FEATURED PERSPECTIVE

Strengthening the EU Arbitration Procedure

by Bruno Gibert and Céline Pasquier

Bruno Gibert

Céline Pasquier

Bruno Gibert is a partner and Céline Pasquier is an associate with CMS Bureau Francis Lefebvre in Neuilly-sur-Seine, France.

In this article, the authors examine the European Commission's proposed directive on double taxation dispute resolution mechanisms and discuss how the EU arbitration procedure could be amended to more effectively reduce double taxation.

The fight against base erosion and profit shifting and the guarantee of effective double taxation dispute resolution mechanisms are closely knit concerns. Preventing tax fraud and avoidance is important to countries because they all want their fair share of tax revenues. Likewise, effective and efficient double taxation dispute resolution mechanisms are important to taxpayers engaged in cross-border transactions.

The OECD and the EU share all of these concerns. The EU discussed BEPS and the corporate tax system in its 2015 action plan, while the OECD addressed the same in its BEPS action items. Turning to the question of dispute resolution, last October 25 the EU published the ''Proposal for a Council Directive on Double Taxation Dispute Resolution Mechanisms in the European Union'' (proposed directive).

I. Attempts to Craft Arbitration Procedures

A. The EU and the Arbitration Convention

These concerns are not new. Early on, the EU recognized the need to address the absence of a mandatory binding mechanism to handle disputes arising from efforts to eliminate double taxation. The European Commission first presented a proposed directive addressing the matter in 1976. On July 23, 1990, the EU member states finally employed a multilateral convention, the arbitration convention (AC), to ensure a mandatory binding resolution mechanism for the elimination of double taxation. The AC entered into force on January 1, 1995. Each new member state that has acceded to the European Union has entered into the AC.

The AC applies to disputes regarding the adjustment of profits of associated enterprises (transfer pricing issues) and the attribution of profits to permanent establishments. When a dispute involving the member states has not been resolved by the competent authorities using the mutual agreement procedure, the AC requires the use of mandatory binding arbitration. In the arbitration phase, an advisory commission composed of five members (a president, two member states representatives, and two independent persons of standing) is appointed and has six months to resolve the case.

On December 7, 2004, the European Council adopted the Joint Transfer Pricing Forum's (JTPF) proposed code of conduct on the AC aimed at providing a ''more effective and uniform application'' of the AC using a more practical procedure (including defined timelines and starting points), transparency, and taxpayer participation.

On December 22, 2009, the council adopted a revised code of conduct providing guidance and specifications on:

- serious penalties;
- the scope of the AC (triangular transfer pricing and thin capitalization cases);
- the interest charged or credited by tax administrations in the context of AC proceedings;
- practical details on the functioning of the AC (a deadline for setting up the advisory commission, criteria for the independence of the arbitrators);
- the timing of referral to the AC procedure; and
- the interaction of the AC with domestic dispute procedures.

In April 2015 the JTPF published a Report on Improving the Functioning of the Arbitration Convention, further revising the code of conduct. This revision:

- clarified the application of the AC in specific cases (absence of actual payment of tax, changes in taxpayer's status);
- addressed the effect of the new article 7 of the 2010 model tax convention on the procedure;
- discussed the need for transparency in cases where access to the AC is denied;
- clarified the functioning of the advisory commission; and
- clarified the deadline for requesting a procedure under the AC.

The JTPF's yearly monitoring of the implementation of the AC is also a useful tool for analyzing double taxation dispute resolution within the EU.

Also, beyond the JTPF's work to improve the function of the AC, the European Commission has taken other actions to combat double taxation. Intergovernmental seminars were held in December 2012, a study to identify and describe the most frequent cases of double taxation was launched in March 2013, and expert groups were created in June 2014 to examine cross-border tax obstacles facing individuals in the European Union (including inheritance tax issues).

As a result of this work and the commission's recognition of the need for further improvement in double taxation dispute resolution, arbitration was identified as one of the issues to be addressed by the 2015 Action Plan for a Fair and Efficient Corporate Tax System in the European Union.

The proposed directive submitted by the European Commission builds on the AC and the work of the JTPF to broaden the scope of the AC while improving the convention with more efficient and enforceable mechanisms.

