under the Arbitration Convention as well as the OECD Model, before a Dispute can enter the MAP stage, the competent authority to which the request was made will first need to decide whether it agrees with the Correction of the other Member State and, if so, whether it is willing and able to provide a unilateral adjustment. In other words, access to MAPs requires a decision from the other Member State on a unilateral adjustment.

However, neither the OECD Model (in the arbitration clause or in the Commentary on the OECD Model) nor the Arbitration Convention contain a deadline for such a decision. Also, no fall-back mechanism exists in the case of (systematic) failure of a Member State to render such a decision. Consequently, a taxpayer will generally not be able to lodge an appeal against the tax administration for not deciding on such a request. In practice, the absence of (i) a term to decide on a unilateral adjustment and (ii) a fall-back mechanism mean that Member States have the discretion to block access to MAPs indefinitely. Anecdotal evidence suggests that this discretion is a practical issue rather than a theoretical one.

Furthermore, the two-year period for resolving the MAP only starts once the Complaint is considered to include the minimum required information. For that purpose, the Code of Conduct allows Member States to request additional information and it also includes a deadline for such a request (within a two-month period after receipt of the Complaint). However, the Code of Conduct does not specify a period, after receipt of the additional information, during which the competent authority making the request needs to consider whether the minimum information standard is complied with. The Code of Conduct also does not restrict additional information requests to one round. Member States therefore have the liberty to decide when the two-year period begins.

3.1.3. Access to arbitration

Upon meeting the two-year period and without agreement on the Dispute, the competent authorities are required to appoint the Advisory Commission under the Arbitration Convention (under the OECD Model, the Arbitration Commission). The decision to set up the Advisory Commission is taken only by the competent authority (i.e. it is not a taxpayer’s decision). The Arbitration Convention also does not provide for a term for appointing the Advisory Commission nor does it provide for a fall-back mechanism if Member States fail to do so. In other words, Member States also have the discretion to block access to arbitration under the Arbitration Convention for cases which meet the requirements.

Statistical information on MAPs under the Arbitration Convention, as published by the EU Joint Transfer Pricing Forum (the JTPF), suggests that blocked access to MAPs is a practical issue rather than a theoretical one. For example, based on the year-end 2015 statistics, Italy reports an inventory of 61 cases pending for arbitration. Germany also reports a high inventory of cases pending for MAPs (84 as per end 2015).

3.1.4. Domestic legal proceedings

Domestic laws of most Member States do not allow the competent authorities to derogate from the (final) decisions of domestic courts. Therefore, the OECD Model allows for tax treaties concluded by these Member States to block access to the MAP stage if a domestic court has rendered a (final) decision on the issue. If a taxpayer initiated domestic legal proceedings under the Arbitration Convention, access to MAPs is allowed but the two-year period for reaching agreement in the MAP stage only commences upon the date of the final decision of the (highest) court. In respect of the Arbitration stage, the Arbitration Convention provides that, where Member States cannot derogate from the (final) decisions of domestic courts, access is denied unless (i) domestic legal proceedings have expired, or (ii) the taxpayer has withdrawn such a procedure before a decision has been delivered.

29. Some Member States, such as Denmark, which incorporated the Arbitration Convention into its domestic law, and Italy, as a result of a Supreme Court ruling of 19 June 2015, allow taxpayers the possibility to lodge an appeal against a refusal of access to a MAP under the Arbitration Convention.
30. A taxpayer may be able to pursue civil law proceedings (in the form of tort litigation) against the competent authority in a Member State that fails to decide on a request for unilateral adjustment and therefore effectively blocks access to a MAP. Damages claimed in such proceedings could include the amount of the double taxation and interest on such amount.
31. Code of Conduct, art. 5(a).
32. Id., art. 6.3(e).
33. Unfortunately, statistical data on MAPs under the Arbitration Convention does not include information on Member States’ failure to decide on unilateral adjustments or stalling of the start of the two-year period. These data only list cases that are “initiated”, which according to the Code of Conduct means that they are considered well founded but for which it was decided that a unilateral adjustment was not available. See the JTPF’s website under item 3 “Member States’ Statistics” for statistical data on MAPs under the Arbitration Convention for the years 2012 until 2015, available at http://ec.europa.eu/taxation_customs/business/company-tax/transfer-pricing-eu-context/joint-transfer-pricing-forum_en.
34. Under the OECD Model, the taxpayer requests the competent authorities to set up the Arbitration Commission.
35. The Code of Conduct provides for a six-month period, starting after the end of the two-year period, for the appointment of the Advisory Commission. However, the Code of Conduct does not legally bind Member States. Taxpayers cannot invoke the Code of Conduct to force appointment of the Advisory Commission.
36. Supra n. 33.
37. The German competent authority mentions in the End 2015 MAP statistics that these 84 cases are primarily pending due to absence of exchange of position papers. See foot note 1 included in Table 2 of the statistics, available at https://ec.europa.eu/taxation_customs/sites/taxation/files/jtpf0042016enactatat.pdf.
38. Supra n. 24.
39. When Member States cannot derogate from a final court decision, continuing a MAP after a final court decision does not make much sense from a practical perspective considering that the competent authority in the Member State in which the court decision was taken will (i) likely not agree to a MAP resolution that is less favourable than the court decision and (ii) be allowed under the Arbitration Convention to block access to the Arbitration stage.

