EUROPEAN
COMMISSION

Strasbourg, 25.10.2016
SWD(2016) 343 final

COMMISSION STAFF WORKING DOCUMENT

IMPACT ASSESSMENT

Accompanying the document

Proposal for a COUNCIL DIRECTIVE

on Double Taxation Dispute Resolution Mechanisms in the European Union

{COM(2016) 686 final}
{SWD(2016) 344 final}

CONTENTS

1. INTRODUCTION, BACKGROUND

It has been demonstrated as far back as 1923 that the imposition of comparable taxes by two (or more) tax jurisdictions in respect of the same taxable income or capital ('**double taxation/multiple taxation**') has a negative impact on cross-border investment and leads to economic distortions and inefficiencies[1]. As a consequence the League of Nations and later on other international organisations like the Organisation for Economic Cooperation and Development ('OECD') and the United Nations ('UN') have been working on establishing mitigating measures which strike the right balance between supporting undistorted cross-border economic activities and a country's right to levy taxes on profits from these activities.

As the most practical solution, models for bilateral agreements between states for the avoidance of double taxation situations, the so called **Double Taxation Conventions** ('DTC'), have been developed. There is now a long history of such DTCs between numerous jurisdictions across the world. Within the EU, most Member States[2] have concluded a DTC with each other, which allocate taxing rights, contain approaches on how to relieve double taxation when it occurs, and include procedures to resolve disputes created by the existence of divergent interpretation of the respective DTC ('**double taxation disputes**'). These mechanisms are called **double taxation dispute resolution mechanisms** ('DTDRM').

2. POLICY CONTEXT, DRIVERS, PROBLEM DEFINITION AND SUBSIDIARITY

2.1 Policy context

The context described below is expected to result in a continuously high and even increasing number of situations where Member States exercise their taxing rights in a way that can result in double taxation disputes.

*2.1.1 National tax sovereignty of **EU** Member States*

The EU Treaty freedoms allow individuals and businesses to move and operate freely in the Internal Market without discrimination. At the same time, the EU Member States have the right to exercise their sovereignty in direct taxation. As a result, a company operating cross-border may find itself in a situation where different Member States decide to levy taxes on the same income or capital. This situation gives rise to **double taxation**.

Direct taxation is not harmonised in the EU and the EU's role in the area is limited to certain competences. EU Member States are largely free to design their direct tax systems and procedures and to decide what to tax, when to tax it, and at what rate, as long as their rules are not discriminatory or otherwise contrary to the EU Treaties. The EU Treaties include no explicit provision for EU legislative competence in the area of direct taxation. Under Article 115 of the Treaty on the Functioning of the European

---

1 Jogarajan, S. Stamp, Seligman and the drafting of the 1923 Experts Report on Double Taxation, World tax journal Jogarajan et al. (2013) p.368-392 (2013)

2 Out of 378 possible bilateral treaties, 370 have been concluded;

Union (TFEU)[3], the Commission has the power to propose EU legislation to improve the functioning of the Internal Market, but the proposals will only become EU law subject to unanimous support in Council. On that basis, and in the context of the Capital Markets Union (CMU) Action Plan, the EU Commission has started mapping and discussing with EU Member States on the best ways to remove restrictions linked to the existence of burdensome withholding tax procedures.

*2.1.2 Double taxation and double taxation dispute **resolution** mechanisms*

The DTDRM provided in DTC is a State to State procedure to mutually agree on how to solve the double taxation dispute, usually in the form of **Mutual Agreement Procedures ('MAP')**.

Under a 'classical' DTDRM the taxpayer can request the initiation of a DTDRM with the competent authority (usually a special unit in the tax administration or the ministry) of the Residence State within three years from the first notification of the action, which he considers as not being in accordance with the DTC. The competent authorities of the States will then have to contact each other and negotiate how to solve the double taxation dispute. The taxpayer is not directly participating in this State to State procedure. Under DTCs including the 'classical' DTDRM, the States are not obliged to reach a solution and shall just endeavour to reach an agreement, which is a rather vague objective. Therefore it can happen, and it does happen in practice, that the States are not in a position to solve the double taxation dispute with the effect that the double taxation persists.

Figure 2: A typical MAP common in classical DTCs (Commission services)

The problem of unresolved double taxation disputes is widely recognised. In 2007 the OECD issued a report on improving the resolution of tax treaty disputes. It concluded that it is inevitable that MAPs do not achieve a satisfactory result in cases where States cannot agree.[4] To ensure a resolution of such disputes, the 2008 revision of the OECD Model Tax Convention introduced an *arbitration clause* for cases where competent authorities cannot agree in the context of a MAP. Such a clause provides that if negotiations between the competent authorities do not result in a solution within a certain time period (usually two years), an independent body is established ('**advisory commission**') to issue a decision on how to solve the disputes which is binding for the States involved **('mandatory binding arbitration**').

In the EU, such a mandatory resolution by way of arbitration was already agreed in the 1990s on the basis of the EU Arbitration Convention ('EU AC') on the elimination of double taxation in connection with the adjustment of profits of associated enterprises[5], an area commonly referred to as transfer pricing. It provides that if no agreement is reached

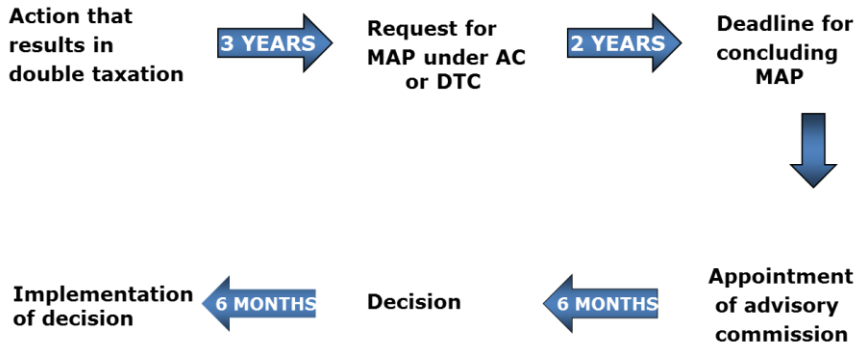
[3] Official Journal of the European Union C 326/49, 26.10.2012

[4] OECD (2007) Report. Improving the Resolution of Tax Treaty Disputes

[5] See European Convention 90/436/EEC on the elimination of double taxation in connection with the adjustment of profits of associated enterprises**:** (1990, 90/436/EEC, "European Arbitration Convention").

between the competent authorities within two years after the initiation of the MAP procedure, an advisory commission should be established by the States within six months[6]. The advisory commission has to decide within six months how to resolve the transfer pricing dispute.

Figure 3: The proecedure laid down in the EU Arbitration Convention (Commission services)



Source: European Commission

As with any tax assessments, a taxpayer has also the possibility to appeal before national courts. However, these domestic judicial proceedings do not aim at eliminating double taxation. Instead they rather address the question regarding whether domestic law has been correctly applied. In doing so, it may happen that the courts in both States involved confirm the correct application of domestic law with the effect that the double taxation situation remains, which is not satisfactory from the perspective of the taxpayer. An appeal in front of the Court of Justice of the European Union ('CJEU') would require an EU legislative instrument, one of the options assessed in this impact assessment.

2.1.3 OECD BEPS project and Anti-Tax Avoidance Package ('ATAP')

The work on solving double taxation disputes should be seen in the context of the OECD's work on the Base Erosion and Profit Shifting (BEPS) project. While this project predominantly aims at closing existing loopholes that facilitate avoidance of corporate taxes, and to find solutions to today's tax challenges, including those linked to the expansion of the digital economy, it also contains an action on improving double taxation dispute resolution mechanism (Action 14). In September 2013, the G20 Leaders approved the OECD Action Plan on BEPS comprising of 15 actions which were finally endorsed in October 2015[7]. However, addressing aggressive tax planning structures and complex cross-border arrangements through domestic rules creates significant additional risk of double taxation if new rules are not implemented in a harmonised way[8].

At EU level, the Anti-Tax Avoidance Package (ATAP) was presented in January 2016[9]. It ensures a coordinated implementation of BEPS measures in the EU but does not cover

---

6 Code of Conduct on the implementation of the EU Arbitration Convention, COM 2009 472, Par- 7.2 b)

7 See OECD (2013), Action Plan on Base Erosion and Profit Shifting. OECD Publishing, Paris

8 See Lang et al. IBFD 2016, Chapter 2.2

9 Anti Tax Avoidance Package adopted by the Commission on 28 January 2016; http://ec.europa.eu/taxation_customs/taxation/company_tax/anti_tax_avoidance/index_en.htm

all BEPS Actions (e.g. transfer pricing). Improving double taxation dispute resolution mechanisms therefore complements the anti-tax-avoidance measures. There are Member States expectations to raise additional tax revenues resulting from the application of the BEPS measures,[10] [11] particularly for the transfer pricing cases[12] where the statistics collected by the EU Joint Transfer Pricing Forum ('EU-JTPF') a Commission expert group advising the Commission on transfer pricing matters[13] already confirm that this area of taxation is sensitive to disputes[14]. The two combined can put further strain on the occurrence of double taxation. Improving dispute resolution mechanisms is therefore an integral component of the work on BEPS.

2.1.4 The June 2015 Action Plan

On 17 June 2015 the Commission presented an Action Plan to reform corporate taxation in the EU which sets out a series of initiatives to tackle tax avoidance, secure sustainable revenues and strengthen the Single Market for businesses[15]. In order to create greater certainty for companies, the Commission announced in this Action Plan that by 2016 it will propose improvements to the current DTDRM.

2.1.5 The CCCTB

The CCCTB is a single set of rules that companies operating within the EU could use to calculate their taxable profits. That way, each Member State can then tax the profits of the companies in its state at their own national tax rate (just like today). The Commission's June 2015 Action Plan sets out a staged approach for the implementation of the CCCTB. In practical terms, the Commission is planning to table two new Proposals: the first instrument will lay down the provisions for a Common Corporate Tax Base (CCTB) whilst the second will add the elements related to consolidation (i.e. CCCTB). [16].

It can be expected that by providing for a common and consolidated tax base for the EU companies, instances of double taxation will significantly be reduced. Remaining differences in the interpretation of provisions in the Directive would be subject to the jurisdiction of the CJEU. However, the first step (developing a set a rules for the determination of a common tax base) will not make tax disputes disappear and will not tackle at all the functioning of the DTDRM. That is because even with a common tax base the possibility of differences between States on the allocation of taxing rights under their domestic law and DTC, e.g. a transfer pricing dispute, will not disappear until the second step is taken.

