CFE tax advisers europe

OPINION STATEMENT

Opinion Statement FC 3/2020 on the Directive on Tax Dispute Resolution Mechanisms in the European Union

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CFE Tax Advisers Europe is the European umbrella association of tax advisers. Founded in 1959, CFE brings together 33 national tax institutes, associations and tax advisers' chambers from 24 European countries, representing more than 200,000 tax advisers. CFE is part of the EU Transparency Register no. 3543183647-05.

We would be pleased to answer any questions you may have concerning our Opinion Statement. For further information, please contact Stella Raventós-Calvo, Chair of the CFE Fiscal Committee or Aleksandar Ivanovski, Tax Policy Manager at info@taxadviserseurope.org. For further information regarding CFE Tax Advisers Europe please visit our web page http://www.taxadviserseurope.org/

CFE Tax Advisers Europe Office I 188A, Avenue de Tervueren, 1150 Brussels, Belgium
Tel. +32 2 761 00 92 I info@taxadviserseurope.org I www.taxadviserseurope.org

1. Introduction

CFE welcomes the Commission's intention to expand and improve the mechanisms available to Member States to resolve double taxation disputes with the introduction of Council Directive No. 2017/1852 of 10 October 2017 on tax dispute resolution mechanisms in the European Union (the "Directive").

CFE commented on this matter in the context of the OECD BEPS consultation process in April 2016[1] and when the proposed Directive on Double Taxation Dispute Resolution Mechanisms was subject to public consultation in May 2017[2]. This Opinion Statement complements these previous opinion statements.

2. Background

Double taxation impedes the ability of entrepreneurs operating cross-border to develop their business and consequently decreases the competitiveness of the Single Market. Easily accessible, efficient and effective dispute resolution mechanisms are a crucial element in achieving fair and effective taxation within the Single Market. At present, there are a large number of outstanding cases[3]; in addition, more comprehensive audits by tax authorities are increasing the number of such cases. These developments make the implementation of a properly functioning dispute resolution mechanism crucial.

In general, CFE welcomes this Directive and views it as a positive development. Several aspects which CFE especially appreciates were summarised in CFE´s Opinion Statement FC 4/2017 on the proposed Directive on Double Taxation Dispute Resolution Mechanisms in the European Union issued in May 2017, including, inter alia, its extended scope compared to the EU Arbitration Convention, increased efficiency and effectiveness in the process, and higher tax certainty as a result.

Given that the purpose of the Directive is to facilitate resolution of disputes which arise from the interpretation and application of agreements and conventions that provide for the elimination of double taxation, it appears to the CFE that the scope should also cover the EU Directives in the field of taxation, since different application and interpretation of these Directives by different Member States may result in disputes and double taxation. CFE also wishes to draw attention to the fact that the wording of the second sentence of Art. 2(2) may cause difficulties in resolving tax disputes under the mechanisms of the Directive. The wording does not determine the Member State whose laws should prevail in giving definitions to the terms involved. While this article follows closely Art. 3(2) of the OECD Model Tax Convention it is not clear whether the interpretation and guidance provided in the Commentaries to the OECD Model Tax Convention should be, or would be, adopted by the Member States, particularly those that are not members of the OECD.

3. Comments on Procedures under Directive

CFE in particular appreciates that the Directive expands the existing mechanisms for taxpayers under previously available possibilities by broadening the scope of disputes that could be settled, streamlining

[1] CFE and AOTCA Opinion Statement FC 4/2016 on the OECD BEPS Final Recommendations, April 2016, available on the CFE website: http://taxadviserseurope.org/wp-content/uploads/2018/05/CFE-AOTCA-Opinion-Statement-FC-4-2016-on-the-Final-BEPS-Recommendations.pdf

[2] Opinion Statement FC 4/2017 on the proposed Directive on Double Taxation Dispute Resolution Mechanisms in the European Union, May 2017, available on the CFE website: http://taxadviserseurope.org/wp-content/uploads/2018/05/CFE-Opinion-Statement-FC.04.2017-on-Dispute-Resolution_0.pdf

3 See https://ec.europa.eu/taxation_customs/news/statistics-apas-and-maps-eu_en

the process and addressing some of the shortcomings. Consequently, CFE considers the Directive to be a positive development.

In spite of the overall positive developments, there are nevertheless outstanding issues that, in CFE's view, merit further consideration. To that end, CFE is setting out its views on the matter hoping that these comments will be helpful in any future revisions of the Directive or in other developments in the resolution of tax disputes.

3.1 Length of dispute resolution process

The positive development for taxpayers and for tax certainty generally is that the Directive introduces a stipulation for the mandatory resolution of income tax disputes subject to a strict and enforceable timeline.

In spite of such a strict timeline, the dispute resolution process under the Directive could still take up to 5 years. Such a length of time for the proceedings, in particular from a taxpayer's point of view, does not represent an *effective* dispute resolution process. If the process under the Directive is reviewed with a view to making changes, it should be amended so the binding resolution is achieved within 2 to 3 years at most.

