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The EU Sets the Standard for International Tax Dispute Resolution

Jonathan Schwarz (Temple Tax Chambers; King's College London) · Saturday, November 11th, 2017

Adoption of the EU Council Directive on Tax Dispute Resolution Mechanisms in the European Union on 10 October 2017 is a milestone in international tax dispute resolution. The Directive offers a uniform mechanism to address tax treaty disputes among EU member states that meets the BEPS Action 14 minimum standard, and largely renders the arbitration option in the OECD BEPS MLI redundant as between EU member states. It will apply to intra-EU disputes relating to income earned in a tax year commencing from 1 January 2018 for cases submitted from 1 July 2019. Competent authorities of Member States may agree to apply the Directive to cases submitted earlier or to earlier tax years.

The directive supplements the EU Arbitration Convention which only covers transfer pricing and attribution of profits to permanent establishments. The new directive covers disputes between Member States over the interpretation and application of treaties that eliminate double taxation of income and capital. Its self-contained mutual agreement procedure (MAP), backed up by binding mandatory arbitration or alternative dispute resolution mechanisms, will likely provide the most effective, rule based system for resolving treaty disputes.

The directive expressly contemplates multi-state disputes with the result that complex transfer pricing or multiple residence disputes are capable of resolution in a single procedure.

Presenting "complaint"

OECD Model Article 25 mutual agreement procedure concepts underpin the directive with a number of refinements. Large undertakings and large corporate groups must submit a "complaint" to each member state involved in the dispute, while individuals and other business undertakings must submit their complaint only to their state of residence. In the case of individuals and smaller undertakings, it is the responsibility of competent authority the member state in receipt of a complaint to notify the competent authorities of all other Member States concerned within two months of receipt of the complaint. The OECD time limit for bringing a complaint applies – three years from the receipt of the first notification of the action resulting in, or that will result in, the treaty dispute.

Unlike existing treaty-based MAP, a complaint must be accompanied by detailed information and supporting documentation relating to the dispute as specified in the directive. The information must be in the language of each receiving state or any other language they may accept. Competent

authorities have three months to request further information which must be supplied within three months of request. Competent authorities then have a further six months to decide whether to accept the complaint. Limited grounds for rejecting the request are specified in the directive. The absence of a decision on this is deemed acceptance.

Mutual agreement

Competent authorities have six months to decide whether to resolve the dispute unilaterally. In the absence of such resolution the competent authorities must endeavour to resolve the issue by mutual agreement within two years from the last notification of acceptance of the complaint. This may be extended by up to one year at the request of a competent authority if justified in writing.

Arbitration or other alternative dispute resolution

In the absence of resolution by mutual agreement, taxpayers are entitled to request arbitration by an Advisory Commission. In addition, a request may be made where some, but not all, competent authorities have refused the MAP request if taxpayers have no right of appeals to national courts on the refusal.

An Alternative Dispute Resolution Commission may be established instead of an Advisory Commission. This may differ in composition and form from the Advisory Commission and may include last best offer arbitration. Although not explicit, it is apparent that the Advisory Commission will proceed by way of reasoned opinion. The directive also contemplates a permanent Alternative Dispute Resolution Commission.

Procedure

The arbitration process is also subject to a strict timetable, with a normal overall time limit of 18 months from the time of request until the Advisory Commission is required to give its opinion. National courts are given specific authority to intervene where there are failures in the appointment of the Advisory Commission and detailed requirements must be met in the case of independent members. Although the procedural rules (Rules of Functioning) are to be agreed by the competent authorities, the EU Commission is required to prepare standard rules which will apply in the absence of agreement or notification to the taxpayer. Taxpayers are entitled to appear before the Advisory Commission with the consent of the competent authorities. An Advisory Commission or Alternative Dispute Resolution Commission may require the taxpayer to appear before it and also has power to require attendance by the taxpayer and the production of documents and information from both the taxpayer and the competent authorities.

Decisions are by majority decision, with a casting vote to the chair in cases of deadlock. The competent authorities are bound by the decision unless they agree a different resolution within six months of notification of the decision. The taxpayer must agree the decision in order to be bound by it, thereby preserving appeal rights to national courts.

Transparency

The competent authorities may agree to publish the final decisions in full, subject to taxpayer consent. Information concerning any trade, business, industrial or professional secret or trade process, or that is contrary to public policy may be excluded. If there is no such agreement or consent the competent authorities must publish an abstract of the decision including a description

of the arbitration method used. The abstract must contain a description of the issue and subject matter, the date, the tax periods involved, the legal basis, the industry sector, and a short description of the final outcome. Although the decisions do not constitute binding precedent, they will undoubtedly form a useful body of persuasive opinion.

The Commission estimates that there are about 900 double taxation disputes in the EU today, involving about €10.5 billion. More tax treaty disputes are in any event anticipated in the Post-BEPS era. By far the most user friendly treaty dispute resolution mechanism, enforceable on Member States, it may become the venue of choice in Europe. One strength of the directive is its status in EU law subject to the general jurisdiction of the Court of Justice of the EU and national courts. That is also a limitation in that it only applies to intra-EU disputes. A mechanism to extend the directive to third country tax treaty disputes would truely revolutionise the area.

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