---

10 see e.g. for France: http://www.economie.gouv.fr/2015-annee-record-pour-le-controle-fiscal http://www.gouvernement.fr/argumentaire/2015-annee-record-pour-le-controle-fiscal-3956

11 see Martens J. (2015)

12 see Allen & Overy (2014)

13 see yearly statistics on pending cases under the Arbitration Convention, http://ec.europa.eu/taxation_customs/taxation/company_tax/transfer_pricing/forum/index_en.htm

14 see e.g. JTPF Report on Transfer Pricing Risk Management (2013), paragraph 16

15 European Commission (2015). Action Plan for a Fair and Efficient Corporate Tax System in the EU https://ec.europa.eu/priorities/sites/beta-political/files/com_2015_302_en.pdf

16 for the CCCTB proposal see http://ec.europa.eu/taxation_customs/taxation/company_tax/common_tax_base/index_en.htm

In addition, the full CCCTB is suggested to mandatorily apply only to large multinational groups[17]. For groups below the threshold the CCCTB would not be mandatory. Their position in case of a cross-border double taxation dispute would remain unchanged.

For this reason the initiative on improving double taxation dispute resolution mechanisms rather supplements the CCCTB for situations where it does not (yet) apply. For those businesses and periods where the CCCTB does not apply the initiative has the same goal: improving the business environment in the Single Market by making it simpler and cheaper for companies to operate cross border.

2.2 Scope of this impact assessment

This impact assessment examines the possible measures to provide more efficient and better functioning DTDRMs.

Which taxpayers are affected by shortcomings of DTDRM

The results of the public consultation conducted in 2010 demonstrated that 94 % of the corporate taxpayers, which participated in this consultation, indicated that they had encountered a double taxation dispute as regards their business income[18]. In the 2010 public consultation 30% of double taxation cases were reported by individuals (58 cases) of which 69% sought remedies. The mutual agreement procedure was invoked in only 7 of these cases. In 2013 the Commission set up an Expert Group to evaluate the issue of double taxation for individuals. The Group concluded its work in November 2015 with the adoption of a report[19] with recommendations for the main areas of concern, i.e. cross border workers, characterisation mismatches. The most relevant recommendations in this report are to develop a multilateral tax treaty, to recommend common approaches and processes in the EU, to harmonise forms and procedures within the EU and, as only one aspect, an amendment of current rules for mutual agreement procedures which would also allow mediation procedures to better address the problems encountered by individuals. From 87 respondents to the public consultation in 2016, 10 were from private individuals. However, from the 10 individuals who responded only 2 could be considered as being private individuals/sole traders while the rest were consultants (2), academics (2), or were responding on behalf of their companies (2). The fact that only corporate taxpayers responded to the 2016 data collection can be taken as a further indication that corporate taxpayers are predominantly subject to double taxation disputes.[20]

Why focussing on business profits of corporations and not on individuals?

---

17 the CCCTB proposal foresees mandatory application for a company belonging to a consolidated group with a total consolidated group revenue that exceeds EUR 750 000 000

18 European Commission (2011). Summary Report of the Responses Received to the Commission's Consultation on Double Taxation Conventions and the Internal Market See section "Main Conclusions" - Annex A

19 European Commission (2015): Expert Group Reports on "Ways to tackle cross-border tax obstacles facing individuals within the EU" and "Ways to tackle inheritance cross-border tax obstacles facing individuals within the EU"

20 Ibidem - All 27 respondents to the 2016 data collection were companies/organisations none of them was a private entrepreneur. 21 respondents did encounter double taxation within the EU, 5 did not and 1 respondent did not provide an answer;

The main problems with the existing DTDRM are encountered by companies. In this area there are currently various efforts at MS and international level to ensure taxation of companies' cross border activities. This adds to the fact that disputes already arise mainly from the application of the current company targeted rules like transfer pricing.

Theoretically individuals may also face double taxation issues as regards other kinds of income (e.g. employment income). Although it was confirmed by the Expert Group that double taxation disputes arise, it was not possible to find tangible and quantitative evidence on whether the existing DTDRM are problematic and have shortcomings for other kinds of income than business income.

Therefore, the other recommendations of the Expert Group, for example the development of EU wide conflict rules, recommendations and procedures are expected to be more proportionate for addressing the double taxation issues encountered for individuals and should be addressed with priority. This is confirmed by the 2016 stakeholder consultation in which only a proposal providing for the harmonisation of conflict rules was seen as fully appropriate to address the issue.

On the other hand there is the political and economic urgency of adopting measures in the field of business profits of corporations. Given the stronger evidence of the magnitude and the consequences of the problems with ineffective DTDRMs in the corporate area, this initiative focusses on corporate taxation of business profits.

However, nothing prohibits the extension of the rules developed under this initiative to issues encountered to the cross border tax obstacles of individuals as identified by the Expert Group once the magnitude and the extent of the problem as well as the proportionality can be established.

Why not cover inheritance tax?

Attempts have been made by the Commission in the context of the study on inheritance taxation[21] to establish the magnitude and extent of the problem for inheritance tax but only anecdotal data was gathered to support the potential call for action in this area. As far as the discrimination problem is concerned, the study concluded that a number of discrimination elements have been eliminated from certain Member States' jurisdictions and new case law by the CJEU was developed. Despite the need for progress and a potential for double taxation persisting, the impacts of the remaining discrimination from the inheritance taxation rules did not seem to cause a significant impact on the functioning of the single market as a whole. Moreover, the study concluded that, as far the data would permit, that the situation has neither worsened nor improved over the last decade. Some Member States have in fact eliminated inheritance taxation altogether thereby reducing the potential for double taxation.

In general, the Member States did not conclude as many bilateral conventions on inheritance taxation as in corporate taxation. Consequently a commonly accepted set of rules for allocating taxing rights/removing double taxation ('conflict rules') is missing. To address this, many Member States grant unilateral relief for double taxation which is

[21] European Commission (2010-2011): "Study on inheritance taxes in the EU Member States and possible mechanisms to resolve problems of double inheritance taxation in the EU"

effective in many cases. The starting point for double taxation disputes for inheritance tax where the size of the problem and the effect of various recommendations has not yet been assessed is different to that for business taxation where the EU can review a longer history of recommendations, compile a detailed assessment of the number and kind of cases, and has implemented increasing measures to ensure taxation.

Why not cover VAT?

When it comes to indirect taxation (notably the VAT) double taxation risks can exist and trigger consequences for the single market. The public consultations and previous work conducted by the Commission in the VAT area have led it to consider and consult on a VAT-specific mechanism for eliminating double imposition of VAT in individual cases[22], including an arbitration procedure. The Commission will facilitate this process by running or sponsoring concrete projects in the future[23].

However, the present impact assessment does not cover double imposition of VAT issues for the following reasons:

- situations and causes creating double imposition of VAT are radically different from the ones triggering double taxation in the income tax area. They relate to characterising or interpreting the place of supply of goods and services[24];
- the legal framework significantly differs and has an impact on how to envisage an effective dispute resolution mechanism. Indeed, the mechanism and the underlying procedure would require to be enshrined in the existing VAT legal framework. There would be a need to provide for specific provisions in order to exclude situations related to different interpretations for which prevailing power would be with the VAT Committee established under Article 398 of the VAT Directive and the CJEU[25]. Furthermore, in the VAT area, there are no provisions for the elimination of double taxation similar to a DTC in the field of direct tax [26] for cases which do not relate to the interpretation of the VAT Directive;

---

22 European Commission, Consultation paper: Introduction of a mechanism for eliminating double imposition of VAT in individual cases, and Report on the outcome of the consultation; [is the marked part correct with these "…"???]

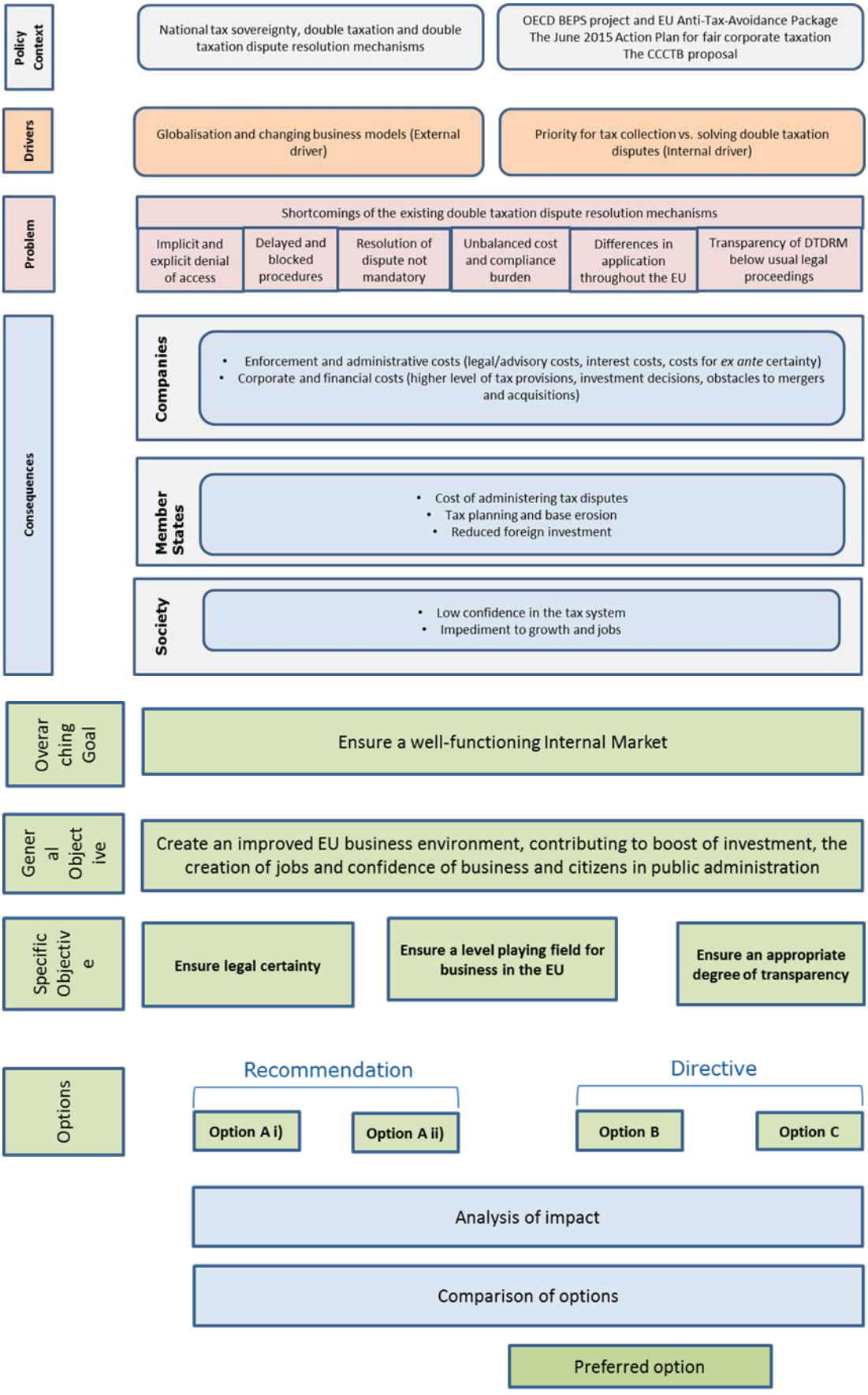
23 European Commission, Action plan on VAT (2016), COM (2016) 148 final.

