Executive summary

The European Commission (the Commission) issued a proposal for a Council Directive on Double Taxation Dispute Resolution Mechanisms in the European Union (the Proposed EU Dispute Resolution Directive, the Proposed Directive). The Proposed Directive includes a reinforced mandatory binding dispute resolution mechanism in the European Union. Currently double taxation dispute resolution in the EU is governed by an inter-governmental Convention which was signed on 23 July 1990 (the Arbitration Convention). The Proposed Directive builds upon the Arbitration Convention, but broadens the scope to cover additional areas, beyond transfer pricing and allocation of profits to permanent establishment, and provides features to address certain identified shortcomings of the existing process to enhance the enforceability and the effectiveness of the mechanism.

Detailed discussion

Background

On 25 October 2016, the European Commission announced a new package for corporate tax reforms. The package includes three separate legislative initiatives, namely: (i) a two-stage proposal towards a Common Consolidated Corporate Tax Base (CCCTB), (ii) a proposed Directive on Double Taxation Dispute Resolution Mechanisms in the European Union, and (iii) amendments
to the Anti-Tax Avoidance Directive as regards hybrid mismatches with third countries. These legislative proposals will be submitted to the European Parliament for consultation and to the Council for adoption.

The Package also contains a Chapeau Communication, outlining the political and economic rationale behind the proposals, as well as impact assessments on the CCCTB and the dispute resolution mechanism.

According to the Commission, these measures will create a simple and pro-business tax environment and will help to combat tax avoidance.

Overview of the Directive

The Proposed EU Dispute Resolution Directive includes the following (new) elements:

- A broader scope including all cross-border double corporate tax situations (instead of transfer pricing and allocation of profits to permanent establishments only)
- Mandatory resolution of double taxation disputes, if necessary by way of arbitration within a fixed time frame
- A maximum period of 15 months for the arbitration phase
- A default fast-track enforcement mechanism supervised by the competent national courts of each Member State involved in cases where the Advisory Commission in the arbitration phase is not set up within a certain time limit
- Rules allowing Member States to use alternative dispute resolution mechanisms instead of an Advisory Commission (e.g., mediation, baseball arbitration)
- Requirements for notification of the taxpayers during the course of the procedure and for publication of the final decisions on elimination of double taxation (subject to consent of each of the taxpayers concerned, or at least abstracts of them)

1. Scope of dispute resolution mechanisms

The Proposed Directive would apply to all cross-border situations subject to double income tax imposed on business profits by two (or more) EU Member States. The definition of taxpayers includes permanent establishments whose head office is situated in a country outside of the EU. The Proposed Directive does not apply to tax exempt income or capital, or income or capital that is taxed at a zero rate.

2. Interaction with national proceedings

The submission of the dispute to the mutual agreement procedure (MAP) or to the dispute resolution procedure does not prevent the taxpayer from initiating or continuing domestic proceedings in relation to the same matters. The domestic law of some Member States does not allow that a dispute resolution procedure derogates from the decisions of judicial bodies. In these Member States, the taxpayer can utilize the dispute resolution only if the taxpayer withdraws its action before a final decision in the domestic proceedings is reached.

3. Procedural stages

The proposal provides for three key procedural stages, the complaint, the MAP and the dispute resolution procedure:

- Accepting the complaint

  Similarly to the Arbitration Convention, the Proposed Directive would allow for a MAP, initiated through complaint of the taxpayer initiated within three years from the notification of the action resulting in double taxation. Within six months of receiving a taxpayer complaint, the competent authorities shall decide on its acceptance and admissibility. If the complaint is accepted, a MAP will be initiated.

- Rejecting the complaint

  The tax authorities may jointly decide to reject the complaint if it is inadmissible, if there is no double taxation, or if it has not been filed within the deadline provided by the Proposed Directive. In this case, the taxpayer shall be entitled to appeal against this decision in accordance with national rules.

  If only one of the competent authorities considers that a complaint is inadmissible and should be rejected, an Advisory Commission shall be set up. Where the Advisory Commission confirms the admissibility and the existence of double taxation, the competent authorities can initiate the MAP described below within a certain timeframe. If neither competent authority initiates the MAP within this timeframe the Advisory Commission would deliver a final opinion on the elimination of double taxation. See Dispute Resolution Stage below.