B. The OECD and Double Tax Conventions

The number of double taxation conventions (DTCs) providing for a mandatory binding arbitration procedure is very limited; only 20 DTCs include the provision. The OECD's actions on arbitration started in 2008, later than the EU's efforts. In its revised Model Tax Convention on Income and on Capital, the OECD recommended complementing the MAP process provided in article 25 with a mandatory binding arbitration phase to address cases in which competent authorities do not manage to reach an agreement during the MAP phase (paragraph 25.5 of the model tax convention).

The OECD's BEPS actions have complemented that work through action 14, which deals with making dispute resolution mechanisms more effective, and action 15 Part V (improving dispute resolution) and Part VI (arbitration), which addresses developing a multilateral instrument to modify bilateral tax treaties. The BEPS actions attempt to set a minimum standard for implementation of MAP under article 25 of the model tax convention. They provide guidance on the timelines to be respected while ensuring more effective access to MAP by enabling taxpayers to file a request to open a MAP to any of the competent authorities involved in the case.

Regarding arbitration, no minimum standard is set by the OECD and the states are free to decide whether to implement the process or not. Twenty states[1] — which represent more than 90 percent of outstanding MAPs — have committed to introduce mandatory binding arbitration in their DTCs. Action 15 provides for an arbitration process that aligns with the timeline of the MAP, including in case the MAP is suspended. Practically, the multilateral instrument adopted in response to action 15 provides further guidance on the procedural aspects and timelines of arbitration under the model tax convention including:

- a two-year deadline to introduce the arbitration phase, extendable to three years;
- time extensions for the provision of information;
- the binding effect of the arbitration decision if the taxpayers affected agree to be bound by the outcome of the arbitration decision and no final decision by a domestic court renders the arbitration decision invalid;
- the makeup of the arbitration panel (three arbitrators), including criteria for independence of the arbitrators;
- confidentiality of the proceedings;
- the competent authorities' option between ''final offer'' and ''independent opinion'' processes to be followed by the arbitration panel; and
- allocation of the costs of the procedure.

II. Does the AC Prevent Double Taxation?

In order to determine the best way for tax administrations and taxpayers to resolve disputes on double

[1]Australia, Austria, Belgium, Canada, France, Germany, Ireland, Italy, Japan, Luxembourg, the Netherlands, New Zealand, Norway, Poland, Slovenia, Spain, Sweden, Switzerland, the United Kingdom, and the United States.

taxation, a ''Public Consultation on Improving Double Taxation Dispute Resolution Mechanisms'' was conducted by the European Commission from February to May 2016. Per the official announcement, the consultation was aimed at gathering all stakeholders' views in particular on:

- the relevance of removing double taxation for enterprises operating cross border;
- the impact and effectiveness of the above-mentioned double-taxation dispute resolution mechanisms for business and enterprises established in the European Union;
- how these mechanisms can be improved; and
- the solutions which are discussed.

The commission also expected to discern the degree to which the problem of double taxation affected stakeholders.

Eighty-seven stakeholders responded to the public consultation (the respondents). ''A Summary Report: Responses Received on the Commission's Consultation'' was drafted by the Directorate General for Taxation and Customs Union and published in May 2016. Responses came predominantly from business organizations, tax practitioners, and companies with some additional responses from nongovernmental organizations and academics. More responses came from Germany, Belgium, France, the United Kingdom, and the Netherlands than any other countries.

A. Shortcomings in the Implementation of the AC

The respondents identified the following shortcomings of the AC, divided into three categories[2]:

- Legal certainty:
  - — *Implicit and explicit denial of access to MAP*[3]: Taxpayers believe that tax administrations are reluctant to resolve double taxation disputes and prefer to propose settlements to taxpayers in order to avoid having to report open cases under a MAP or in arbitration. In 2014 access to the AC was explicitly denied in 14 cases.
  - — *Delayed and blocked procedures*: Respondents want clearer rules and more stringent timelines, including an appropriate deadline for reaching a final and effective agreement on a given dispute. They also draw a parallel between the short time allocated to taxpayers for the preparation of transfer pricing documentation and longer delays encountered in dispute resolution.
  - — *Resolution of disputes not mandatory*: Respondents requested that arbitration decisions have a binding effect and also want the guarantee of a review mechanism, particularly the right to appeal an ineffective ruling or the absence of a ruling taken within the timeline imposed.
- Level playing field for EU business:
  - — *Unbalanced cost and high complexity/compliance burden*: Respondents note that taxpayers and tax administration resources are all affected by lengthy procedures. For taxpayers, this may mean cash flow immobilization because of taxes paid before resolution of the dispute as well as accounting and legal fees associated with the dispute.
  - — *Differences in application throughout the EU*: The respondents called for a consistent procedure across all member states. This implies abrogating specific domestic procedures that may lengthen the procedure's timeline.

  The uncertainty and unpredictability of timelines as well as compliance and cost burdens directly affect taxpayers' investment decisions, including where to invest. This can distort competition within the European Union.
- Appropriate level of transparency:
  - — *Transparency versus availability of information*: The respondents' goal is to create set of standards for taxpayers while also providing sufficient flexibility to allow the competent authorities to find an efficient solution to each case. The respondents agree to improve the level of transparency of the procedure, notably by the publication of the decisions, if the name of the taxpayer remains confidential and that business and commercial secrecy is guaranteed.

In practice, the respondents observed that the double taxation dispute resolution issue has been growing in size and magnitude because of the globalization of the economy, the increase of intragroup transactions, and the tax administrations' increasingly stringent audit practices. As the number of transfer pricing tax audits has grown, double taxation cases have increased in turn. This rise is likely to continue given the trends in tax administration.

More generally, the respondents noted that the long duration, unclear deadlines, and nonconclusiveness of double taxation dispute resolution are three key factors that may deter multinational enterprises from referring a case to the AC. Further, because of these shortcomings, taxpayers may prefer to settle on tax adjustments performed by tax administrations instead of trying to eliminate double taxation, considering the costly and

[2]European Commission, ''Commission Staff Working Document Impact Assessment Accompanying the Document Proposal for a Council Directive on Double Taxation Dispute Resolution Mechanisms in the European Union,'' SWD(2016) 343 final (Oct. 25, 2016).

[3]Implicit denial occurs when a taxpayer is effectively blocked from invoking an otherwise applicable procedure. Explicit denial occurs when the competent authority refuses a request for access to a dispute resolution mechanism.

How Do Existing Mechanisms That Eliminate Double Taxation Address Respondents' Concerns?

	Enforceability			Efficiency			Scope of Mandatory Resolution		
DTDRM	Implicit Denial	Explicit Denial	Block	Administrative Burden and Costs		Non-Homogeneous Uptake in the EU	Not Mandatory	Limited to Certain Issues	Limited to Certain Member States
EU arbitration convention	X	X	X	X		X		X	
DTC with arbitration	X	X	X	X		X			X
DTC without arbitration	X	X	X	X		X	X		
No DTC	X	X	X	X		X	X		

Source: Commission Staff Working Document Impact Assessment, SWD(2016) 343 final, at 106.

burdensome aspects of the MAP, even with the AC. Finally, the respondents requested that taxpayers be able to fully participate in the MAP and the arbitration phase.

The above table examines different double taxation mechanisms (the AC, a DTC providing for the arbitration procedure, a DTC providing for no arbitration procedure, and no DTC) and summarizes the ability of each to address some of the respondents' concerns.

The Commission Staff Working Document Impact Assessment also provides statistics on cases submitted to arbitration. It states that transfer pricing cases constitute around 70 percent of all pending double taxation cases and that 50 percent of cases in which member states are concerned are intra-EU cases.

The public consultation sought to determine what dispute resolution issues needed to be addressed and how this should be done. The respondents suggested that existing dispute resolutions in the EU were only a starting point in terms of scope, enforceability, and efficiency. In the consultation, the commission presented four potential instruments that might be used to improve EU dispute resolution mechanisms.