24 Situations at stake relate to (i) differing interpretations of what constitutes a taxable supply, (ii) differing interpretations of the rules concerning the place of supply in the Member States as well as (iii) differing views on the circumstances in an individual case and the legal situation between the parties – See above-mentioned Consultation paper page 2-3 and above-mentioned report pages 1-2

25 See the above-mentioned Consultation paper (footnote 11) page 3 and also point 5.1.2 on page 8, underlining the "risk of duplication and contradictory decisions" otherwise based on Article 398 (VAT Committee competence), Article 397 (Council) and Articles 226 or 234 (CJEU)

26 See the above-mentioned consultation paper (footnote 11) page 4

Figure 1: Intervention logic



· the report issued by the Commission further to the 2007 Consultation showed little evidence on the materiality and magnitude of existing VAT double

imposition issues which may be referred to such mechanism (i.e. not involving interpretation of a provision of the EU VAT legislation).

Given the above-described characteristics and particularities, developing a combined effective and efficient mechanism for both VAT and direct tax does not appear to be feasible. If proven relevant, a specific approach for the area of VAT should be explored and assessed.

2.3 Drivers

2.3.1 Globalisation and changing business models (External driver)

For companies that are highly integrated internationally as it is the case in most EU Member States, activities are not limited to one jurisdiction only. Current business models used by multinational companies have become more complex, intra-group transactions have multiplied[27], and multinationals' integrated value chains make it increasingly difficult to determine where profits are created. These aspects have an impact on taxation. For example, while between the associated enterprises within a MNE group, the (re-)location of intangible assets is easier than for tangible assets (e.g. machinery, factories), estimating their true economic values and the real values of payments for their use is very complicated in practice. Sometimes pricing is even impossible given the lack of similar transactions occurring between third parties to which these intra group transactions can be compared.

It is not only the rise in economic integration and the increase of capital flows which causes conflicting situations of double taxation. Also the complexity of business models and the new features they incorporate (like the presence of the digital economy) are not aligned with the current international taxation standards often agreed a long time ago. Therefore mechanisms which properly solve double taxation disputes that may arise because of that are required.

2.3.2 Priority for tax collection vs. solving double taxation disputes (Internal driver)

States need to safeguard taxation and collection of tax on cross-border transactions especially at a time where there is a multiplication of financial, trade and investment flows combined with full integration of business models by companies. Securing tax revenue in cross-border situations through stricter taxation rules as well as tougher tax collection and audit practices on cross-border transactions is the immediate priority for Member States. This is reinforced by the fact that taxpayers play with loopholes of the existing rules and set up schemes which need to be immediately addressed and taxed in cross border situations (see BEPS project).

---

[27] For illustration: Data on intra-group transactions are available for the inward multinational companies' activity in Italy (the activity of foreign-owned affiliates in Italy) at the OECD Activities of Foreign Affiliates (AFA) Database. According to the AFA Database, in 2008 intra-group exports of the manufacturing sector accounted for 44.57 percent of total exports of such sector (EUR 29 770 million of intra-group exports out of EUR 66 785 million of total exports), and in 2013 they accounted for 40.94 percent (EUR 34 302 million of intra-group exports out of EUR 83 772 million of total exports). And regarding imports, meanwhile in 2008 intra-group imports of the manufacturing sector accounted for 50.94 percent of total imports of such sector (EUR 29 970 million vs. EUR 58 823 millions), in 2013 these intra-group imports rose and accounted for 58.50 percent (EUR 43 153 million vs. EUR 73 764 millions).

The increased focus on safeguarding taxation in cross border situations can conflict with other States' sovereignty which then may create double taxation and disputes between States on how to remove them. In the long term, unresolved double taxation has detrimental effects on growth and investment (a long established fact, see above) but these negative effects are not immediately visible. The impact assessment shows that the current DTDRM have some elements which do not work well, make them resource-intensive for the States, and don't have enough guarantees of success (long, costly, ineffective, resource-intensive procedures). The impression is that there is a greater interest in collecting taxes than solving a double taxation dispute. This is assumed to drive the problems encountered with the current DTDRM.

2.4 The problems identified

2.4.1 Double taxation disputes

a) General

Nearly every cross border business transaction is at risk of causing double taxation due to the fact that the State where the taxpayer is resident usually taxes the world wide income and the State where the company generates business income taxes the income generated in its territory. The DTC concluded between States ensure that in the overwhelming majority of those cross border business transactions a double taxation conflict does not arise (first layer: The Double Taxation Convention).

Nevertheless, in some instances a double taxation conflict arises despite such a DTC, e.g. in a situation where States interpret the DTC concluded differently. For these cases it is important that there is a possibility that allows MS to get in touch and encourages them to solve the double taxation dispute. Nearly all DTCs actually provide for such a possibility (Second layer: DTC providing for a classical Mutual Agreement Procedure, MAP).

As a classical Mutual Agreement Procedure only provides that States endeavour to reach an agreement, it is important to have an agreement between the States that obliges them to reach an agreement. Mandatory binding arbitration is seen as the strongest tool that achieves this (third layer: mandatory binding arbitration).

The situation in the EU is characterised by the fact that with the EU AC a large majority of double taxation disputes are covered by a dispute resolution mechanism which requires mandatory binding arbitration. It is widely recognised that the EU AC provides significant improvement compared to situations where there is only a classical MAP. Furthermore, the simple fact of such an arbitration clause gives an incentive to States to solve the disputes before it goes to arbitration. The fact that only a few cases under the AC finally went to arbitration should therefore be seen as confirmation of this assumption rather than as a failure of the EU AC.

It is not possible to reliably establish how the situation would have been without the existence of the EU AC, i.e. to quantify for instance the number of cases which would not be solved and their duration. However, the fact that the OECD and the UN both aim at implementing mandatory binding arbitration on a broader level confirms the positive impact of the EU AC.

In addition it needs to be stressed that there are clear indications that the problem is growing in size and magnitude due to several factors: globalisation and increased audit practices of tax administrations.

This effect is not limited to the EU but rather observed worldwide. It is therefore the right time to act before the risks encountered actually materialise in the EU. The current mechanisms (EU Arbitration Convention 1990/463/EEU and bilateral tax treaties) need to be strengthened through a common framework to address these developments at least at EU level.

Given MS' sovereignty for their bilateral relations with third countries the problem can only be addressed at EU level for MS intra EU relations. However, well-functioning DTDRMs within the EU are expected to have positive effects also in relation to third countries, especially in multilateral situations where part of the stakeholders are resident in the EU.

Although it is commonly recognised that the EU AC clearly improves the situation compared to a situation without mandatory binding arbitration, stakeholders criticise that the EU AC does not work to its full extent and is only applicable to disputes on transfer pricing and attribution of profits to permanent establishments. This criticism gave rise to the comprehensive monitoring of DTDRM in the EU, finally resulting in this initiative.

b) Estimation of the number of double taxation disputes by the end of 2014

Over recent years international organisations and the European Commission monitored developments related to double taxation dispute resolution. On this basis, the Commission took various actions to (i) estimate the magnitude and impacts of the problems, and (ii) to develop possible solutions.

At the end of 2014 there is an estimated number of around 910 cases of double taxation disputes pending under the EU AC (transfer-pricing disputes) and DTCs (non-transfer pricing disputes) within the EU[28]. This conservatively calculated number is estimated to represent at minimum around 50% of Member States' total double taxation disputes worldwide.

The 2016 data collection[29] indicated that remedies before domestic courts are regularly sought in parallel to remedies available under the EU AC or DTC. There is some reason to believe that every year in a number of cases no remedies are taken by taxpayers which are subject to double taxation (this number is conservatively estimated at around 120 cases in 2014). Based on the data available, the input received from stakeholders and views expressed in various articles, the number of double taxation disputes is expected to increase in the future.[30] [31]

The statistics on double taxation disputes at OECD level show that the problem is also emerging at a global level. The inventory of cases at the level of OECD Member States

[28] see Annex E for background calculations

[29] see Annex C

[30] see e.g. articles quoted in Chapter 2.2. note 20, in. Lang et al. (2016), and, in particular ICC, ICC warns enhanced tax dispute resolution mechanism needed to prevent exacerbating double taxation, Paris, 4 Nov. 2014

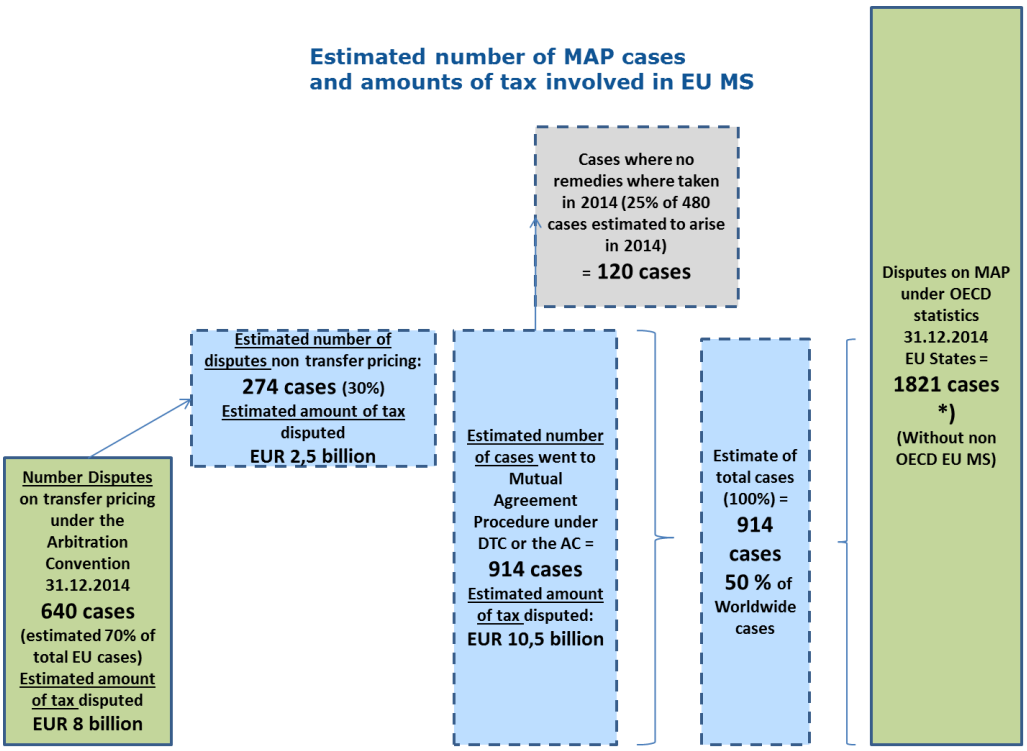
[31] See section 5.3 of 2016 data collection, Annex C

more than doubled from 1176 bilateral cases at the end of 2006 to 2711 bilateral cases at the end of 2014.

c) *Estimation of the amounts involved in double taxation disputes by the end of 2014*

The total amount of tax disputed involved in the cases pending at the end of 2014 is estimated at 8 billion Euro in the area of transfer pricing and at 2.5 billion Euro for other cases, a total of EUR 10.5 billion by the end of 2014, of which there is a quarter where the taxpayer did not seek the remedies.[32] Putting the estimated number of EUR 10.5 billion Euros in relation to the total corporate income tax levied in the EU for the year 2014 (EUR 351 billion)[33] would result in a percentage of 3%. In this context, however, it needs to be recalled that the amount for a company affected by a double taxation dispute can be significant.