3.2. MAP stage

Under the MAP, Member States shall endeavor to reach an agreement on the double taxation dispute within two years of the acceptance of the complaint. This term can be extended by up to six months, if the taxpayer and the other competent authorities agree. The competent authorities will need to inform the taxpayer on any decision reached in this phase, regardless of whether they have reached an agreement to eliminate the double taxation or not.
If an agreement has been reached at this stage, such agreement is binding on the authorities and enforceable by the taxpayer subject to the taxpayer renouncing recourse to any domestic remedy. That decision shall be implemented irrespective of any time limits prescribed by the national law of the Member States concerned.

3.3 Dispute Resolution Stage

3.3.1 Procedure
An Advisory Commission will be set up in case no agreement is reached under MAP. Member States can deny access to the dispute resolution procedure in cases of double non-taxation or cases of fraud, willful default or gross-negligence.

Competent authorities need to set up an Advisory Commission within 50 days from one of the events described above. For cases where the Advisory Commission is not set up within the requisite timeframe, taxpayers may refer to the competent national courts of each Member State.

The Advisory Commission should deliver its opinion within six months. It will deliver its opinion in writing and will apply national rules and double taxation treaties. In the absence of a double taxation treaty or agreement between the Member States concerned, it may refer to international practice in matters of taxation such as the latest Organisation for Economic Co-operation and Development Model Tax Convention.

Once the competent authorities are notified of the Advisory Commission's opinion, they would need to reach an agreement within six months. They may take a decision which deviates from the opinion, but if they can't reach an agreement to eliminate the double taxation, they are bound by that opinion.

The final decision, similar to the one reached under the MAP is binding on the tax authorities and enforceable by the taxpayer subject to the taxpayer renouncing recourse to any domestic remedy. The final decision shall be published subject to consent of the concerned taxpayers. Where no consent is provided, the competent authorities should still publish an abstract of the final decision containing information such as description of the issue, subject matter, legal basis and short description of the final answer.

3.3.2 Alternative Dispute Resolution Commission
Competent authorities can also decide to set up an Alternative Dispute Resolution Commission instead of an Advisory Commission, which may apply conciliation, mediation, expertise, adjudication or any other dispute resolution processes or techniques to resolve the dispute. The Commission should comply with the requirements, including timing, as set out for the Advisory Commission, but it does not have to have the same rules decision making within the Commission.

Taxpayers may at their request appear or be represented before the Advisory or Alternative Dispute Resolution Commission.

Next steps
This proposal will be submitted to the European Parliament for consultation and to the Council of the European Union for adoption. It is proposed that Member States should transpose this Directive by 31 December 2017 at the latest.

All Member States will have to sign up to this proposal before it can be adopted, and each Member State would then need to incorporate it into its national law.

Implications
If the proposed changes are adopted taxpayers operating in the EU would have more certainty and predictability on the resolution of their double taxation disputes. The expanded scope, clear deadlines and option for participation of domestic courts where the dispute resolution procedure is blocked are all positive developments that have been requested for a while. Global businesses with European activities may therefore wish to assess the impact on pending and expected disputes of the proposal, in particular the expansion to all cross-border corporate tax disputes, and should monitor the follow up work by the Commission and the Council in order to take advantage of these.

---

Endnote

For additional information with respect to this Alert, please contact the following:

**Ernst & Young LLP, Global Tax Desk Network, New York**
- Gerrit Groen +1 212 773 8627 gerrit.groen@ey.com
- Jose A. (Jano) Bustos +1 212 773 9584 joseantonio.bustos@ey.com

**Ernst & Young LLP, Transfer Pricing, New York**
- Joana Dermendjieva +1 212 773 3106 joana.dermendjieva@ey.com

**Ernst & Young Belastingadviseurs LLP, Transfer Pricing, Rotterdam**
- Ronald van den Brekel +31 88 407 9016 ronald.van.den.brekel@nl.ey.com
About EY
EY is a global leader in assurance, tax, transaction and advisory services. The insights and quality services we deliver help build trust and confidence in the capital markets and in economies the world over. We develop outstanding leaders who team to deliver on our promises to all of our stakeholders. In so doing, we play a critical role in building a better working world for our people, for our clients and for our communities.

EY refers to the global organization, and may refer to one or more, of the member firms of Ernst & Young Global Limited, each of which is a separate legal entity. Ernst & Young Global Limited, a UK company limited by guarantee, does not provide services to clients. For more information about our organization, please visit ey.com.

© 2016 EYGM Limited.
All Rights Reserved.

EGY no. 03538-161Gbl
1508-1600216 NY
ED None

This material has been prepared for general informational purposes only and is not intended to be relied upon as accounting, tax, or other professional advice. Please refer to your advisors for specific advice.

ey.com