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Consequently, if taxpayers are faced with double taxation, they will need to make a choice between pursuing domestic legal procedures and initiating a MAP.[40] Effective simultaneous application of both mechanisms is therefore unavailable and taxpayers’ legal rights are consequently restricted.

### 3.1.5. Serious penalty

Under the Arbitration Convention, Member States are allowed to deny access to MAPs and arbitration where one, or both of the Member States have imposed a “serious penalty” in respect of the transaction for which the Correction was made.[41] Because each Member State has included its own definition of what constitutes a serious penalty in the Arbitration Convention, they arguably have much leeway to block access to MAPs and arbitration.[42] Although statistical information published by the JTPF indicates that the “penalty blocker” is not often applied in practice,[43] taxpayers have experienced pressure from tax administrations to accept Corrections or audit settlements under the threat of imposing a serious penalty (i.e. with the aim of blocking access to a MAP).[44]

### 3.2. Length of dispute resolution

When making investment decisions, companies generally consider their expectations of the present value of costs and benefits involved with the decision.[45] One of the main elements in analysing such a decision is the expected term of the investment. Unfortunately, when deciding whether or not to initiate dispute resolution, companies are often not able to make accurate predictions about the length of the procedure.

The fact that the decision for unilateral relief is not subject to a deadline (see section 3.1.2.) constitutes one of the main causes of the inability to make accurate predictions about the length of the procedure. Another cause that hinders predictability is the start of the two-year period (during which the competent authorities need to resolve the Dispute). The start of the period is extended by (i) subsequent information requests by the competent authorities to which the request to initiate a MAP was directed and (ii) simultaneously initiated domestic legal proceedings. Furthermore, under the Arbitration Convention, the competent authorities also have the possibility, subject to taxpayer consent, to waive the two-year period. Statistical data indicate that taxpayers often choose to accept such an extension.[46] That is hardly surprising considering that taxpayers’ alternative options are often second best. They could for example request the competent authorities to end the MAP, but that would mean accepting the double taxation if (i) the relevant tax treaty does not provide for arbitration (i.e. where the Arbitration Convention cannot be applied) or (ii) domestic legal proceedings are not expected to fully eliminate the Dispute. Also, if a taxpayer would be able to force the Arbitration stage, that would in any case extend the term of the process by a minimum of 14 months under the OECD Model and 18 months under the Arbitration Convention.

### 3.3. Outcome of dispute resolution

Most of the tax treaties concluded by Member States only require the competent authorities to “endeavour to resolve” a Dispute.[47] Consequently, under these tax treaties, the competent authorities are not required to reach an agreement on the Dispute. Therefore, taxpayers have little assurance that the competent authorities will eventually resolve the Dispute. Furthermore, if the MAP stage takes a long time (if the competent authorities disagree on the interpretation of the facts or due to an incorrect of incomplete presentation of the facts by the taxpayer), expiry of the domestic statute of limitations (in respect of the domestic implementation of a resolution of the MAP) may force the competent authorities to end the MAP.[48] Although the Arbitration Convention does provide for “binding” arbitration (subject to the condition precedent of the competent authorities failing to reach an alternative resolution within a six-month period after the Advisory Commission’s opinion), Disputes eligible for the Arbitration Convention are limited to transfer pricing and PE profit allocation issues. In addition, even under the Arbitration Convention and contrary to popular belief, resolution of a Dispute is not guaranteed in practice.[49]