Figure 4: Estimation based on 2014 figures for illustration only



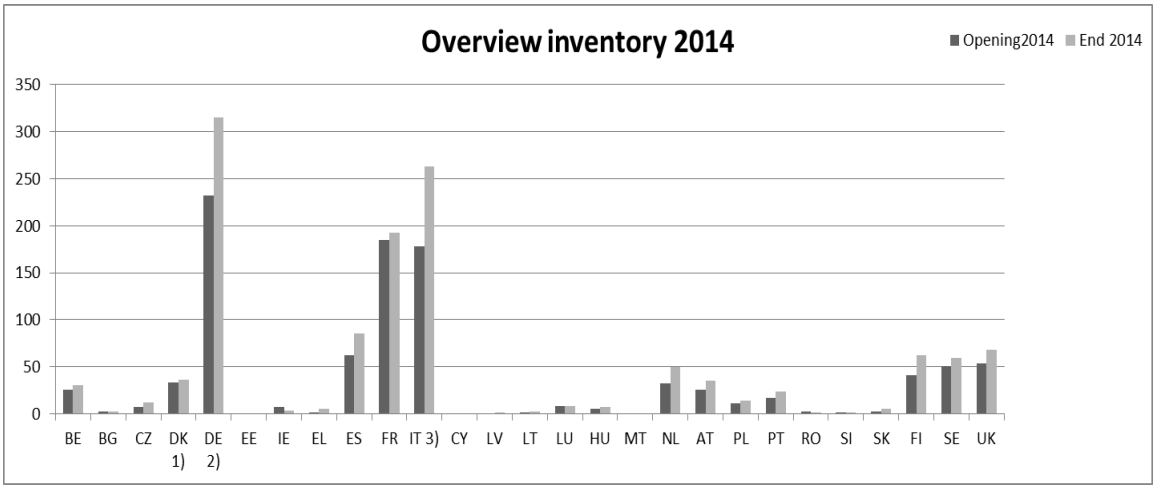
Source: *European Commission*
Notes: **) The number of 1821 cases is calculated as the number of cases reported by EU MS to the OECD MAP Statistics 2014 divided by 2 for arriving at the number of bilateral cases. There is a certain degree of uncertainty due to the fact that it is not clear from the statistics whether cases pending under the EU Arbitration Convention are included in the numbers reported by MS or not.*

d) The spread of the problem within EU MS

As regards the spread of cases between Member States the statistics on cases under the EU AC show in absolute numbers a higher number of cases for MS with a bigger economy than for smaller economies. However, some MS manage to keep a relatively low inventory of pending cases despite the size of their economy (while for other MS it is relatively high).

32 See Annex F for the estimation and the assumptions made;
33 Source: Eurostat and DG Taxation and Customs Union

Figure 5: cases under the EU Arbitration Convention per MS



Source: European Commission

e) Taxpayers affected by double taxation disputes

The problem of a double taxation dispute is directly linked to cross-border business activity, i.e. it is not limited to certain industries nor is it dependent on the size of company acting cross border (e.g. SME or MNE). Therefore, all business sectors and businesses are affected by the problem depending on the degree of their cross border activity. However, the data available allows only assessing the problem at MS level but not between industries or kinds of taxpayers.

The comments received in the 2010 and 2016 public consultations and the input received from stakeholders confirm that when acting cross border, SME's are in the same way affected. However, there are no figures available on the exact number of double taxation cases or the amounts involved for SMEs. There is more cross border trade of MNEs in absolute numbers but we also know – and the EU actually promotes – that SMEs take advantage of the single market. Given that a double taxation dispute causes a certain amount of fixed costs (see section on inefficient procedures below) and assuming that the amounts of double taxation involved for SMEs are expected to be lower. Therefore one can assume that the initiative would be especially beneficial to SMEs.

2.4.2. The problems of DTDRM in the EU

The problems of DTDRM in the EU were identified based on the monitoring of the EU AC, empirical evidence from statistics on cases under the EU AC as the most developed DTDRM in the EU[34], and by the 2016 public consultation conducted by the European Commission.

The following table illustrates the aspects of the EU AC which have been identified as causing issues:

[34] See e.g. statistics on cases pending under the EU Arbitration Convention http://ec.europa.eu/taxation_customs/resources/documents/taxation/company_tax/transfer_pricing/forum/jtpf0082015acstatistics2014.pdf

Figure 6: Aspects identified in the EU AC which do not work well

Procedural phase laid down in the EU Arbitration Convention	**Identified weaknesses of the EU AC**	**Potential consequence**
Mutual Agreement Procedure (First stage of the procedure during which Member States shall endeavour to settle the dispute and eliminate double taxation on an amicable basis)	- lack of clarity on terms and conditions under which the complaint filed by the taxpayer to launch the procedure can be considered as 'well-founded' - terms and conditions as well as formalisation of the acceptance or rejection of the complaints are not explicitly provided - limitation of scope to transfer pricing	Can result in: - unjustified denial of access - blocked procedures
Arbitration Procedure (Second stage of the procedure during which Member States shall set up an advisory commission to give an opinion on how to solve the dispute which then will have to be implemented by Member States)	-Absence of enforcement mechanism or default appointment mechanism in the following cases: - delay in or absence of establishing the advisory commission - one or 2 Member States failing to appoint an independent person member in the advisory commission - Non agreement on the appointment of the Chair of the Advisory Commission - Non implementation of the final arbitration decision other issues: - Absence of provisions detailing the secretarial, administrative and internal rules of functioning of the advisory commission (eg working languages, calendar, hearings, etc) - Limited provisions related to the contents and form of the opinion of the Advisory Commission - Limited provisions on costs and management of costs of the procedure	Can result in: - blocked procedures - delayed procedures - non conclusive decisions - unnecessary costs and compliance burden

Scholars and practitioners identified similar problems for DTC in general[35], i.e. MAP is time consuming (and thus expensive), with cases lasting often two years but also much longer[36]. In some instances it gives no guarantee of resolution of the double taxation dispute, adding to uncertainty and consequently in distorted economic decisions.

The global political and economic circumstances described above, which can lead to possible instances of double taxation, are considered to be beyond the scope of EU

[35] Madere (1975)., pp. 108-124, confirmed by the responses received on the 2016 data collection (section 2.6) Annex E

[36] Altman (2005.) IBFD Chap.2;

legislation. Therefore, in addition to encouraging Member States to reduce the cases of double taxation, for instance by improving the existing burdensome withholding tax procedures, a future initiative should focus on making sure that there are effective DTDRMs in place.

The shortcomings and problems encountered with the current DTDRMs can be clustered under three main categories: (i) lack of enforceability, (ii) inefficient procedures, and (iii) instances where there is no mandatory binding dispute resolution.[37]

2.4.2.1 Lack of enforceability

There are three main issues identified with relation to enforceability of the existing DTDRMs:

*a) Taxpayers do not request for a DTDRM and accept double taxation ('**Implicit denial of Access')***

The taxpayers stressed the instances where they were *effectively* deprived from invoking an applicable procedure[38] (***'implicit denial'***). The drivers of such situation are essentially two-fold. According to the opinions of stakeholders (businesses, tax consultancies, tax and commerce institutes notably) which took part in the OECD's discussion on the BEPS Action 14, there is a generalised perception that tax administrations are not motivated to resolve double taxation disputes[39]. Instead, they offer the taxpayers settlements, in which they propose tax adjustments under the condition that no DTDRM is sought. In the absence of data from the Member States administrations, we can consider that the reasons triggering such behaviour could include: (a) the intention to avoid administrative costs (e.g. translations, coordination of actions between the administrations of the States involved, sheer length and complexity of the case requiring allocated resources, etc.), (b) reputational risks resulting from obligations to report open cases combined with expected negative impact on the tax environment[40].

On the taxpayer's side, it has been noted that they consider accepting double taxation as less costly and less burdensome compared to engaging in a DTDRM. Some companies reported having a preference for accepting double taxation rather than spending even more money and many more years trying to avoid it. The costs and burdens arising are described in detail under the consequences in the next section.

Following the 2016 data collection, in the 30% of double taxation cases where no remedies were taken, these two drivers were mentioned in 60% and 50% of the cases as at least one of reasons. The right of claiming for remedies should apply irrespective from

---

37 See Annex F for a more detailed overview and an estimate of the size of the respective problems encountered;

38 See e.g. comments from Non-Governmental Members of the EU Joint Transfer Pricing Forum JTPF/020/2012/EN, p. 7-9 particularly page 7 (access into the AC), page 9 (exclusion of access to the AC based on different arguments and denying access to the AC in the case of perceived abusive situations), page 14 (Article 8 AC: Practice/monitoring observations), page 16 No access to MAP, the corresponding situations being assessed between 4 and 5 on a scale of 1-5 in terms of detrimental impact

39 OECD BEPS Action 14 – Public Discussion contributions;

40 European Commission (2013). Discussion paper on ways to improve the functioning of the AC, JTPF/002/2013/EN;

whether the claim is finally justified or not and the question of whether there is a legal justification for an implicit denial of access or is not relevant.

*b) Cases are not accepted by Member States under available dispute resolution procedures ('**Explicit denial of Access**');*

Taxpayers report that in a number of cases access to a dispute resolution procedure is denied by tax administrations, i.e. a request for initiating a DTDRM is refused (***'explicit denial of access'***). In 2014 MS reported that access to the EU Arbitration Convention was explicitly denied in 14 cases[41]. Roughly extrapolated to the total number of double taxation disputes for corporations, there would be 25 instances with an explicit denial of access in 2014.

