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# Opinion Statement FC 2/2024 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. CFE was the initiator of the Global Tax Advisers Platform through which it is associated with more than 600,000 tax advisers worldwide. 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 Bruno Gouthière, Chair of CFE Fiscal Committee, Jos Goubert, Chair of the Direct Taxes Subcommittee, or Aleksandar Ivanovski, Director of Tax Policy at [info@taxadviserseurope.org](mailto:info@taxadviserseurope.org). For further information regarding CFE Tax Advisers Europe please visit our web page <http://www.taxadviserseurope.org/>

## 1. Background

Directive (EU) 2017/1852 on tax dispute resolution mechanisms in the European Union (the “DRM”) was adopted by Member States on 10 October 2017 and is applicable as from 1 July 2019. It 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.

CFE commented on this matter at several instances, notably on 20 March 2020 to provide practical comments in view of future revisions of the DRM<sup>1</sup>, and when the proposed Directive on Double Taxation Dispute Resolution Mechanisms was subject to public consultation in May 2017<sup>2</sup>, as well as in the context of the OECD BEPS consultation process in April 2016<sup>3</sup>. This Opinion Statement complements these previous opinion statements.

CFE welcomes the opportunity to contribute through ongoing engagement with the European Commission and European Parliament, in discussions in our role as a Member of the EU expert group Platform for Tax Good Governance and Aggressive Tax Planning and via the public consultation process, such as this one.

## 2. General Comments

CFE welcomes the adoption of the DRM which it considers to be a positive development for the protection of taxpayers’ rights as explained in our previous Opinion Statement on this matter. It is however still too early to have sufficient practical experience in relation to the functioning of the DRM as it has only been operational since 1 July 2019. There are nevertheless outstanding issues that, in CFE’s view, merit further consideration.

The DRM 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 Mutual Agreement Procedure (“MAP”) 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.

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<sup>1</sup> Opinion Statement FC 3/2020 on the Directive on Tax Dispute Resolution Mechanisms in the European Union, March 2020, available on the CFE website: <https://taxadviserseurope.org/project/cfe-opinion-statement-fc-3-2020-on-the-directive-on-tax-dispute-resolution-mechanisms-in-the-european-union/>

<sup>2</sup> 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](http://taxadviserseurope.org/wp-content/uploads/2018/05/CFE-Opinion-Statement-FC.04.2017-on-Dispute-Resolution_0.pdf)

<sup>3</sup> 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>

However, closer involvement of the taxpayer in the process would increase tax certainty and the trust of taxpayers in these types of dispute resolution procedures. Dispute resolution procedures should be contradictory procedures, which should be transparent towards the taxpayer (tax administrations should inform the taxpayers on the discussion and evolution in a timely manner), and taxpayers should have the rights to express their views. This would ensure that dispute resolution procedures are compliant with the right to a fair trial. An example could be the taxpayer being entitled to propose or submit evidence, and/or their more active participation in the process.

Tax transparency is already happening towards tax administrations. Relationships between taxpayers and tax administrations would be improved if transparency would be reciprocal. Improving tax transparency of tax administrations towards taxpayers would enhance the trust of taxpayers and legal certainty.

In addition, Member States and tax administrations should have the duty to provide guidelines to taxpayers on the implementation and application of the DRM as we notice that such regulations complementing the national transposition of the DRM are not available in all EU Member States (e.g., no regulations available in Belgium, Luxembourg, Portugal, etc.).

It would also be crucial to remove barriers to entry to certain remedies, such as tax administrations imposing criminal penalties or pushing for settlements by offering better bargaining positions to close the door to MAP. In that respect, certain tax authorities apparently take advantage of the derogation provided under Article 16(6) of the DRM to prevent taxpayers from requesting MAPs. As tax authorities are not consistent in interpreting what constitutes cases of tax fraud, willful default, or gross negligence, CFE calls the Commission to provide clarification from an EU law perspective on Article 16(6) and especially on the concepts of tax fraud, willful default and gross negligence. Given the significant discretion involved in the application of Article 16(7), the Commission should evaluate the functioning of this article in the Member States.

Accordingly, CFE notes that the existence of a clear and simple procedural tax law would ensure the protection of taxpayers' rights as it would set a clear framework for both tax administrations and taxpayers, defining what can be done, how and when by each party and providing remedies to balance powers between tax administrations and taxpayers.

Looking forward at the possible evolution of disputes at EU level, it would be important to ensure that the DRM is an appropriate tool to deal with future disputes related to the application of the Pillar 2 rules as implemented in the EU through Council Directive (EU) 2022/2523 of 14 December 2022 on ensuring a global minimum level of taxation for multinational enterprise groups and large-scale domestic groups in the Union.

Similarly, CFE anticipates that the number of disputes may increase in the EU should the Proposal for a Council Directive on transfer pricing be adopted given it sets the threshold for control at a 25% shareholding, while the OECD Transfer Pricing Guidelines apply a 50% shareholding threshold to determine whether the control criterion is met. This 25% threshold would dramatically increase the transfer pricing compliance burden of companies operating in the EU and as a consequence broaden the scope of transactions potentially subject to dispute between two tax administrations in the EU, also in those cases where due to lack of control they have no power to make decisions and/or suffer decisions taken by other controlling partners.

The CFE hopes that these comments will be helpful to the Commission in the review the functioning of the DRM.