

Double taxation dispute resolution mechanisms in the European Union

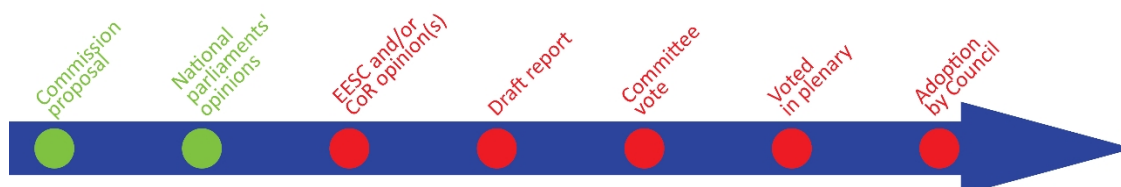
OVERVIEW

Double taxation happens when two (or more) tax jurisdictions impose comparable taxes on the same cross-border taxable event. This can happen since taxation is a sovereign right for individual countries.

The proposal for a directive on double taxation dispute resolution mechanisms in the European Union is instrumental to reducing compliance costs and administrative burdens. It contributes to the broader objective of building a deeper and fairer internal market as well as a fair and efficient corporate tax system in the European Union. The proposal builds on the Union Arbitration Convention, which needs to be updated to improve the existing mechanisms and make them fit the current global tax environment better. This will be done by adding a limited number of rules, and ensuring coordination within the European Union.

Proposal for a Council directive on double taxation dispute resolution mechanisms in the European Union

<i>Committee responsible:</i>	Economic and Monetary Affairs (ECON)	COM(2016) 686
<i>Rapporteur:</i>	Michael Theurer (ALDE, Germany)	25.10.2016
<i>Shadow rapporteurs:</i>	Andreas Schwab (EPP, Germany) Anneliese Dodds (S&D, UK) Pirkko Ruohonen-Lerner (ECR, Finland) Miguel Crespo Urban (GUE/NGL, Spain)	2016/0338(CNS) Consultation procedure - Parliament adopts only a non-binding opinion
<i>Next steps expected:</i>	Publication of draft report	



Introduction

Double (or multiple) taxation happens when two (or more) tax jurisdictions impose comparable taxes on the same taxable event (income or capital). This occurs as a result of an event that spans more than one country. Dispute resolution mechanisms in double taxation aim at an out-of-court settlement of the fiscal situation of taxpayers who are engaged in activities in other countries.

Commonly used terms and acronyms in double taxation dispute resolution mechanisms:

DTCs	Double taxation conventions
DCTDRMs	Double taxation dispute resolution mechanisms
EUAC	European Union Arbitration Convention
MAP	Mutual agreement procedures (out-of-court)

Context

Double taxation is the consequence of the fact that rights to impose taxes belong to countries (also referred to as tax jurisdictions, which may cover part of, or all of, a state). As a result of two or more countries applying their own tax rules, the same cross-border taxable event may be treated differently.

Double taxation may consequently arise when a taxpayer's situation crosses borders; it can affect natural persons or legal entities (namely businesses, with regard to corporate tax). Double taxation is not limited to corporate tax,¹ and double taxation dispute resolution mechanisms (DTDRMs) can be used in respect of all taxpayers and all taxes. For businesses operating in more than one country, double taxation can constitute a tax obstacle creating costs and administrative burdens.

Actions available in case of double taxation

If taxpayers (natural persons or legal entities) face double taxation in a cross-border situation, they can bring the matter to the competent courts,² but these can only rule in respect of the tax relating to their country (the other country not being a party in the proceedings). Taxpayers can also seek to mitigate double taxation through the consultation and arbitration procedure, which is included in many tax treaties (the 'mutual agreement procedure'), an alternative, out-of-court mechanism.