It is not possible to assess and affirm whether the reasons presented by the tax administrations for denying access were valid, correct and duly justified[42]. Therefore it is not the denial of access itself which is considered to be problematic but rather the fact that access to DTDRM may be denied in cases where it would not be justified and thus creates a situation of legal uncertainty. However, the underlying issue remains the same – there is the risk that in justified cases the double taxation burden is not lifted from the taxpayer's shoulders and the enforceability of theoretically available remedies is limited.

c) *Cases are blocked or delayed within the applicable procedure ('**Blocked/Delayed Procedure**'),*

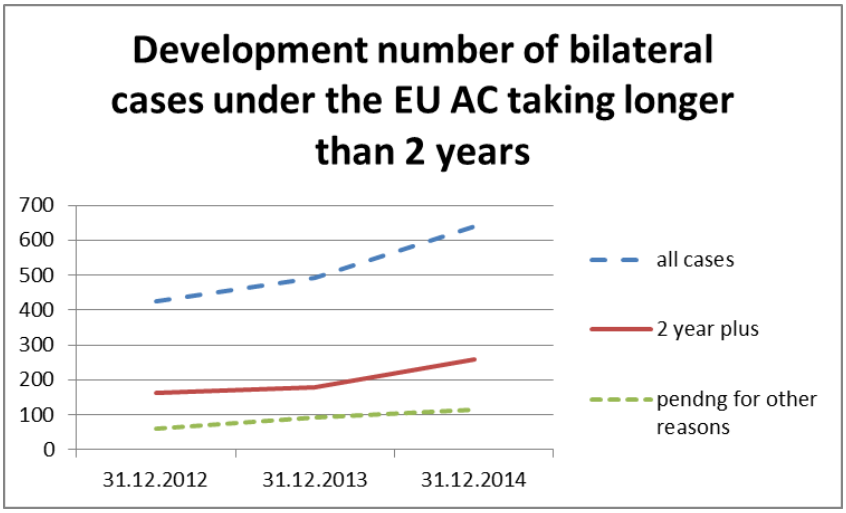
At the outset it should be recalled that in cases where the available DTDRM does not provide for timelines in which the dispute shall be solved or does not require a mandatory resolution of the cases at all, there is no breach of timelines. However, in these circumstances the issue would rather be an inappropriate duration up to a non-resolution of the case, i.e. the situation would be worse.

For instances where there are fixed timelines for a resolution of a double taxation dispute like in cases under the EU AC, it was identified that in a significant number of cases the timelines are not followed; the procedure is either blocked or delayed and the resolution, if any, takes much longer than provided for.

[41] See EU Joint Transfer Pricing Forum, Statistics on Pending MAPs under the EU Arbitration Convention at the end of 2014

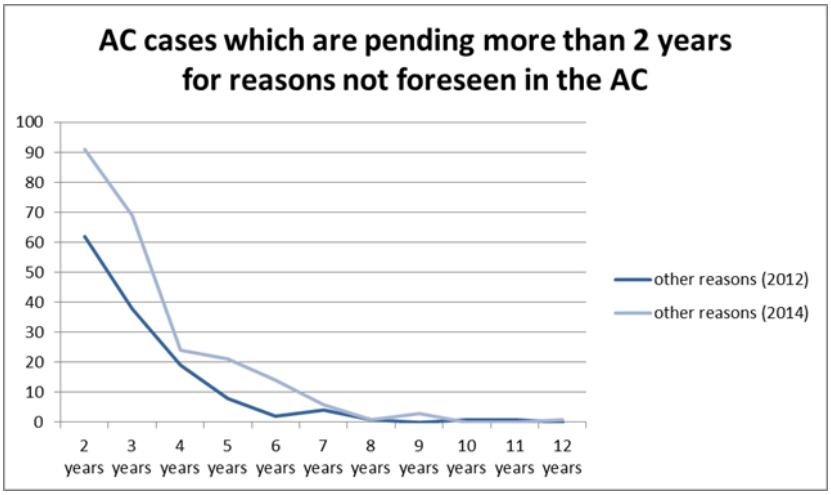
[42] Reasons justifying an explicit denial of access range from non-applicability of the remedy requested, non-sufficient information submitted by the taxpayer, falling under a condition for exclusion, e.g. serious penalties as a reason for not applying the EU AC

Figure 7: Number of cases under the EU AC pending more than 2 years



Source: European Commission

Figure 8: Duration of cases under the EU AC pending more than 2 years



Source: European Commission

A blockage or delay may occur at several steps of the process, starting with the risk that a long time period passes until a procedure is finally initiated by the Member States up to the moment of resolution. The stakeholders report a long lead-time before a conclusion is reached, even in cases where a particular DTDRM requires a mandatory resolution within a certain timeline. The long duration, the non-conclusiveness of DTDRM and the absence of clear timelines to be followed under a DTDRM are encountered as a crucial shortcoming calling for clearer rules and more stringent timelines[43].

As taxpayers are not a party to a dispute, they are confined to merely follow the actions between competent tax administrations. However, the latter are accused as being more committed to combatting tax avoidance rather than the avoidance of double taxation. That results in a low commitment to endeavour to remove double taxation, to the point of

[43] See e.g. recommendation C9 of the Draft Report of European Parliament – Committee of Economic and Monetary Affairs (2015), Rapporteurs Anneliese Dodds, Luděk Niedermayer

refusing to take part in the resolution dispute mechanism[44]. The EU Arbitration Convention and most of the few (14 out of 370 bilateral treaties) DTCs with an arbitration clause requiring a resolution of the dispute within three years from the initiation. The overall real lead-time until these cases are concluded varies. While the majority of these cases seem to be concluded within three to four years from the initiation, some cases are taking considerably longer to resolve to an extent that it seems they might never be resolved. Often it remains open whether such a delay is always legitimate, creating a lack of legal certainty of the DTDRM currently in place.

2.4.2.2 Inefficient procedures

The 2010 publication, the 2016 data collection and especially the work done at the level of the EU JTPF have identified two main issues regarding efficiency and economy of the existing DTDRM:

*a) High complexity of procedures and compliance burden ('**Complexity and Compliance**')*

Taxpayers report that they regard the current DTDRM as complex and creating a significant compliance burden which is not balanced with the actual results that can be expected[45]. In practice it is also observed, for example. in transfer pricing for taxpayers' planning, implementation and documentation are occurring in a shorter amount of time while the time spent on controversy and dispute resolution is expanding[46].

The efforts taken are measured against the benefit to be expected. As regards the DTDRM currently available, these efforts are measured against a procedure which does involve a risk of complete or partial non-success and even if successful, having a duration which exceeds what is considered appropriate[47]. These risks are further exacerbated by the fact that the taxpayer takes no part in the dispute process and has no influence on how his case advances.

However, it needs to be stressed that the efforts and compliance requirements are not solely associated with the design of the DTDRM itself but may also be a result of the complexity of tax matters, language barriers, as well as different legal and accounting rules in place in different Member States.

*b) Non- homogenous uptake of DTDRM ('**Non Homogenous Uptake**')*

The problem of non-homogenous uptake of DTDRM in the EU is two-folded, i.e. it relates to the differences between the DTDRM available and in the way an identical DTDRM are actually applied.

---

44 OECD BEPS Action 14 – Public Discussion contributions, p. 46;

45 See e.g. section 2.6 of the 2016 data collection, Annex H

46 Ernst & Young (2013) Navigating the choppy waters of international tax. 2013 Global Transfer Pricing Survey, page 13.

47 See Commission Staff Working Paper, supra Commission of the European Communities, Commission Staff Working Paper: Company Taxation in the Internal Market, SEC(2001)1681,at 267 (23 October 2001), at 276 (one of the main objectives of the European Arbitration Convention was to provide timely decisions).

There are bilateral double taxation disputes within the EU which are covered by mandatory binding arbitration (either the EU AC or a DTC with arbitration) and for which Member States shall only endeavour to reach an agreement. On the other hand, there are very few situations where there is no dispute resolution mechanism at all. In the EU only 8 out of 378 bilateral relations between Member States are not covered by a DTC.[48] For double taxation disputes on transfer pricing the EU AC applies.

Furthermore, the statistics available for the EU AC show how an identical DTDRM is applied with different success in Member States. While some Member States manage to keep their inventory (i.e. number of active cases) stable and at a relatively low level over the years, for other Member States a continuous mismatch between cases initiated and cases solved is encountered[49] resulting in an increasing inventory of cases. Given the bilateral nature of DTDRM this means that even if one MS has established a framework allowing an effective application of DTDRM, it will not be able to conclude cases if the other Member State does not effectively manage its case-load.

The driver behind the different levels of actual applications by Member can be assumed to be differences in the way Member States organise these procedures, the level of resources which are invested, or legal impediments applying in some Member States, e.g. internal processes to be followed between different authorities.

2.4.2.3 No mandatory binding dispute resolution

The DTDRM traditionally laid down in DTC requires the States involved in the dispute only to 'endeavour reaching an agreement' on how to eliminate double taxation. Due to this rather vague objective, in many cases disputes are not resolved with the consequence that the taxpayer is left with a situation of double taxation, a problem which cannot be addressed by an ordinary court (see section 1.2 above).

Since 2008 the OECD Model Tax Convention provides for extending the MAP with a mandatory binding arbitration procedure for cases where the competent authorities cannot reach an agreement on one or more issues so that the resolution of the case is prevented.[50] However, the uptake of arbitration procedures in DTCs within the EU is rather limited; as of today an arbitration clause was agreed only in 14 out of 370 bilateral DTC within the EU[51.]

It is widely recognised that the EU AC as multilateral convention providing one mandatory binding dispute resolution mechanism which also became part of the '*Acquis'* is a major achievement which significantly improves the situation compared to the DTDRM traditionally laid down in DTC.

One can assume that the slow uptake of arbitration clauses is driven by the priority of MS for tax collection rather than on agreeing on an obligation to solve disputes instead of just endeavouring to resolve a double taxation dispute. In addition the fact that the

48 Bilateral DTCs CY/LV, CY/LU, CY/NL, CY/FI, CY/HR, DK/ES, DK/FR, HR/LU;
49 See Annex G
50 See paragraphs 63 ff. of the Commentary on Article 25 OECD MTC
51 Bilateral DTCs: AT/DE, BE/UK, EE/NL, FI/NL, FR/DE, FR/UK, DE/LU, DE/SE, DE/UK, IT/SI, NL/PT, NL/SI, NL/UK, ES/UK;

implementation of an arbitration clause in a DTC is often part of a comprehensive renegotiation of a DTC, a process which often takes years,

2.4.2.4 Confidentiality of DTDRM proceedings

The MAP and the arbitration proceedings are currently kept confidential in order to protect business and commercial secrecy and also to ensure flexibility and efficiency for the governments[52]. This lack of transparency differs substantially from what prevails under judicial proceedings and is described by some academics as the 'Achille's heel' of the MAP[53]. By this, the DTDRM is criticised as being contradictory to the overall[54] increased demand and legitimate public interest for more transparency regarding companies' tax affairs[55].