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40. If a MAP is pursued, Member States may allow the taxpayer to postpone domestic legal proceeding so that these remain available if the taxpayer does not agree with the outcome of the MAP or, at a later stage, arbitration.
41. OECD Model: Commentary on Article 25 para. 26 also allows states when concluding tax treaties to deny access to MAPs in cases of “significant penalties”.
42. For example, Ireland provides in the “Individual Declarations of the Contracting States on Article 8” that failure to file a tax return and maintain proper records constitute a “Serious Penalty” under the Arbitration Convention.
43. Supra n. 33.
46. Supra n. 33.
47. Supra n. 15.
48. Note that, under the Arbitration Convention, contracting states’ statute of limitations cannot prevent implementation of a resolution. In the Netherlands, the five-year statute of limitations for implementation of a resolution (in the form of an ex-officio reduction, see supra n. 12) is not only waived for arbitration but also for a MAP.
49. See H.M. Pit, Commission Initiative To Improve Dispute Settlement Mechanisms within the European Union – The Arbitration Convention (90/436), 56 Eur. Taxn. 11 (2015), sec. 4.3.1., Journals IBFD.
4. The Directive

4.1. Introduction

In the scope of its June 2015 Action Plan (which among other items included the revival of the CCCTB), the European Commission announced its intention to improve double tax dispute resolution mechanisms. It delivered on that promise with the publication of the proposal to the Directive on 25 October 2016, which to a certain extent is based on the wording of the Arbitration Convention. On 23 May 2017, the Council reached agreement on the Directive. On 10 October 2017, the Directive was adopted by the Council and it will apply to Complaints submitted as of 1 July 2019 for financial years starting on or after 1 January 2018.

4.2. Resolving areas of concern

This paragraph aims to determine whether the Directive will resolve the areas of concern discussed in section 3.

4.2.1. Access to dispute resolution

The main elements of access to dispute resolution (qualifying disputes, access to MAPs, access to arbitration, domestic legal proceedings and serious penalties) are discussed below.

4.2.1.1. Qualifying disputes

The Directive will not only cover case-specific MAPs but will also apply to interpretative MAPs. Unlike the Arbitration Convention, the scope of application of the Directive is no longer limited to transfer pricing issues, but covers any dispute that leads to double taxation. Finally, the Directive also applies to individuals who are subject to taxes on income and capital covered by tax treaties.

Considering that the Directive intends to guarantee a resolution of any Dispute, the legal rights of companies faced with double taxation will be much improved under the Directive.

4.2.1.2. Access to MAPs

The Directive will require the competent authorities to decide on accepting or rejecting a Complaint within a six-month period after receipt thereof (this term may be extended for another six-month period if the competent authorities request additional information). If the Dispute is not resolved unilaterally or if the Complaint is not accepted by both competent authorities, the Directive will provide for certain fall-back mechanisms. These fall-back mechanisms will be triggered if (i) one of the competent authorities rejects the Complaint, (ii) both competent authorities reject the Complaint or (iii) one or both competent authorities fail to render a decision on the Complaint within the term.

In the first situation, the taxpayer is allowed to request the competent authorities to set up an Advisory Commission to render a decision on the Complaint. If the Advisory Commission accepts the Complaint, the competent authorities will need to initiate the MAP stage. It is noted that the Advisory Commission will be allowed to resolve the Dispute itself if neither of the competent authorities initiates the MAP stage.

In the second situation, the taxpayer will be allowed to lodge an appeal with the domestic courts of the Member States of the competent authorities in respect of their rejection of the Complaint. If both of the courts accept the Complaint, the competent authorities will be required to initiate the MAP stage. If only one of the courts accepts the Complaint, both competent authorities will be required to set up an Advisory Commission with the aim of deciding on the acceptance of Complaint. If the Complaint is accepted by the Advisory Commission, both competent authorities need to initiate the MAP stage.


51. The Directive as adopted on by the Council in October 2017 has been substantially rephrased compared to the initial proposal published end 2016. Some main differences compared to the initial version are that, under the current wording, access to dispute resolution is also available to individual taxpayers and that it no longer excludes disputes relating to withholding taxes.