B. Options for Improving EU Dispute Mechanisms

The commission presented the following options in the public consultation:

- *Option A1*: Improve existing dispute resolution mechanisms available to member states by adding mandatory binding arbitration clauses in DTCs and extending the scope of the AC.
- *Option A2*: Refer double taxation cases that cannot be resolved in MAP to the Court of Justice of the European Union for mandatory binding arbitration.
- *Option B*: Institute an EU directive broadening the scope of mandatory binding arbitration and addressing each individually identified shortcoming.
- *Option C*: Incorporates the dispute resolution mechanism in Option B but would also include a set of specific and targeted rules detailing how to resolve double taxation issues.

All respondents agreed that there was a need for direct action at the EU level, building on the existing mechanisms available to remove double taxation. Respondents believed that introducing mandatory arbitration in EU member states' DTCs or referring MAP cases to the CJEU for mandatory binding arbitration (citing competence and workload concerns) would be insufficient. Option C would have required a long time to implement, in part because it would go beyond what was actually necessary to achieve the identified goals. Therefore, the option favored by the respondents was Option B.

II. The Purpose of the Proposed Directive

The European Commission's suggested approach for improving dispute resolutions in the EU consists of a directive that would build on and supplement the existing AC. A new EU dispute resolution mechanism would be provided under a directive extending the availability of mandatory binding arbitration to include all cross-border situations.

A. The Commission's Solution: Option B

Under Option B, the proposed directive would supplement the AC.

While the AC is a multilateral convention concluded by the member states in accordance with the former article 220 of the EC Treaty, the proposed directive would rely on article 115 of the Treaty on the Functioning of the European Union. A directive is part of EU legislation and directly affects member states. As part of EU legislation, it may be monitored by the CJEU. Passing the proposed directive under the special legislative procedures will require a consultation of the European Parliament and unanimity in the council.

The introduction of a directive to improve dispute resolution mechanisms in the EU is intended to help create a coordinated and common practice of double taxation dispute resolution within all EU member states. It also provides the opportunity for the CJEU to build a common interpretation and control of its implementation.

If adopted, the proposed directive would require member states to transpose it into law by December 31.

B. Broadening the AC's Scope

Under the AC, enterprises are eligible to use the double taxation dispute resolution mechanism if the dispute involves a transaction with an ''associated enterprise.'' Two enterprises are considered associated under the AC, as it stands, when:

> an enterprise of a Contracting State participates directly or indirectly in the management, control or capital of an enterprise of another Contracting State, or the same persons participate directly or indirectly in the management, control or capital of an enterprise of one Contracting State and an enterprise of another Contracting State.

Under article 1 of the proposed directive, the scope of the AC would be extended to ''all taxpayers that are subject to one of the taxes on income from business.'' Article 1 of the proposed directive implicitly places penalties (which are not taxes), as well as any tax that is not based on income from business, outside the scope of the proposed directive. The proposed directive observes that business concerns and corporations are the most affected by double taxation. Thus, double taxation encountered by individuals is not addressed by the directive.

Article 1 of the proposed directive also provides two antiabuse mechanisms that restrict the scope of application of the double taxation dispute resolution mechanism:

- the provisions of the proposed directive would not apply to ''income or capital within the scope of tax exemption or to which a zero tax rate applies under national rules''; and
- the provisions of the proposed directive would not prevent ''the application of national legislation or provisions of international agreements where it is necessary to prevent tax evasion, tax fraud or abuse.''

Neither of these conditions are addressed in the AC nor in the revised 2015 revised code of conduct.

C. Improving Dispute Resolution Mechanisms

The proposed directive answers each of the shortcomings identified by the commission's consultation, although it does raise some concerns itself.

1. Legal Certainty

a. Implicit and Explicit Denial of Access to MAP.

1. *Implicit denial of access*: This problem results from the apparent reluctance of tax administrations to resolve double taxation disputes and their preference to enter into settlements with taxpayers instead of having to open — and, therefore, report — cases under MAP or arbitration. This implicit denial of access could be solved by implementing a more efficient procedure under the proposed directive and allocating more resources to tax administrations. No specific provision of the proposed directive addresses this issue. Rather, the proposal as a whole addresses this issue and attempts to reduce implicit denial of access by enabling more efficient dispute resolution mechanisms.