2.5. Consequences

2.5.1 Consequences for companies

Enforcement and administrative costs related to DTDRM

Different kind of costs may arise in the context of DTDRM at different stages of a double taxation dispute. It was difficult to obtain detailed information from stakeholders on the costs involved in a DTDRM as they are not recorded separately, i.e. traced to a specific case. Furthermore, it is not possible to distinguish these costs between what is directly related to the DTDRM and which costs are related to the underlying issue, e.g. transfer pricing. Thirdly, the costs vary on a case by case basis, i.e. the complexity of the issue underlying the dispute, the Member States involved and the amounts at stake are non-comparable. The subsequent analysis is therefore largely qualitative.

- *legal, advisory and procedural cost* – companies bear costs of consultancy on legal tax matters both to avoid disputes (e.g. the 'forced' cost as described below) and to ensure their resolution should they occur (e.g. cost of assessing the choice of available dispute procedures, costs of extensive data collection required by the tax authorities to compose and follow a dossier, and costs for translations especially in fact intensive cases such as transfer pricing, etc.). In some cases these costs will go towards recruitment or dedicating of specialised company staff[56] to assess the company's standing from the tax point of view or cover the dispute case; in others, towards an external consultancy to provide sustained service. These costs are decreasing the available resources for focusing on profitability to hedging their bets on potential tax disputes [57]. Moreover, the input received from stakeholders and publications also reveal that often various

---

52 Christians (2011), par 121. See also Bertolini M (2010) available at: http://works.bepress.com/michelle_bertolini/1/

53 Riza (2014) p 11

54 IFA (2015) - 69th IFA Congress in Basel, Switzerland Sept 1, Report by Philip Baker Pasquale Pistone (General Reporters), Practical protection of taxpayers' rights

55 See United Nations Report. Doc E/C 18/2015/CRP.8 §129

56 See see Wrappe S C - Side Effect of BEPS-Driven Changes: Hiring, Coordinating Additional Transfer Pricing Staff 24 Transfer Pricing Report 791

57 Bertolini et al. (2012) p.22

procedures are taken in parallel. Naturally, this multiplication of procedures multiplies the otherwise avoidable costs for choosing, launching and following the case.

- *interest cost* – these costs usually arise for the suspension of the tax which is imposed double, or if the tax is already paid, to obtain liquidity from third party providers. the amounts at stake vary in relation to the amounts disputed the duration during which the dispute is going on.
- *secondary costs* – whereas largely intangible, these are the costs arising from how the functioning of DTDRM is *perceived*, irrespective of whether this perception is based on actual experience or not [58].

For these costs, the duration of the procedure has a further damaging direct impact as they are assumed to increase proportionate to the duration of the procedures.

Despite the difficulties of estimating the actual costs, the majority of stakeholders regard the costs associated with DTDRM as excessive/significant[59]. Cost reduction has been quoted systematically as one of the areas where improvements to the DTDRMs were necessary[60][61] [62].

An E&Y survey revealed that companies were unlikely to invoke a subsequent arbitration procedure once they have experienced it once[63]. Stakeholders in the 2016 data collection also reported that as a result of a lack of trust in the current DTDRM they map tax risks and try to prevent disputes by getting ex ante certainty by tax administrations via rulings. These efforts are naturally connected with the same kind of costs which are similar to those of a double taxation dispute.

Finally, when a double taxation dispute is not solved, the double taxes imposed become the company's operational costs.

---

58 See e.g. *Ernst & Young (2003), Transfer Pricing 2003 Global Survey: Practices, Perceptions, and Trends in 22 Countries Plus Tax Authority Approaches in 44 Countries* showing that where the MAP has the highest success rate (allocation cases), it was used in only 51% of the appealed cases (10% of total adjustments), and only 57% of parents and 68% of subsidiaries who used the process indicated that they would do so again (88% in the United States).

59 See section 2.6 of the 2016 data collection, Annex H

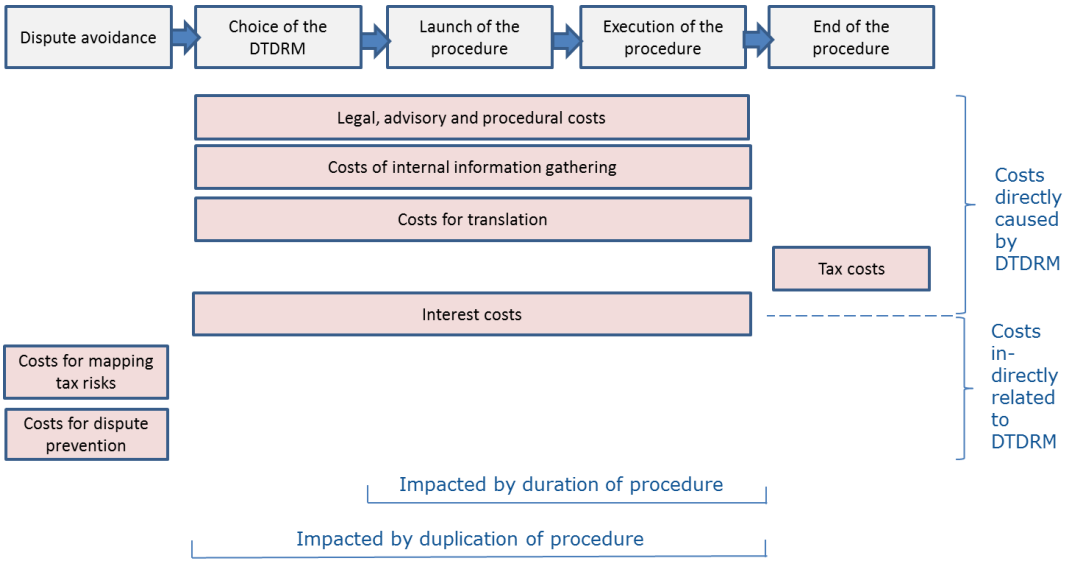
60 Bertolini M.S. and Weaver P.Q., Mandatory Arbitration within Tax Treaties: A Need for a Coherent International Standard, (February 2012). 2012 American Taxation Association Midyear Meeting: JLTR Conference , page 29

61 D'Alessandro, V. (2009) Improving the Resolution of International Tax Disputes, *Tax Notes International*, 55, 1153-65, Section II.G Elevated Legal Costs;

62 See e.g. 2003 report by E&Y showing that where the MAP has the highest success rate (allocation cases), it was used in only 51% of the appealed cases (10% of total adjustments), and only 57% of parents and 68% of subsidiaries who used the process indicated that they would do so again (88% in the United States).

63 See e.g. *Ernst & Young (2003), Transfer Pricing 2003 Global Survey: Practices, Perceptions, and Trends in 22 Countries Plus Tax Authority Approaches in 44 Countries*

Figure 9: Enforcement and administrative costs associated with DTDRM and costs of double taxation non-eliminated



Source: *European Commission*
Notes: *Higher level of provisions in financial statement to reflect risks underlying double taxation disputes*

Nearly all accounting standards require that liabilities or provisions have to be recognised in financial statements in order to give a true and fair view of the economic reality. This includes uncertain tax positions which may result from ineffective DTDRM and cover liabilities in case of non-full recovery of the amounts in dispute, also taking into consideration the uncertainty in terms of timing and amount. A majority of stakeholders mentioned that these reserves or provision would not be booked otherwise[64] and would have an impact on earnings and possibly share values[65] [66]. This has also attracted the attention of accounting standards setters[67] [68]

64 See section 6 in Annex H

65 See Bloomberg BNA *Transfer Pricing Report*, March SEC Roundup (04/02/2015, p.1491), November SEC Roundup (11/12/2015, p. 891), August SEC Roundup (09/03/2015, p.443), Securities and Exchange Commission Financial Statements Filed during October 2015, detailing Transfer Pricing Issues (11/12/2015), Securities and Exchange Commission Financial Statements Filed during January 2016 , detailing Transfer Pricing Issues (03/17/2016) – One of the cases filed is particularly representative of the impact on reserves and profit disclosure for listed companies having activities in the EU, particularly in the Digital economy. In this case, the amount at risk was initially of 325 Mill. EUR based on the first assessment notified by the tax authorities and has been ultimately decreased to 96 Mill. EUR (Amaya Inc. /PokerStarts Ink – Permanent Establishment Issue Transfer Pricing Report 09/01/2015 p. 443g

66 See Financial Times, US companies warn tax avoidance crackdown will hit earnings 29/03/2016 http://www.ft.com/intl/cms/s/0/b6f04f72-f12c-11e5-aff5-19b4e253664a.html#axzz4AuMH4pbl

67 See recent work of the IASB –Draft IFRIC Interpretation DI/2015/1 Uncertainty over Income tax treatments

68 See Mandatory Arbitration within Tax Treaties: A Need for a Coherent International Standard Michelle S. Bertolini and Pamela Q. Weaver, (February 2012). 2012 American Taxation Association Midyear Meeting: JLTR Conference p.20: "For Companies doing business globally and dealing with the uncertainty of relief from double taxation, compliance with these provisions (FAS 109/FIN 48) can be difficult. See also Burnett, Chloe, International Tax Arbitration. Australian Tax Review, Vol. 36, No. 3, pp. 173-190, 2007; Sydney Law School Research Paper No. 08/31 page. 188. Bakker A. J. (2010) Tax Risk Management: From Risk to Opportunity, IBFD –Chapter 6-6 page 183 (re. Canada, quoting in particular the example of the Fifth Protocol to the Canada-United States tax treaty which includes a Mandatory binding arbitration mechanism)

The existence of mandatory arbitration and effective DTDRM would mitigate the above-mentioned risks and may help taxpayers to better estimate them for financial reporting purposes. The related compliance costs under the international accounting standards such as International Accounting Standard IAS 12 (respectively FAS 109/Fin 48/ASC 740 under US Generally Accepted Accounting Principles) should also decrease.

Investment decisions

There is no conclusive evidence as to the effects of DTCs on FDIs ('Foreign Direct Investments')[69]. However, promoting investment has been for long one of their declared objectives and DTCs are de facto valued by countries and governments as a means to advance their economic development[70]: From this perspective, DTCs and particularly DTDRM[71] contribute to creating a favourable investment climate. According to some authors, this is all the more important that in the current global environment where most non-tax barriers to cross-border trade and investment have been removed, tax is viewed as 'the last trade and investment barrier'[72].