52. Art. 1 provides that, “the Directive lays down rules on a mechanism to resolve disputes between Member States when these 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. Directive applies to any double taxation arising as a result of interpretation and application of agreements and conventions.” On the basis of art. 2(1), sub d, an “affected person” means any person, including individuals, that is a resident for tax purposes in a Member State.

53. Supra n. 7.

54. The relevance of extending the scope of the Directive to “interpretative MAP” (which were not explicitly covered in the first version of the Directive) may be questioned considering that such discussions are initiated on the request of the competent authorities and do not involve a specific taxpayer.

55. Going forward, if the competent authorities do not agree on the recognition of the PE and, alternatively, also do not agree on the profit allocation to the PE, both issues may be dealt with directly under the Directive (meaning the existence of the PE does not need to be resolved under a tax treaty before the profit allocation dispute can be dealt with under the Arbitration Convention).

56. If domestic legal proceedings are initiated, the term for deciding on the Complaint will only commence upon the final court decision or upon expiry of the term for initiating such proceedings (see sec. 4.2.1.4.).

57. The decision to resolve the Dispute unilaterally is subject to the same terms as the decision to accept or reject the Complaint.

58. If Member States fail to set up the Advisory Commission, the taxpayer may request domestic courts to set it up.
In the third situation, the Complaint is deemed to be accepted by one or both of the competent authorities. In this situation, the subsequent step would be (i) the initiation of the MAP stage if the other competent authority did also not decide on the Complaint or if it accepted it, or (ii) the setting up of the Advisory Commission if the other competent authority rejected the Complaint.

Based on the above, the Directive will provide clear deadlines for competent authorities to decide on the Complaint, to initiate the MAP stage and to set-up the Advisory Commission. It will also contain effective fall-back mechanisms in case the competent authorities fail to take appropriate action. These clear deadlines and fall-back mechanisms will allow companies to effectively prevent competent authorities from blocking access to MAP. This will significantly improve the legal rights of companies attempting to resolve double taxation through MAPs.

4.2.1.3. Access to arbitration

Where the competent authorities have initiated the MAP stage, they will need to decide on a resolution of the Dispute within the two-year period. This period commences upon the acceptance of the Complaint by the last of the competent authorities. If the competent authorities fail to reach a resolution during the MAP stage, they will be required to inform the taxpayer on the reasons of such failure ("failure notification"). It is noted that the Directive does not provide for a term within which the competent authorities need to send the failure notification to the taxpayer. Within a 50-day period after receipt of such failure notification, the taxpayer is allowed to request the competent authorities to set up an Advisory Commission with the aim of rendering an opinion on the Dispute (the Arbitration stage). The competent authorities need to set up the Advisory Commission within a 120-day period after the taxpayer’s request.

The legal certainty for taxpayers in respect of access to the Arbitration stage will be improved under the Directive as a result of the clear deadlines for resolving the MAP (the two-year period) and the fall-back mechanism in case of failure to resolve the Dispute during the MAP stage. However, in the absence of a clear deadline for sending the failure notification to the taxpayer, the competent authorities could in theory prevent the taxpayer from requesting the setting up of the Advisory Commission by not (timely) sending of the failure notification.

4.2.1.4. Domestic legal proceedings

Under the Directive, a taxpayer will be able to initiate domestic legal proceedings and will also retain access to MAPs and arbitration. However, if domestic legal proceedings are pursued, the term for acceptance of the Complaint (for initiating the MAP stage) will only commence on the date of the final decision of the relevant court or upon expiry of the term for initiating such proceedings. A resolution reached under the MAP will only become binding to the taxpayer (subject to his consent) upon termination of (already) initiated domestic legal proceedings or waiving rights to such proceedings (if not yet initiated). If a Member State’s domestic law does not allow the competent authority to derogate from a court decision, the Directive provides that the MAP will be terminated if such a court decision is rendered before agreement is reached during the MAP stage.