2. *Explicit denial of access*: This issue had previously been identified by the JTPF. The 2015 revised code of conduct on the AC refers to ''denial of access'' and states that ''Member States should consider providing domestic legal remedies for determining whether the denial of access to the Arbitration Convention by the administrative bodies is justified.'' It also specifies that competent authorities should exchange views and reach a common position before informing the taxpayer of a denial. In 2014 statistics monitored by the JTPF showed that 14 cases were rejected, mainly because they were not presented within the three-year period or were considered outside the scope of the AC. In comparison, in 2015 access to the AC was explicitly denied in only three cases that were outside the scope of the AC. Denial of access because a case falls outside the scope of the AC should be specifically justified by the competent authorities. The extension of the scope of the proposed directive may help reduce the number of cases rejected. Also, like the AC that expressly states in article 8 that a competent authority is not obliged to initiate a MAP or set up an advisory commission to begin the arbitration process if one of the enterprises concerned is liable to a ''serious penalty,'' article 15.6 of the proposed directive explicitly allows member states to ''deny access to the dispute resolution procedure in cases of tax fraud, willful misconduct and gross negligence.'' The wording retained by the proposed directive is in line with the wording of the code of conduct on the AC.

b. Delayed and Blocked Procedures. The respondents also called for clearer rules and more stringent timelines. The proposed directive endeavors to provide for a more defined approach to the different stages of the procedure and the applicable timelines than exists in the AC. The proposed directive dedicates an article to the taxpayer's complaint (''Article 3: Complaint'') and two articles to the MAP (''Article 4: Decision Accepting a Complaint — Mutual Agreement Procedure'' and ''Article 5: Decision Rejecting the Complaint''), while articles 6 and 7 of the AC only deal with the MAP. Arbitration is dealt with by articles 6 to 14 of the proposed directive, as compared with articles 7 to 14 of the AC.

1. *The complaint*: In keeping with OECD BEPS action 14, the proposed directive states that the taxpayer

can file the complaint with each of the competent authorities concerned by the case, while under the AC the complaint is filed with the contracting state of which it is an enterprise (or where its PE is situated). In terms of timing, the AC requires that the case be presented within three years from the first notification of the action that results in or is likely to result in double taxation. The proposed directive sets the same deadline, starting from the ''receipt of the first notification of the action resulting in double taxation.'' That a case can only be introduced under the proposed directive if the taxpayer is ''subject to double taxation'' may be a barrier. The reference to the ''action resulting in double taxation or likely to result in double taxation'' in the AC better protects the interests of taxpayers and allows the MAP phase to begin earlier. The proposed directive should also explain the phrase ''action resulting in double taxation'' to provide added clarity and to improve the efficiency of the process.

The proposed directive also includes a list of information taxpayers must provide when filing their complaint and corresponding timelines that the competent authorities must meet when requesting further information or deciding to admit or reject the case. There are no equivalent provisions in the AC, although similar explanations appear in the 2015 revised code of conduct on the AC. The proposed directive builds on the explanations and timelines in the code of conduct and goes further regarding the details in the list of information to be provided by the taxpayer.

2. *The MAP*: Under the AC, the competent authorities should endeavor to reach an agreement to eliminate double taxation within two years from the date the case was properly submitted (article 7.1), although the competent authorities can waive the two-year limit by mutual agreement and with the agreement of the taxpayers concerned (article 7.4). The proposed directive provides the same timeline as the AC, but with no waiver option. However, it provides for a six-month extension based on a justified request of the competent authority concerned and subject to acceptance by the taxpayers and other competent authorities involved.

If the proposed directive endeavors to be more precise and efficient than the AC, it should also specify when and how the competent authorities should exchange their views. In that respect, the proposed directive could build on the 2015 revised code of conduct on the AC (content and format of position papers, organization of meetings, deadlines).

Article 5 of the proposed directive deals with the decision of the competent authorities to reject the taxpayer's complaint. Three reasons to reject a complaint are inadmissibility of the complaint, absence of double taxation, or expiration of the three-year period. The authors should further explain the reference to ''inadmissibility'' for clarity. In practice, under the AC, cases are typically rejected because they fall outside the scope of the AC or because the three-year period expired. Proposed article 5 further states that a case should be deemed rejected if the competent authorities ''have not taken a decision on the complaint within six months following receipt.'' This is adequate in terms of efficiency, but assumes that the competent authorities have sufficient resources to deal with the complaint in that time frame.