Furthermore at the level of the investors, the shortcomings highlighted above have direct negative consequences on investment decisions for the following reasons:

- the lack of certainty and predictability as regards potential excessive taxation and the corresponding remaining cash ultimately assigned to the financing of the investment and the period needed to achieve neutralisation of the excessive taxation, are key for FDIs;[73]
- a non-effective DTDRM triggers additional tax cost for the investors which cannot be neutralised with sufficient predictability and puts at risk the part of remaining cash which can be repatriated.

When deciding upon an investment, if an investor is aware that a decision involves a risk of a double taxation dispute and uncertainty particularly as regards the time frame in which such dispute can be resolved between the States, he will take these considerations into account and potentially not invest. Good practices of investment planning in a

---

69 See Sauvant and Sachs (2009), "*The Effects of Tax Treaties on Foreign Direct Investment: BIT, DTT and Investment Flows*", Oxford University Press

70 Idem

71 Regarding DTDRM, by analogy with findings on effective justice systems in the 2016 EU Justice Scoreboard page 4 one could conclude that improving DTDRM's effectiveness could have a positive impact on establishing confidence throughout the business cycle.

72 See The E15 Initiative, ICTSD and World Economic Forum, "Strengthening the Global Trade and Investment System for Sustainable Development – International Investment Law and Taxation: from coexistence to cooperation – Julien Chaisse January 2016 –globalisation".

73 See the above-mentioned reference: Strategic considerations for tax controversy risk management and double taxation avoidance, Darrin Litsky, Sanjav Kumar and Eric Lesprit, International tax review, 22 March 2016 – Also Commission Services Progress Report on the EU-Japan Business Round Table (2015) where the following statement was made "In order to enhance direct investment between the EU (…) in particular, the measures to avoid double taxation of the same profit should be regarded as a sine qua non. (…). The EU Member States and Japan should modernise the tax treaties between them and ensure, to the greatest possible extent (…) that corresponding adjustments and arbitration in case of transfer pricing taxation are provided.

context of financial crisis and globalisation where investment cycles are significantly shortened refer to a period of three years.[74]

Several sources and the public consultation confirm that multinational companies based in major trade countries consider that, to enhance direct investment in the EU, measures to reward risk taking associated with cross-border investment are essential[75].

Merger and Acquisitions and implications on strategic intangibles

Responses to the 2016 questionnaire show that a risk of double taxation and the lack of effective DTDRM arising in jurisdictions trigger certain arrangements in cases of Mergers and Acquisitions (e.g. the inclusion of warranty clauses, price increases, reorganisations).[76] [77]

The likelihood of unsolved disputes in this context have led multinationals to set up contingency plans for materialising risk which can impact business decisions: these models aim in particular at selecting and assessing transactions being at risk of double taxation in order to revise or even 'scrap' them[78].

The consequences described above, i.e. the enforcement and administrative costs, economic costs and considerations of investments apply irrespective of the size of an enterprise, i.e. also for SMEs. However, the enforcement and administrative costs linked to the assessment of the procedure, its initiation and management, can be disproportionately higher for the SMEs, in particular when set against the absolute amount of tax amount disputed being relatively small when compared to the disputed tax amounts reported by some multinationals. At the same time, the economic costs (to be) borne by the SMEs can still be gravely detrimental to their economic activity; the shifts in their balance-sheet ratios triggered by higher (and uncertain) tax provisions can have a far higher impact on their financial condition and cash flow. With costs of access to capital already relatively high and investment decisions inherently more risky in terms of potential negative consequences this would further hinder the SMEs operations, investment and expansion.

---

74 Bradley et al., Managing the Strategy Journey, Mc Kinsey Quaterly July 2012

75 Litsky et al.., Strategic considerations for tax controversy risk management and double taxation avoidance, International tax review, 22 March 2016

76 See section 6.7 of the 2016 data collection, Annex H

77 See Bloomberg BNA Transfer Pricing Report, March SEC Roundup (04/02/2015, p.1491), November SEC Roundup (11/12/2015, p. 891), August SEC Roundup (09/03/2015, p.443), Securities and Exchange Commission Financial Statements Filed during October 2015, detailing Transfer Pricing Issues (11/12/2015), Securities and Exchange Commission Financial Statements Filed during January 2016 , detailing Transfer Pricing Issues (03/17/2016) – One of the cases filed is particularly representative of the impact on reserves and profit disclosure for listed companies having activities in the EU, particularly in the Digital economy. In this case, the amount at risk was initially of 325Mill. EUR based on the first assessment notified by the Tax authorities and has been ultimately decreased to 96Mill. EUR (Amaya Inc. /PokerStarts Ink – Permanent Establishment Issue Transfer Pricing Report 09/01/2015 p. 443),

78 For illustration of an approach considered by MNEs to set up such a self-examination process of transactions being at risks, see International taxation controversy: the coming sytorm Mc Dermott Will & Emer, 17 March 2014

2.5.2 Consequences for the Member States

The costs associated with solving a double taxation dispute for companies are mirrored to some extent in the costs arising at the level of the Member States. A long duration of a case, ongoing information gathering or bilateral negotiations between Member States increase these costs significantly and bind human recourses.

Jurisdictions that do not ensure an efficient and effective DTDRM in place to counterbalance the effects of increased scrutiny on aggressive tax planning, increased tax audit policy and risk of diverging interpretation, will face negative consequences in terms of foreign investments at least in the medium term.[79] Additionally, at the international level and particularly when establishing relationships with third countries, having effective DTDRM in place in an EU Member States is considered as being a cornerstone to ensure a friendly business and investment tax environment.[80] [81] [82] Another point to consider is that a non- functioning DTDRM is expected to result in companies mapping their tax risks and engage in structures to minimise their taxes which may emerge to shifting of profits away from States with a risk of double taxation remaining (Tax planning and base erosion).

The shortcomings identified above increase the respective administrative burden and costs. A long duration of a proceeding ties up resources and causes costs which cannot be reclaimed and which, in the worst case scenario, can exceed the amount of tax at issue[83]. Furthermore, in cases where tax payments have to be reimbursed as a result of the DTDRM, interest may have to be paid by the State for the kept tax payments[84]. This applies especially in times where the interest rate for kept tax payments may be higher than the current market rate[85].

2.5.3 Consequences for the society

Unresolved double taxation disputes are not in the interest of any stakeholder[86] [87]. The absence of consideration of taxpayers' rights in most of the currently used DTDRM has been recently underlined by surveys and scholar publications[88], particularly as regards the recognition of taxpayers as an interested party, the absence of appeal rights in case of

---

79 van Herksen M., Mulvihill P., Liebenberg J. and Shah V. The impact of BEPS on tax controversy, International Tax Review February 2016

80 "Choudhury H. and Owens J. "Bilateral Investment Treaties and Bilateral Tax Treaties", International Tax Investment Center Issues Paper, June 2014

81 Irish (201), pp. 121-144, 2011

82 See, Litsky, et al.(2016) – Also Commission Services Progress Report on the EU-Japan Business Round Table (2015

83 As an illustration, see the two first cases of arbitration under the EU Arbitration Convention on transfer pricing: see Sidhu (2014) page 590 & seq. and D'Alessandro (2009)

84 See e.g. section 2.17 tax collection and interest charges doc JTPF/002/2015

85 For example in Germany the interest for tax refunds is 6% (strting 15 months after accrual of tax). Kroh/Weber "Verzinsung von Steuererstattungsansprüchen als risikolose Geldanlage" (Interest on tax refunds as Capital investment non official translation) DSTR DStR 2015 Heft 50, 2794 - 2797:

86 UN Tax Committee (2015) Doc. E/C 18/2015 CRP 8 page 7 in particular

87 See above footnote 93

88 See 69th IFA Congress in Basel, Switzerland Sept 1, Report by Philip Baker and Pasquale Pistone concluding that the mutual agreement procedure under bilateral treaties is "a black hole of taxpayers' rights",

non-activity of the Competent Authorities or denial of access[89], the ability for taxpayers to participate in the procedure, the lack of publicity of the decisions and transparency.
A non-efficient DTDRM has also indirect consequences such as reduced trust in tax administration and lower voluntary compliance resulting in reduced tax collection[90].

2.6 Baseline Scenario

The baseline scenario starts with the status quo as regards the DTDRM available in the EU as described in section 2.3.1 and their problems as identified in section 2.3.2 above. It is expected that within the following years the few bilateral relations which are currently not yet covered by a DTC will be covered in the mid-term. This assumption is based on common recognition of the benefit of DTC and the continuously growing network of DTCs worldwide. For the same reason it is not expected that a DTC between MS will be terminated in future, although it can of course not be excluded. The baseline scenario is therefore that a 100% coverage of bilateral relations between MS with DTC will be achieved.

The economic environment in the baseline scenario is characterised by a further increase of globalisation and cross border trade. However, to keep the estimation rather conservative, a specific factor for increasing cross border business activity is not taken into account.

As regards the availability of mandatory binding arbitration in DTC, the baseline scenario takes into account the other developments on improving DTDRM, e.g. in the context of Action 14 of the OECD BEPS project. The efforts at the level of the OECD are expected to increase the number of bilateral DTC between MS with mandatory binding arbitration. However, given the slow uptake of these clauses in the past shows a certain reluctance of at least some MS, it is not expected to achieve 100% coverage. For a DTC where such a clause is newly implemented such a clause would provide an incentive for States to more quickly resolve double taxation disputes not yet covered by the AC. On the other hand, the fact of being bound to agree may make some Member States more reluctant to accept cases. It is not possible to quantify these two effects. More important is, however, the expectation that the issues which are encountered for DTDRM containing mandatory binding arbitration clauses will remain/occur also for the new treaties. For this reason, the estimation of the future development is made on the basis of the numbers reported for the EU AC, and a DTDRM with mandatory binding arbitration.

As a further aspect the CCCTB proposal needs to be taken into account. It is assumed that the implementation of a CCCTB in the EU will reduce the number of double taxation disputes for corporate taxpayers subject to the CCCTB or opting for the CCCTB. However, the CCCTB comes to its full effect only if the rules for consolidation apply, Given that the CCCTB is suggested to be implemented in 2 steps with consolidation to be achieved in the second step and that double taxation disputes arise mostly several years after the respective tax period it is expected that the full effect of the CCCTB as

[89] For example Denmark
[90] See e.g. IMF Current challenges in Revenue mobilization improving tax compliance https://www.imf.org/external/np/pp/eng/2015/020215a.pdf

regards a reduction of double taxation disputes is not expected to occur in the short term. Furthermore, the full CCCTB is suggested to mandatorily apply only to large multinational groups[91]. For groups below the threshold the CCCTB would not be mandatory. Its adoption will help to reduce the number of disputes arising for those companies to which it will apply. Due to a lack of data it is difficult to estimate the percentage of companies with a turnover above EUR 750 million facing double taxation issues. An indication may be taken from the 2010 public consultation where 37 % of the respondents were companies with a turnover of more than EUR 1 billion.