Furthermore, terms for access to arbitration are also extended for the duration of the domestic legal proceedings (i.e. finalized or expired) and the Advisory Commission's opinion will only become binding subject to the same requirements as provided for the MAP stage (see above). In addition, where Member States’ domestic laws do not allow the competent authorities to derogate from court decisions (i) access to arbitration is denied if a court has rendered a decision on the issue before the request for access to arbitration is made and (ii) the arbitration stage is terminated if a court decision is made after the request to access arbitration and before the opinion of the Advisory Commission.

Consequently, although the rules on the simultaneous application of remedies are somewhat more detailed under the Directive compared to the Arbitration Convention, effective simultaneous application of both remedies remains unavailable. In practice, however, taxpayers faced with double taxation due to transfer pricing corrections will often choose to initiate a MAP over domestic legal proceedings if a Member State disallows the competent authority to deviate from court decisions. If, in such situations, domestic legal proceedings are applied, access to a MAP is effectively blocked and double taxation will only be resolved if the court decision fully eliminates the Correction. Alternatively, where the competent authorities in both Member States are allowed to derogate from court decisions, a taxpayer may choose to lodge a so-called “protective MAP” (i.e. initiate domestic legal proceeding first and resolve any remaining double taxation under the postponed MAP). However, experience shows that taxpayers do not often litigate because of the fear of spill-over effects (a court ruling on globally applied transfer pricing model may provide an open invitation for other tax administrations to also challenge transfer prices used by that related taxpayer in their jurisdiction). Furthermore, a taxpayer may not care too much about a transfer pricing correction provided a full corresponding adjustment is obtained in the other Member State and tax rates do not deviate too much between the states.

59. This period may be extended by a year upon the consent of both competent authorities (the taxpayer’s consent is not required).
60. The competent authorities may also set up an Alternative Dispute Resolution Commission (ADRC) instead of the Advisory Commission. The ADRC will also have to render a final opinion on the Complaint, but it may differ from the Advisory Commission in terms of its composition. It may also apply other means of resolution than the independent opinion process applied by the Advisory Commission where the opinion is reached by a simple majority of the commission members with the chair deciding in the case of a draw). Such other means, for example, could be "baseball arbitration", or "final offer arbitration". In this type of arbitration, the ADRC’s decision is limited to choosing one of either of the competent authorities’ proposals on the Dispute.
61. Supra n. 58 in the case of the failure of the competent authorities to set up the Advisory Commission.
62. In practice, after the two-year period, a taxpayer could also request the setting up of the Advisory Commission without having received the failure notification (under the presumption that the competent authorities failed to reach a resolution on the Complaint). However, in order to prevent any uncertainty, the Directive could provide that the failure notification is deemed to be received by the taxpayer within for example a 50-day period after the end of the two-year period (for reaching agreement in the MAP Stage. A similar provision is used in the Directive in case the competent authorities do not render a decision on acceptance of a Complaint (see art. 5(2)).


4.2.1.5. Serious penalty

Similar to the Arbitration Convention, the Directive will also allow Member States the possibility to block access to arbitration in cases where a penalty was imposed in relation to the Correction. Under the Directive, the penalty will need to have been the result of “tax fraud”, “wilful default” and/or “gross negligence”. These undefined terms, according to the Directive, will have the meaning as provided for (i) in the applicable tax treaty or, if such a definition is absent, (ii) in the tax law of the Member State imposing the penalty.

A major improvement, compared to the Arbitration Convention, is that the Directive will allow taxpayers the possibility to appeal before a domestic court against a refusal of a Member State to set up the Advisory Commission in case of a (serious) penalty. Furthermore, because the Directive will form part of EU law, a domestic court may also refer to the EU Court of Justice (the Court of Justice) in order to provide its (final) view on the interpretation of the terms “tax fraud”, “wilful default” and “gross negligence”. Although taxpayers would be able to challenge blocked access to arbitration in their domestic courts, competent authorities will still be able to use the threat of delaying dispute resolution procedures to force taxpayers to accept Corrections or audit settlements.

4.2.2. Length of dispute resolution

Under the Directive, Member States will no longer have the discretion to block access to MAPs indefinitely and they will arguably also have less leeway to delay or block access to arbitration (see sections 4.2.1.2. and 4.2.1.3.). However, the fall-back mechanisms included in the Directive will rely on domestic legal proceedings (meaning an appeal before Member States’ domestic courts). Therefore, if the taxpayer decides to apply these fall-back mechanisms, the length of the dispute resolution process will be substantially extended (with the timeframe of domestic procedures and, if a domestic court so requests, the term for a ruling of the Court of Justice).