3. *Arbitration*: The major changes between the AC and the proposed directive relate to the expanded scope of coverage, the appointment and composition of the advisory commission, and the introduction of an alternative dispute resolution commission.

Article 6 of the proposed directive would allow cases to be brought before the advisory commission when the two-year period starting from the acceptance of the complaint has expired or at the time a complaint is rejected by only one of the relevant member states. In this case, the matter would be referred to the advisory commission for admissibility purposes, but the taxpayer would have to confirm that it renounces domestic remedies (or that domestic remedies have expired).

Article 7 of the proposed directive suggests that the appointment of the advisory commission be referred to a competent national court if the advisory commission has not been set up within the timeline provided by the proposed directive. Furthermore, the composition of the advisory commission can be increased from five to seven members because of the possible introduction of one additional independent person of standing from each member states. If the commission is composed of seven members in accordance with article 8 of the proposed directive, the nomination of the independent persons of standing and the chair might take longer. This should be prevented. Notably, referring the appointment of the advisory commission to the competent national court may not speed up the process given that domestic courts often encounter delays.

If the competent authorities agree to do so, an alternative dispute resolution commission could be appointed under article 9 of the proposed directive. The composition and form of the commission would differ from the advisory commission, and the alternative dispute resolution commission could decide ''to apply conciliation, mediation, expertise, adjudication or any other dispute resolution processes or techniques to solve disputes.'' This may be problematic since some of these procedures are not binding on the taxpayers, which could lead to issues when the decision has to be executed unless the binding force of the arbitration process can be applied to the alternate mechanism.

Finally, while the proposed directive is not particularly descriptive as to the exchanges of view between competent authorities and timelines in the MAP phase, article 10 of the proposed directive provides a functioning framework for the members of the advisory commission to agree on when addressing exchanges of information and their format, timelines, working language, and costs. In parallel, article 12 of the proposed directive provides for the terms and conditions

under which the taxpayers may provide information to the commission and appear or be represented before the commission. This is in line with the recommendations of the 2015 revised code of conduct on the AC. Thus, taxpayers would be more involved in the arbitration process. This may be useful particularly in case of a disagreement between competent authorities on the facts of the case. However, it is important to ensure that these additional meetings do not delay the six-month process.

4. *Resolution of disputes not mandatory*: In response to the respondents' request for a more direct effect of the decision eliminating the double taxation and a guaranteed recourse, articles 13 and 14 of the proposed directive provide an explicit obligation for the advisory commission or alternative dispute resolution commission to adopt a final opinion within six months from the time it was set up. As reflected in the introduction to the directive, articles 13 and 14 follow the AC including its timelines. Thus, clear rules and constraining deadlines are already provided under the AC and its code of conduct.

2. Level Playing Field for EU Business

a. Unbalanced Cost and High Complexity/Compliance Burden. Avoiding lengthy MAP and arbitration procedures is in the interest of both tax administration and taxpayers. Article 11 of the proposed directive aligns with article 11.3 of the AC and states that the costs of the advisory commission procedure (other than those incurred by the taxpayers) are to be shared equally between the member states concerned. The code of conduct on the AC further notes that costs include the administrative costs of the advisory commission and the fees and expenses of the independent persons. When the proposed directive allows for two independent persons per member state instead of one, there is a risk that related costs would increase. However, the proposed directive tends to reduce the compliance burden by providing alternative procedures to achieve the intended objective more efficiently (such as an arbitration phase at the stage of the complaint and the creation of the alternative dispute resolution commission).

b. Differences in Application Throughout the EU. The proposed directive, by its very essence as EU legislation, would have a common effect across all EU member states. Still, unlike a regulation, which is a binding legislative act and must be applied in its entirety across the EU, a directive sets forth a goal that all EU member states must achieve but leaves it to each member state to devise its own laws to reach these goals. Thus, the proposed directive renders the implementation of the dispute resolution procedure more flexible for the member states — a result that may speed up implementation, but may not result in a wholly uniform procedure across the EU.