3.2 Taxpayers' Role and Rights

The Directive entitles the taxpayer to initiate the proceedings. CFE observes that under the Directive, the taxpayers' rights are broader than rights available under other tax dispute resolution mechanisms, such as the MAP procedure or under the EU Arbitration Directive. These additional rights include, for example, that taxpayers will be notified of the terms of reference of the dispute, the proposed timeframe for completion and the terms of conditions of the involvement of third parties.

However, the closer involvement of the taxpayer in the process would increase tax certainty and trust of taxpayers in these types of dispute resolution procedures. An example could be the taxpayer being entitled to propose or submit evidence, and/or their more active participation in the process.

3.3 Creation of Advisory Commission or an Alternative Dispute Resolution Commission

CFE welcomes the flexibility that the Directive offers in the form of an option between the Advisory Commission or the Alternative Dispute Resolution Commission (the "Commissions"). Such flexibility can simplify and accelerate the dispute resolution process.

One of the crucial elements of an effective and efficient dispute resolution process is transparency in the selection of the persons who are decision makers, i.e. arbitrators or members of committees whose decision will be the basis for final resolution of the dispute.

Therefore, CFE believes that a more transparent process of selection of members of the Commissions should be considered. In addition, the right of the concerned taxpayer to file an objection against the member of the Commission that they consider is not an impartial or independent member could increase the trust of the taxpayer into the transparency of the whole process.

3.4 Lack of Independent Persons of Standing

CFE agrees that any person elected as a member of any of the Commissions should be experienced and knowledgeable, as well as fully independent and impartial from the parties involved in the particular case. On the other hand, CFE notes that the criterion listed in Article 8, point 4 letter (d) is so strict that it could be a serious problem identifying a suitable person in some countries, in particular in those countries where the judges are not allowed to perform activities other than judicial activities. Needless to say, those persons suitable to be members of these Commissions should have solid knowledge in the field of international taxation. CFE therefore strongly suggests reconsidering the necessity of the criterion stated in Article 8, point 4 letter (d) of the Directive.

Additionally, an option to not implement the decision due to a lack of independence should be further considered. Any independence concerns should be raised upon appointment to avoid delays. Since there is no guidance on independence, a wide discretion has been given to national courts. Alternatively, some guidance should be issued in this area.

3.5 Dispute Administration Body

Experiences from other dispute resolution forums, in particular from arbitration, show that the dispute resolution process can be more effective and rapid if there is an institution taking care of administration of the dispute resolution process. These institutions could administer the case, send reminders to parties or arbitrators, and share experience of procedural issues based on previous experience.

For the purposes of disputes under the Directive, the Permanent Court of Arbitration could be a suitable institution as it already has experience with administering cases between states.

Such an institution could also maintain the list (either publicly available or not) of persons having necessary skills and experience to act as arbitrators or members of the Commissions. In addition, it could also be considered that such an institution would serve as the appointing body if any party to the dispute were inactive in the selection process.

3.6 Form of Decision given by Commissions

Under the Directive, the Commissions reach conclusions and issue an opinion. If the competent authorities fail to reach an agreement as to how to resolve the question in dispute, the opinion of the Advisory Commission or Alternative Dispute Resolution Commission shall become a binding resolution of the dispute. However, the Directive does not provide any formal requirements for this opinion, for example a requirement to set out the reasoning.

Considering this fact, the CFE would welcome a legal requirement to state clearly in the opinions the reasons/arguments which led the Commissions to reach their conclusions. Such an approach would have several advantages. It could: (i) increase tax certainty and the trust of the taxpayer in the dispute resolution process, (ii) decrease the risk that the cases on tax disputes will be subject to political trade, (iii) increase predictability of the results for similar cases in the future and finally, as a result of all these aspects, (iv) could lead to a lower number of tax disputes in the future.

3.7 Introduction of Instruments to Stimulate Prompt Decision

Whilst in many cases the tax will already have been paid in the first State prior to dispute procedure being invoked, it may be worth considering using the payment of the tax or obligation to pay interest as a leverage to encourage speedy resolution of disputes between tax authorities. For example, the use of escrow accounts whereby the tax would become lodged in an account, which would only become unblocked once there has been a satisfactory resolution of the dispute. The sum should be limited to the highest amount of tax which may become due in order to avoid double taxation.

4. Parallel Mechanisms

Currently, a dispute involving the interpretation of double taxation treaties can be solved in several forums using the various dispute resolution methods available. On one hand, the introduction of the new instrument is welcome as it brings another possibility which a concerned taxpayer could consider using to defend its rights. In particular, the CFE believes a broader and more flexible approach to the form of alternative resolution procedure which can be applied will greatly improve the process for both the competent authorities and the taxpayer.

On the other hand, the multiple means of resolving disputes available in this field of tax law increase opacity and uncertainty.