In view of streamlining the procedure of the fall-back mechanisms, the Directive could allow for taxpayers to request the European Commission to assess the rejection of a Complaint by a Member State rather than the domestic courts of Member States in the current version. This alternative would allow the European Commission the possibility to initiate infringement proceedings with the Court of Justice if it considers that a Member State’s refusal of a Complaint violates EU law. Bypassing Member States’ domestic courts will reduce the length of the procedures and will ensure that the wording of the Directive is interpreted in a harmonized way in the European Union.

4.2.3. Outcome of dispute resolution

The Directive will ensure, through the opinion of the Advisory Commission, that all Complaints, including non-transfer pricing-related Disputes, will ultimately be resolved if the competent authorities fail to do so during the MAP stage. After the date of the opinion of the Advisory Commission, the competent authorities will have a six-month (renegotiation) period to reach an (alternative) agreement on the Complaint (the Arbitration Convention provides for the same provision). After this period has lapsed and if the competent authorities did not reach an alternative resolution, the opinion of the Advisory Commission becomes binding to the competent authorities. Under the Directive, the implementation of the resolution (the opinion of the Advisory Commission or the alternative resolution of the competent authorities) also remains subject to the consent of the taxpayer. Consequently, the taxpayer may still reject the resolution and try his chances in domestic legal proceedings if still available.

4.3. Concluding remarks on the Directive

One may conclude that the Directive will greatly improve access to dispute resolution. Various clear deadlines and fall-back mechanisms included in the Directive will allow companies to effectively force access to MAPs and arbitration. Effective simultaneous application of domestic legal proceedings with MAPs and arbitration will not be possible under the Directive. However, taxpayers will in most cases prefer to first apply MAPs to prevent double taxation and subsequently, if still available, seek domestic legal proceedings if the outcome of the dispute resolution is not satisfactory for them.

Although the Directive will provide taxpayers with improved legal certainty on the application of dispute resolution, this improvement will come at a (high) price in the form of increased durations of already lengthy procedures.

Finally, under the Directive, the scope of qualifying disputes will be extended to include all disputes leading to double taxation as opposed to only transfer pricing and PE profit allocation disputes under the Arbitration Convention. This constitutes a major improvement of the legal position of taxpayers attempting to prevent double taxation. This increased scope of application of the Directive as well as the possibility for taxpayers under the Directive to lodge an appeal against the denial of a competent authority to accept the Complaint will arguably become much more relevant in the years to come.64

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64. It is noted in this respect that tax administrations, based on para. 1.122-1.125 OECD Transfer Pricing Guidelines (including the updated wording on non-recognition of actual transactions), will have more leeway to consider the use of the arm’s length principle as an anti-abuse provision, rather than a means of establishing an arm’s length price for a controlled transaction. On that basis, tax administrations will arguably have increased possibilities to deny access to dispute resolution. In such situations the Directive will allow a taxpayer to lodge an appeal against the denial of a competent authority to accept the Complaint.

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T. Wiertsema, Council Directive on Double Taxation Dispute Resolution Mechanisms: “Resolving Companies’ Areas of Concern?”, 19 Derivs. & Fin. Instrums. 5 (2017), Derivatives & Financial Instruments IBFD (accessed 13 October 2017) © Copyright 2017 IBFD: No part of this information may be reproduced or distributed without permission of IBFD. Disclaimer: IBFD will not be liable for any damages arising from the use of this information.
5. Suggestions

The following developments and suggestions may further resolve the areas of concern or may otherwise strengthen the dispute resolution process.