Double tax treaties

Double taxation has been recognised as a problem for a long time, and was first addressed as early as the 1920s.³ Since then, the issue has been treated in the double taxation conventions (DTC) concluded between numerous countries,⁴ with networks of tax treaties being created. Various double taxation dispute resolution mechanisms have been included, aimed at resolving disputes resulting from divergent interpretations of the respective DTCs. Mutual agreement procedures (MAP) provide for a state-to-state procedure to solve disputes. Competent authorities contact each other and negotiate to this end. These authorities seek to reach an agreement, but do not have an obligation to reach one. By contrast, arbitration clauses, when mandatory, overcome this possible deadlock.

Several model tax conventions provide a means to settle the most common problems on a uniform basis. The United Nations 'Model Double Taxation Convention between developed and developing countries' (often referred to as the [United Nations Model Convention](#)) and the OECD 'Model Tax Convention on Income and on Capital' (often

referred to as the [Model Tax Convention on Income and on Capital](#)) form part of the continuing international efforts aimed at eliminating double taxation. They both include a provision on 'mutual agreement procedures' ([article 25 in both models](#)), which may involve arbitration.

Existing situation

For entities in the EU, double taxation can happen in the course of business with third countries and also within the single market, in cross-border operations.

International landmarks

At [OECD](#) level, two 'base erosion and profit shifting' ([BEPS](#)) actions relate to dispute resolution mechanisms. [Action 14](#) ('Make dispute resolution mechanisms more effective') recommends a more efficient dispute resolution system to complement the actions taken to counter BEPS, and to ensure certainty and predictability for business. [Action 15](#) on the development of a multilateral instrument covers arbitration in these matters.

European Union: current framework

In the European Union (EU), most Member States have bilateral tax treaties with each other to relieve double taxation when it occurs, and there are procedures to resolve disputes when they arise. However, these procedures are long, costly and do not always result in agreement. The scope of the [Convention](#) on the elimination of double taxation in connection with the adjustment of profits of associated enterprises, signed on 23 July 1990, is limited to transfer pricing disputes and there is no possibility to appeal against the interpretation of the rules. The European Union Arbitration Convention (AC) applies in all Member States.⁵

When a cross-border tax dispute arises and the taxpayer seeks a reassessment, the following remedies can be sought: lodging a case in a domestic court, requesting a mutual agreement procedure under the relevant DTC (which may or may not include an arbitration clause) or requesting a procedure under the AC, if the dispute enters into its scope, i.e. transfer pricing.

The functioning of the current framework was assessed on the basis of the available data. The EU joint transfer-pricing forum produces statistics on pending mutual agreement procedures (MAPs) – under the AC, the latest relate to the situation at the end of 2014. Assessments of the current framework have made clear that the mechanisms were inefficient for resolving double taxation disputes and needed to be improved; see for example the [2010 public consultation](#) and the [impact assessment](#) relating to the proposal under discussion. Apart from the limited scope of the AC, other problems exist: unjustified denial of access to the procedure under a DTC, absence of a general obligation to reach agreement, and, in some cases, lack of a DTC. If all these obstacles are overcome, a remaining challenge can still be non-implementation of the decision of the advisory commission. This situation results in increased costs for tax administrations and taxpayers, and in uncertainty for taxpayers.

At European level, BEPS actions relating to dispute resolution will not alone constitute sufficient action to improve the situation within the single market, namely because, as the [inception impact assessment](#) puts it, 'it possibly downgrades the achievements of the EU through the Convention ... by not covering all EU States'.

The common consolidated corporate tax base ([CCCTB](#)) would eliminate the risk of double taxation in the EU for companies. However, until both proposals in the package, on a common corporate tax base ([CCTB](#)) and on a CCCTB, are agreed, disputes relating to the

tax base could be settled by an improved dispute resolution mechanism, which this proposal would provide.

Parliament's starting position

The European Parliament [resolution](#) of 16 December 2015 with recommendations to the European Commission on bringing transparency, coordination and convergence to corporate tax policies in the Union calls for improving 'the current mechanisms to resolve cross-border taxation disputes in the Union' (both double taxation and double non-taxation), 'to create a coordinated Union approach to dispute resolution, with clearer rules and more stringent timelines', and 'to reduce any uncertainty for corporations in the application of tax law' (transparency).