3. Appropriate Level of Transparency

a. Transparency Concerns. The goal in this respect is to create a set of standards that serve as a reference point for taxpayers while allowing sufficient room for the competent authorities to find a solution to each case. The proposed directive introduces a new article 16 dedicated to the publicity of the final decisions reached by an advisory commission or alternative dispute resolution commission. The opinion of each commission would be rendered in writing and could be published if the taxpayers consent. The taxpayers would be able to review a draft before publication. If a taxpayer does not consent to the publication of the final decision in its entirety, the competent authorities could only publish an abstract that includes a description of the issue and subject matter, date, tax periods involved, legal basis, industry sector, and a brief summary of the final outcome. No information would be published relating to trade, business, industrial, or professional secrets; trade process; or information that is contrary to public policy. Publication of the decisions would be standardized. Transparency would be achieved, while also providing more certainty for taxpayers about the types of double taxation cases heard and the outcome achieved.

D. Evaluating the Proposed Directive

The European Commission's goal in drafting the proposed directive has been to provide a more efficient, enforceable, and transparent arbitration procedure that can be made equally available to all member states without the need to renegotiate all of their DTCs. The commission also sought to remedy the concerns identified in the consultation.

The proposed directive appears to achieve that goal on transparency.

As for achieving legal certainty and creating a level playing field for EU businesses, the conclusion may be a bit more qualified given that the AC and its code of conduct already provide rules for dispute resolution, including timelines. However, the transposition of the AC into EU legislation should strengthen the MAP and arbitration processes and ensure the processes are binding. The new tools for the elimination of double taxation under the proposed directive should also enhance flexibility in the interest of the taxpayers and improve the efficiency of the process**,** even though the changes to the AC suggested by the proposed directive may be costly. In order to keep the costs to the taxpayer down and further enhance efficiency, the commission should add a provision suspending tax collection during the course of a cross-border dispute resolution procedure to the proposed directive. Once a complaint has been accepted by competent authorities (or by the alternative dispute resolution commission), the collection of both the principal and interest on the disputed taxes should be suspended until the final decision of the advisory commission or alternative dispute resolution commission is rendered. Although the code of conduct included this provision (point 8), not all countries applied it (France is one example).

III. The Proposal and Existing Procedures

At the EU level, effective double taxation dispute resolution mechanisms are considered necessary until the common consolidated corporate tax base (CCCTB) enters into force. Once the CCCTB is in place, double taxation should no longer exist for enterprises within the scope of the CCCTB. A dispute resolution mechanism, however, would still be needed until the second stage of the CCCTB and, even after the consolidated tax base is implemented, for corporations that are not eligible for the CCCTB.

For the moment, double taxation disputes remain a significant issue across the EU. Therefore, it is important to examine the proposed directive (and its implementation) in light of other dispute resolutions available within the EU.

A. Interaction of the Proposal With Domestic Law

Under article 15 of the proposed directive (''Interaction With National Proceedings and Derogations''), interactions with domestic law and remedies would remain the same under the proposed directive as under the AC. No changes should be expected in that respect since both EU directives and multinational agreements take precedence over domestic law.

B. Interaction With Existing Processes

The introduction to the proposed directive provides that the directive ''should build on existing systems,'' including the AC. It does not explicitly state that the AC would be replaced by the proposed directive. The AC will have to remain applicable, at least for the time being, since there are pending cases that must be resolved under the AC absent the addition of a transitory mechanism to the proposed directive. Eventually, the proposed directive might replace the AC in practice considering it is broader in scope, provides for a larger array of dispute resolution mechanisms, and would be more effective at obtaining a binding resolution than the AC.

Currently, the procedures provided by the AC and by DTCs (which should be affected by OECD BEPS actions 14 and 15) are independent. Taxpayers can decide which route to follow.

The introduction of a directive that is incorporated into member states' laws may change this analysis. In accordance with well-settled CJEU case law, taxpayers in member states may be obliged to use the directive's procedure if it has been transposed into the member state's law. If so, the application of DTCs may no longer be concurrent and the dispute resolution procedures in DTCs would only apply to member states' cases with third countries (for example, arbitration under the France-U.S. DTC). In any case, considering the extensive work undertaken by the EU on arbitration and the directive's goal of improved efficiency and enforceability, taxpayers would probably favor the directive route.