5.1. OECD Multilateral Instrument

Although the scope of this article is limited to the Directive, it is noted that the OECD’s Multilateral Instrument (MLI) is also expected to have a positive impact on the dispute resolution process. As a minimum standard, participating countries to the MLI are required to adopt a number of changes to the MAP in tax treaties covered under the MLI in order to improve dispute resolution (in line with the wording of article 25(1) to (3) of the OECD Model). Alternatively, countries may opt out of this minimum standard if they commit to adopt administrative measures with the same effect. Similarly, participating countries will be required to incorporate corresponding transfer pricing adjustments in line with article 9(2) of the OECD Model in covered tax treaties or opt out in favour of committing to otherwise making such adjustments or resolving such cases through MAP. As an optional provision, participating countries may choose to adopt and implement mandatory binding arbitration in their tax treaties covered under the MLI. Out of the 67 jurisdictions participating in the MLI, 26 (including the Netherlands) choose to adopt mandatory binding arbitration. This results in approximately 150 tax treaties to contain a mandatory binding arbitration provision. In terms of the actual impact of the provision, it is noted that a number of “opting in countries” choose to exclude existing MAP inventory from arbitration. Furthermore, certain countries also choose to exclude disputes from arbitration if they give rise to “serious penalties” or if they involve the application of domestic anti-abuse rules.

5.2. Advisory Commission’s opinion

Under the current wording of the Directive, the Advisory Commission’s opinion only becomes binding for the competent authorities if they fail to reach an alternative resolution within the six-month period. This “renegotiation period” seems a mere relic from the past because it was introduced in the Arbitration Convention in order to facilitate political adoption at the time. Furthermore, following the amendment of the OECD Model in 2008 which introduced mandatory binding arbitration with article 25(5), an increasing number of Member States strive to include this article in their tax treaties as a matter of domestic policy. Considering its limited practical relevance other than unnecessarily delaying the procedure, there do not seem to be any convincing arguments for maintaining the "renegotiation period" in the Directive.

5.3. Tax interest

Tax interest asymmetry (i.e. where one Member State charges interest on additional tax due and the other Member State does not include interest on the tax refund) may have an economic impact comparable to the underlying double taxation. In practice, many Member States do not take into account the double interest burden in the scope of dispute resolution. As a possible (practical) measure, Member States may decide to agree on a suspension of accrual of taxation interest under the condition of depositing the amount of the profit under dispute on an interest-bearing blocked account. Upon reaching agreement in the MAP, Member States would have access to their share of tax on the funds of the blocked account, including accrued interest. This could provide for an effective measure in transfer pricing disputes where the allocation of profit among the Member States is under dispute, rather than the absolute amount of that profit.

5.4. Taxpayer involvement

Companies often have the impression that they are unable to influence the dispute resolution process because they are not part of the actual dispute resolution negotiations. However, experience shows that companies are able to exert positive influence maintaining the initiative and involving both competent authorities in the MAP process as soon as possible. Furthermore, considering that the competent authorities are generally faced with scarce resources, companies will be able to reduce their workload and accelerate procedures by providing both competent authorities at the same time with all relevant information in a structured and comprehensive manner (including information that has not yet been shared in the tax audit phase). Companies may also decide to provide the competent authorities with various resolution scenarios to the Dispute in order facilitate them in reaching an agreement during MAP negotiations (in the absence of significant tax rate differences between Member States, companies will arguably prefer any resolution over no resolution).

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65. OECD, Multilateral Convention to Implement Tax Treaty Related Measures to prevent Base Erosion and Profit Shifting of 24 November 2016, International Organizations’ Documentation IBFD.
66. On 7 June 2017, 67 jurisdictions signed the MLI at the ceremony in Paris, France.
68. Supra n. 63, sec. 5.1.
69. Competent authorities will hardly ever reach an alternative resolution within the six-month period. This is because such a resolution will logically require the existence of a “winner state” and a “loser state” vis-à-vis the opinion of the Advisory Commission. On a case-by-case basis, the potential “loser state” would arguably always prefer the Advisory Commission’s opinion over the alternative resolution. See L. Hinnekens, European Arbitration Convention: Thoughts on Its Principles, Procedures and First Experience, EC Tax Review 2010/3, p. 114.
70. Currently, tax interest in the Netherlands is charged at a rate of 8% and interest starts accruing after a six-month period following the end of the financial year. Without interest on a full corresponding adjustment in the other Member State, the “double interest” will in theory exceed the (resolved) double taxation if the resolution is reached later than nine-and-a-half years after the end of the relevant financial year (i.e. at 8%, the principal amount doubles in just over nine years: NL(2)/NL(1.08) = 9,006).
71. A notable exception is the Netherlands where domestic tax law allows the competent authority to give up taxation interest and collection interest in case of dispute resolution (see art. 30k General Tax Act and art. 31a Tax Collection Act).
72. See example given in supra n. 37.


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