The European Parliament [resolution](#) of 6 July 2016 on tax rulings and other measures similar in nature or effect (TAXE 2) stresses that 'the setting of a clear timeframe for dispute resolution procedures is key to enhancing the effectiveness of (these) systems'.

Preparation of the proposal

On 17 June 2015, the European Commission presented an [action plan](#) on a fair and efficient corporate tax system in the European Union. It recognised that double taxation has a negative impact on cross-border investment, and causes economic distortions and inefficiencies.

The main shortcomings of the existing framework were described in the June 2016 [inception impact assessment](#) as follows:

- DTCs do not include an arbitration provision covering disputes
- Taxpayers accept double taxation in light of barriers created by length, costs and in some instances the uncertainty of the current mechanisms (17 % of corporate taxpayers and 31 % of individual taxpayers answering the 2010 consultation).
- Access to the AC or the MAP under a bilateral treaty is denied (e.g. 14 cases in 2014 for the AC).
- Member States seem not to open the arbitration phase agreed in the AC.

As part of the preparation of the proposal, a public [consultation](#) on double taxation, which builds on [previous](#) assessments and consultations on the existing mechanisms, was organised to gather views on how double taxation mechanisms could be improved in the EU (16 February 2016 to 10 May 2016). [Answers](#) generally show the need for action to ensure that double taxation is removed, and that timely, business-friendly and predictable resolution mechanisms are put in place.

[Preparatory work in the framework of the platform for tax good governance](#) highlighted that double taxation, outside the transfer pricing area, remains a problem and an obstacle for cross-border trade and investment (for instance regarding limitation in interest deductibility, foreign tax credits, permanent establishment (PE) issues and diverging qualifications or interpretations).

The changes the proposal would bring

The proposal is part of the Commission's [corporate tax reform package](#) adopted on 25 October 2016. The package aims at setting up a single corporate tax system for the single market and improving the tools used to prevent double taxation, in order to provide for a more modern and fairer tax system for business. It consists of a

communication on [Building a fair, competitive and stable corporate tax system for the EU](#), two proposals related to the re-launch of the Common Consolidated Corporate Tax Base (CCCTB), a [proposal](#) for a directive amending the [Anti-Tax-Avoidance Directive](#) (ATAD) of 12 July 2016, to tackle hybrid mismatches involving non-EU countries, and the proposal for a directive relating to double taxation dispute resolution mechanisms.

The [proposal for a directive on double taxation dispute resolution mechanisms in the European Union](#) comes under the broader objective of building a deeper and fairer internal market and contributing to a fair and efficient corporate tax system in the EU. In this context, improving double taxation dispute resolution mechanisms is instrumental to reducing compliance costs and administrative burdens. The proposal aims at updating the existing framework, made up of mutual agreement procedures included in double taxation conventions entered into by Member States and the Arbitration Convention, by offering a directive that provides more legal certainty and broader scope. It would create a coordinated EU approach to dispute resolution, with clearer rules and stricter timelines, building on the systems already in place.

The proposal would first of all extend the scope, from just the transfer prices covered in the AC, to all tax questions relating to business taxes. The proposal would also set an obligation to achieve a result (enforcement) which does not currently exist. Lastly, the provisions would be included in an EU directive instead of an intergovernmental convention.

The proposal provides for:

- a broadened scope that includes all cross-border double taxation situations and restates the objective to eliminate them (article 1), adding an explicit obligation of result on the Member States and setting time-limits (certainty), while a derogation (denial of access to the dispute resolution procedure) is set 'in cases of tax fraud, wilful default and gross negligence' (article 15(6));
- a mutual agreement procedure (MAP) starting with a taxpayer complaint, and dealt with by the Member States involved within two years (articles 3-5). Arbitration is also possible at this stage too (e.g. on admissibility);
- an automatic arbitration procedure within 15 months when no agreement was found in the initial MAP, and default fast-track enforcement mechanisms in cases when the advisory committee is not set up within the specified time (articles 6-7);
- provisions relating to the advisory commission, the alternative dispute resolution commission, rules of functioning, cost of procedure and time-frame for the opinions and final decisions, as well as interaction with national proceedings and publicity. Enforcement and a default appointment mechanism for arbitration is moulded on existing mechanisms in order to address shortcomings of the current framework (articles 8-16).
- the role of the Commission, in particular the possibility to update the list of taxes covered (articles 17-20).⁶
- transposition of the directive into national law by 31 December 2017 (article 21).