C. Intervention of the CJEU or Another Court

The adoption of the proposed directive on double taxation dispute resolution mechanisms within the European Union would render the CJEU competent to review the directive and its application by member states.

During the public consultation, at least one respondent proposed establishing a permanent arbitration court or independent body that would develop standard rules and practices for the efficient resolution of tax disputes. Considering that the CJEU would be competent, an independent body does not seem necessary to achieve the intended objective. Plus, a separate body would represent further costs for the tax administrations and the taxpayers.

D. Other Tools Available

A wider use of joint tax audits performed by the tax administrations of two EU member states could resolve double taxation as part of the audit, thus avoiding the need for MAP or arbitration procedures later. This option could meet the goals of efficiency and enforceability that may be partly lacking under the AC or the proposed directive, while largely reducing costs (by avoiding a later procedure) for both tax administrations and taxpayers. However, this would require the tax administrations to reach a common decision at a very early stage. The JTPF is investigating this issue.

IV. Conclusion

The European Commission believes that instituting a directive is the best way to improve on existing efforts to eliminate double taxation. This approach is welcome because providing additional mechanisms beyond those in the AC and, more importantly, introducing the control of the CJEU should remedy the malfunctions of the AC.

The proposed directive reflects a willingness to provide taxpayers with greater certainty and a more effective procedure for swift resolution of double taxation. Two of the greatest strengths of the proposed directive are its magnitude — it would be enforceable by taxpayers in all member states — and its realism, which stems from the commission's in-depth work on the functioning of the AC.

On February 23 a plenary session of the European Economic and Social Committee adopted a positive opinion regarding the proposed Directive on Double Taxation Dispute Resolution Mechanisms in the European Union. The opinion stresses the urgency of implementing the proposed directive given the increasing number of cases involving double (or multiple) taxation and the growing magnitude of these disputes.

Discussions are now ongoing among member states regarding the technical implementation of the proposed directive. Amendments to the proposed directive have been suggested so as to introduce an EU tool that is applicable within the scope of application of double

tax conventions and some modifications were proposed with respect to the procedure itself aiming at a more efficient process. (Related coverage: p. 27 of this issue.)

An agreement in the European Council on the proposed directive is expected before June 30. Recently, the EU has shown a new capacity for quickly approving proposed directives for tackling tax evasion. Let's hope that this momentum will extend to adopting a more efficient instrument for the elimination of double taxation, particularly given that the various actions at the EU and OECD levels to prevent tax evasion will likely result in a dramatic increase in the occurrence of double taxation. ◆

COMING SOON

A look ahead to upcoming commentary and analysis.

Tax treaty aspects of the McDonald's state aid investigation (*Tax Notes International*)

Fadi Shaheen examines the European Commission's decision to investigate whether Luxembourg selectively granted McDonald's advantageous tax treatment in breach of EU state aid rules.

Mexico's 2017 repatriation tax amnesty (*Tax Notes International*)

Jaime Béndiksen discusses a 2017 Mexican decree providing a tax amnesty for the repatriation of unreported offshore income and investments.

The Brady-Ryan plan: Potential and pitfalls (*Tax Notes*)

Alan D. Viard explains how the House Republicans' blueprint for tax reform could expand the economy, but argues against the border adjustment feature and calls for higher rates on business cash flow.

Is this the end of deferral as we know it? (Will U.S. multinationals feel fine?) (*Tax Notes*)

Zhan Furner, Rebekah Moore, and Michaele Morrow explore the tax treatment of corporate offshore earnings, urging Congress to cut corporate rates and tax all corporate offshore earnings at the same rate.

Countering the federal regime: State action and the rule of law (*State Tax Notes*)

Dan Bucks considers the plausibility of states becoming laboratories of democracy in an increasingly polarized nation.

The *Wynne* decision and its impact on other states (*State Tax Notes*)

Kathleen Wright discusses how *Comptroller of the Treasury of Maryland v. Wynne* has been applied in states such as California, Indiana, Iowa, Kansas, and North Dakota.