

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

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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:

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- (1) Opinion of 6 July 2017 (not yet published in the Official Journal).
- (2) Opinion of 22 February 2017 (not yet published in the Official Journal).
- (3) [OJ L 225, 20.8.1990, p. 10.](#)
- (4) Regulation (EU) No 182/2011 of the European Parliament and of the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers ([OJ L 55, 28.2.2011, p. 13](#)).