The proposal would serve to resolve disputes on tax base relating to all companies, before the proposals for a CCCTB (part of the same package) are adopted. Yet it would retain its usefulness even once CCCTB is adopted, since it applies to all corporate tax related issues, and also covers potential tax base related disputes of companies not covered by CCCTB.

Advisory committees

In the European Economic and Social Committee (EESC), the Section for Economic and Monetary Union and Economic and Social Cohesion is responsible for the file. The EESC has appointed Krister Andersson (Employers – Group I, Sweden) as rapporteur for the [opinion](#).

National parliaments

The [subsidiarity deadline](#) for national parliaments to submit comments on the proposal was 3 January 2017, and the parliaments of 13 countries launched the scrutiny process. A reasoned opinion was issued by the Parliament in [Sweden](#).

Stakeholders

Stakeholders expressed their views in the consultation process that has been going on since 2010⁷ and in the [consultation](#) relating to the proposal (February to May 2016).

Legislative process

Based on [Article 115](#) of the Treaty on the Functioning of the European Union, the proposal requires unanimity in the Council, following consultation of the European Parliament (special legislative procedure).

In the Council, the proposal was presented together with the corporate tax reform package, in the [preparatory body](#) in charge of its examination (Working Party on Tax Questions – Direct Taxation) and subsequently to the Economic and Financial Affairs Council on 8 November 2016. [Technical work](#) on the proposal is under way. The Council adopted [conclusions](#) on 6 December 2016 concerning the Commission communication of 25 October 2016 on building a fair, competitive and stable corporate tax system for the EU.

In the European Parliament, the proposal has been assigned to the Economic and Monetary Affairs Committee (ECON – rapporteur Michael Theurer, ALDE, Germany), with the Internal Market and Consumer Protection Committee (IMCO) providing an opinion.

Sources

[Double taxation dispute resolution mechanisms in the European Union](#), European Parliament, Legislative Observatory (OEL).

Commission website [Resolution of double taxation disputes in the European Union](#)

Endnotes

¹ The current proposal does not cover indirect taxes (notably VAT), as explained in the [European Commission impact assessment](#), pp. 11-13.

² Legal actions may be brought before competent national courts, which can be followed by proceedings before the European Court of Justice or the European Court of Human Rights, depending on the content of the case and the exhaustion of national legal remedies.

³ For historical elements and information on the work of the League of Nations, the Organisation for Economic Co-operation and Development (OECD) and the United Nations (UN), see for instance Lara Friedlander and Scott Wilkie, [Policy forum: The history of tax treaty provisions—and why it is important to know about it](#), Canadian Tax Journal (2006, Vol. 54, No 4, p. 907 sqq); Hans Mooij, [BEPS and international dispute resolution, part 6.1., The winding path of international tax dispute resolution through history](#), in Confédération Fiscale Européenne (CFE) Forum Reports on taxation - 6, 2014, p. 79 sqq.

⁴ Most EU Member States have bilateral treaties with each other: see [European Commission impact assessment](#) p. 5, which indicates that 'Out of 378 possible bilateral treaties, 370 have been concluded' (i.e. such that each Member State would have concluded a bilateral treaty with all 27 other Member States).

⁵ For a presentation of the adoption of the Convention, which results from the transformation of a 1976 proposal for a directive into a Convention signed in 1990, see European Commission Directorate-General Taxation and Customs Union [website](#).

⁶ The [explanatory memorandum](#) of the proposal provides a detailed explanation of the specific provisions, pp. 7-11.

⁷ Annex I of the [European Commission impact assessment](#) recaps the consultation strategy launched in 2010.

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