Briefly, the following dispute resolution instruments are available:

i) National legal remedies are generally not very effective when dealing with double taxation disputes on the basis that national courts do not have jurisdiction to rule on the levying or reduction of taxes in another jurisdiction. Therefore, the inability to bind the other jurisdictions in cases of double taxation results in the taxpayer not getting an effective remedy before the national courts. In addition, it is common practice that domestic law prohibits tax authorities from deviating from the decisions of national courts. Therefore, any decision arrived at under another mechanism contrary to the decision of a domestic court may be rendered ineffective in practice.

ii) The Mutual Agreement Procedure derived from Article 25 of the OECD Model Tax Convention. MAP entitles the tax authorities negotiating an agreement to cancel the double taxation; the taxpayer is not a party to the proceedings. Under the majority of tax treaties, countries are only required to "endeavour to resolve" the dispute, so in many cases no agreement is reached and the double taxation remains outstanding. This could be alleviated in a limited number of tax treaties by a provision for mandatory binding arbitration at the request of the taxpayer if agreement has not been reached within 2 years of the presentation of the case (inserted into the OECD Model Tax treaty in 2008 and to be introduced through MLI implementation).

iii) The EU Arbitration Convention provides for mandatory binding arbitration, but only in relation to transfer pricing related disputes which satisfy three preconditions. The taxpayer has three years from the date of the impugned notification to invoke the procedure. If the authorities fail to reach agreement within 2 years, mandatory binding arbitration is invoked. An advisory commission is set up with both tax authorities represented; a decision is reached within 6 months.

iv) The Directive provides several alternatives of how to reach binding resolution. The taxpayer can initiate the dispute resolution process within 3 years from the receipt of first notification. The competent authorities have 6 months to determine whether to accept the complaint (subject to the provision of outstanding information) and a further 2 years to resolve the double taxation by means of the mutual agreement procedure (this period can be extended by one year). In the event that the Member States fail to reach agreement to eliminate double taxation pursuant to the MAP procedures, the Advisory Commission or the Alternative Dispute Resolution Commission is established and issues an opinion. The competent authorities are not bound by the opinion of either of the Commissions, however, if they do not reach an agreement on an alternative conclusion within six months, the opinion becomes binding.

Although all these aforementioned existing procedures were introduced with an aim to assist taxpayers in mitigating and redressing the effects of double taxation, their parallel existence creates the question of which is the most appropriate procedure for the taxpayer to initiate and increases tax uncertainty.

Consideration should be given to the practical implications for taxpayers and tax authorities of parallel arbitration/MAP procedures/procedure under the Directive being available to the taxpayer to invoke. The Directive does not address how to resolve parallel proceedings that could arise in practice (though some issues are dealt with in Article 16 of the Directive).

In theory, Member States should seek to achieve a satisfactory outcome for the taxpayer; in reality, however, a conflict of interest can arise for the Member States in the negotiating process. Under the present system, negotiations do not take place on a legal level but more on a political level in the sense that they take place between the tax authorities.

Consequently, problems arise in relation to legal certainty and the effectiveness of the process, particularly for the taxpayer. All the aforementioned dispute resolution procedures (in particular the MAP) are costly and time consuming and the outcome of the procedure is extremely uncertain for the taxpayer. CFE notes that from the taxpayer's perspective, the aim of the procedure is not solely to resolve the double taxation but also to clarify the nature and extent of the taxing rights of the different jurisdictions as guidance for its future activities. A decision stating clear reasoning for the outcome is therefore imperative for development of cross border business activities.

5. Extension of Scope for Other Tax Fields

A crucial element of the Directive in comparison to the EU Arbitration Convention, which is limited to transfer pricing, is the extension of the scope of relevant disputes covered to all cross-border double income taxation issues.

However, for the competitiveness of the EU Single Market it will be crucial to introduce additional instruments and mechanism for the avoidance of double taxation, which are not limited to income tax disputes. CFE therefore fully supports any initiative to introduce techniques for avoidance of double taxation and for dispute resolution for other taxes such as for example VAT, inheritance tax, donation tax or insurance tax.

Finally, due consideration should be given to the possibility of extending the existing mechanisms to double tax disputes arising from unilaterally introduced digital services taxes (DST) around the EU. DST

are not income taxes, but revenue or turnover taxes. It is widely accepted in academic literature[4] that turnover taxes do not fall within the scope of the OECD Model and tax treaties. Considering that revenue or turnover taxes are substantially similar to indirect taxes, they do not qualify for treaty relief.

Specifically, if a tax is not a 'covered tax' under Article 2 of the OECD Model Tax Convention, it would consequently not be covered by either the 'distributive' articles of the OECD Model, nor would it qualify for dispute resolution under the Mutual Agreement Procedure (MAP) of Article 25 of the OECD Model. Accordingly, such indirect taxes would not qualify for relief from double taxation under Article 23 of the OECD Model in the residence jurisdiction of the taxpayer, and will inevitably result in double or multiple taxation.

A key policy consideration in a situation in which a tax (for example, DST) is not a covered tax for tax treaty purposes is the inability of a taxpayer to claim double taxation relief, which is a point to be considered in the future revisions of this Directive.

The CFE hopes that these comments will be helpful in any future revisions of the Directive or in other developments in the resolution of tax disputes.

4 Philip Baker, International Tax Law and Double Taxation Conventions 2B.10 (Sweet & Maxwell 2017)