For the reasons elaborated above, the estimation of the number of cases pending and the amounts involved by 2020 does not take into account effects of an eventual implementation of the CCCTB proposal but rather on an environment which is comparable to the status quo.

Development of pending dispute cases

Statistical data on cases pending under the EU AC as reported by MS on a yearly basis since 2004 until 2014[92] is considered as a reliable starting point for estimating the future development of double taxation disputes in the EU.[93] [94]

Historical data shows a continuous and accelerated increase of pending double taxation disputes. This is confirmed by the stakeholders input from the 2016 consultation[95] according to which 64 % of the respondents expect a significant increase of disputes. Moreover, there has been a significant increase of audits in the field of transfer pricing with an expected increase of the amount of taxes to be reassessed[96] [97]. Such trends make it justified to expect that pending double taxation cases will continue to increase in the future.

Starting from 640 double taxation disputes on transfer pricing and profit attribution to Permanent Establishments pending under the AC at the end of 2014, it is conservatively estimated that the total number of double taxation disputes will increase to around 1 200 by the end of 2020.[98] [99].

Amounts involved

---

91 The CCCTB proposal foresees mandatory application for a company belonging to a consolidated group with a total consolidated group revenue that exceeds EUR 750 000 000

92 Numbers for the end of 2015 are not yet available

93 http://ec.europa.eu/taxation_customs/taxation/company_tax/transfer_pricing/forum/index_en.htm

94 The reliability of this self-reported data is increased by the fact that MS report bilateral cases from their perspective only which is then matched with the cases by the other MS involved in the case. The numbers reported are therefore considered as a reliable basis.

95 See section 5.3 of the 2016 data collection, Annex H

96 See e.g. Germany: PwC Study "Betriebsprüfungen 2015" (tax audits 2015 *translated*) http://www.pwc.de/de/pressemitteilungen/2015/in-grossunternehmen-fuehrt-nahezu-jede-betriebspruefung-zu-mehrsteuern.html Denmark announced that for 2016 (as in 2015), its efforts would focus on transfer pricing cases http://www.skm.dk/media/1340763/aktuelle-skattetal_transfer-pricing_020516.pdf

97 See e.g. Martens (2015) or Allen&Overy(2014) http://www.allenovery.com/SiteCollectionDocuments/Multinational-tax-practices-face-growing-scrutiny.pdf

98 For the detailed calculation it is referred to ANNEX D

99 For the CCCTB proposal see section 1.4 above

Starting from an estimated amount of tax amount of tax involved in the estimated number of 910 double taxation disputes at the end of 2014 and an estimated number 1200 of pending cases at the end of 2020 the amount of taxes involved in these disputes is conservatively estimated with EUR 15 billion. This amount does not take into account the expected increase of taxes disputed in these cases where the amounts at stake reach a size creating economic risks for the company affected[100].

Denial of access to DTDRM and duration of procedures

The aspects of enforceability are implicit denial of access, explicit denial of access and blocked or delayed procedure. As the kind and application of DTDRM are not expected to change without EU action, it is expected that the number of case where taxpayers are deprived from access ('implicit denial of access') or where access is actually denied ('explicit denial of access') will increase proportionately to the increase of double taxation disputes. The same applies for cases which are blocked or delayed. Based on the observations on the duration of AC cases available for 2012 – 2014 it is assumed that at a minimum around 20% of the total cases will take longer than 2 years to be solved, with a tendency of a longer duration in general and with some of them taking significantly longer and involving substantial amounts of taxes[101]. The uncertainty created in these cases will require taxpayers to allocate significant provisions in their balance sheets and indirectly affect their competitiveness.

Given the unchanged procedures of the DTDRM and the fact that various recommendations which aimed at reducing enforcement and administrative burden associated with DTDRM did not have a significant impact in the past, it is expected that they will not be reduced in short and mid-term if no action is taken. To the contrary, the growing number and complexity of business models and cross-border integrated value chains could only result in an increase of the overall time needed to resolve a tax dispute. In the US for example, the processing time for resolving cases through the use of the MAP has increased from almost 16 months on average in 1971 to almost two years in 1980 and 2.4 years by 1995[102] to 2.6 years in 2015[103]. The same information emerged from the EU AC statistics which show that the percentage of cases older than 2 years vs. total cases pending cases rose from 37.5 % in 2012 to 40.5 % in 2014.

As regards consistent uptake in Member States, past experience shows that the guidance and the recommendations that were developed by the EU or OECD did not significantly impact the way the DTDRMs are handled in different Member States. Unless the Member States take more unilateral (or bilateral) efforts to enforce the speedy and least burdensome DTDRM procedures, it is not expected that a more homogenous application of the mechanisms will be ensured in the future.

---

100 See section 2.3.2.1 d) above

101 For the detailed calculation it is referred to ANNEX E

102 Z.D. Altman, (005); p. 128;

103 See IRS Competent Authority Statistics April 27, 2016, noting that in the years 2011 and 2014 the average time is between21,4 and 27,9 months;

2.7 The EU's right to act

2.7.1 Legal basis

Article 115 of the Treaty on the Functioning of the EU (TFUE) is the legal basis for legislative initiatives in the field of corporate taxation. Although no explicit reference to direct taxation is made, Article 115 refers to directives for the approximation of national laws where their differences directly affect the establishment or functioning of the internal market.

Naturally, double taxation disputes are not limited to intra-EU situations. Effective and efficient prevention of double taxation are recognised as critical to building an international tax system that supports economic growth and a resilient global economy[104]. The OECD has for a long time acknowledged the shortcomings of the DTDRM under the model tax treaty (the Mutual Agreement Procedure in Art 25 OECD MTC) and has since recommended a series of improvements, including a recommendation for Member States to agree on mandatory binding arbitration in their DTCs. The most recent BEPS Action Plan also envisages making dispute resolution mechanisms more effective. OECD / G20 countries participating in the BEPS project agreed on a minimum standard, best practices and a process for monitoring the number of cases, their duration and the amounts of tax involved. However, although the business community and a number of countries consider that mandatory binding arbitration is the best way of ensuring that tax treaty disputes are effectively solved through MAP, there was no consensus between the OECD and G20 countries regarding the adoption of a mandatory binding arbitration. Nevertheless, a limited number of OECD and G20 countries, including 13 Member States, are taking forward the work on such a mandatory binding arbitration mechanism[105].

In addition even a common multilateral instrument like the EU AC still encounters the shortcomings identified in section 2.4 above. A future EU initiative shall address precisely the shortcomings of the existing DTDRMs.

2.7.2 Subsidiarity

Double taxation as discussed in this impact assessment concerns cross-border situations where two (or more) Member States are involved. It can happen that two jurisdictions correctly claim corporate income tax on the same profit (a double taxation dispute). The Commission is not proposing to eliminate such cases per se, but to provide a mechanism for taxpayers in such situation to achieve effective tax relief by having the dispute solved.

As already mentioned in the problem analysis, the shortcomings of the DTDRM in the EU are a serious impediment to a well-functioning Internal Market; on the one hand, it is distortive to the tax-neutral economic decisions of the European businesses and prohibitive to investment, creating market access barriers also for foreign investments. On the other hand, it is costly for the Member States in terms of lost value stemming from the foregone economic activity of companies which decide to opt out of economic

[104] See executive summary final report OECD/G20 Action 14
[105] See Annex II of the final report OECD/G20 Action 14

operations in their territory. Furthermore, both parties suffer from avoidable administrative costs and burdens of ineffective dispute resolution mechanisms.

Whereas the content and interpretation of the provisions of tax treaties between Member States remain within their sole competence, it is important to guarantee taxpayers an effective mechanism to resolve cross-border double taxation disputes, should they occur. As revealed by the consultation of stakeholders underlying this impact assessment, bilateral DTC adopted by Member States and even a multilateral agreement such as the EU AC alone do not provide effective solutions for the effective and efficient resolution of such disputes. This equally applies to other kind of international agreements which are structured in a similar way.

The design of a more enforceable and efficient DTDRM at EU level is expected to limit the duration, the costs and uncertainty associated with the resolution of double taxation disputes in cross border situations. It is also expected to significantly limit the number of cases of double taxation in the EU which remain unresolved for non-justified reasons. By this, uncertainty on the side of taxpayers facing double taxation will be removed and the implications of a negative perception eliminated.

DTDRM are by nature bi- or multilateral procedures, requiring coordinated action between the Member States. Consequently, if only one Member State is willing to effectively solve the tax dispute and even if relevant procedures are available in the applicable DTDRM, the disputes will not be solved if the other Member States does not agree or do not act as set out in the DTDRM. The problems cannot be addressed by Member States working individually. A common procedure between States requires that the procedure is applied in the same way in both States. This needs to be ensured for the functioning of DTDRM. The experience gained from monitoring of the functioning of the EU AC, a DTDRM agreed between MS by way of a multilateral convention without involvement of the EU, confirms that the issues will persist if double taxation disputes remain left to be solved by/within Member States alone, i.e. the procedure is implemented and designed individually. The same applies for the ongoing international activities in this field which aim at promoting bilateral agreements between MS. Furthermore, uncoordinated action by Member States will at best fail to achieve the intended improvements and, at most, deepen the problems identified through enlarging the schism between Member States.

In summary, the need for EU action is well-founded and confirmed by evidence over the last decades which show that no EU action, i.e. leaving the resolution of intra EU disputes between Member States to Member States only has not and is unlikely to solve in the future the problems currently encountered.

3. THE OBJECTIVES

3.1 General

The **general objective** is to contribute to an improved EU business environment, contributing to boost of investment, the creation of jobs and to maintain the trust of businesses and citizens in public administration**.**

This general objective translates into ensuring a **well-functioning Internal Market**, with no distortive legal or factual arrangements for the market operators in the area of taxation of corporate income. Competitiveness of the companies should be preserved through reduced/removed costs and risks of double taxation disputes and/or litigation procedures. Removing (some of) the concerns related to a possible tax dispute for the companies, by promoting an EU wide coherent approach of treatment of such disputes, should ultimately contribute to **the completion of a fair and predictable tax system in the EU** which also safeguards the interests of MS

Specific objective is to ensure legal certainty and a level playing field for EU businesses. In addition the settlement of disputes should be made sufficiently transparent to ensure the trust of citizens and business in the public system.

3.2 Specific objectives in detail

3.2.1 Ensure legal certainty

It should be ensured that there is **defined access to the available DTDRM in justified cases** and for eligible taxpayers. This includes making sure that taxpayers being subject to a double taxation dispute are not deprived from effective access to these remedies and are protected from an unjustified denial of access (i.e. covering both implicit and explicit denial of access). The procedure should be not be delayed or blocked in unjustified cases, i.e. is **followed**. On the other hand, enforceability should not be applicable when a MS would be obliged to solve the double taxation dispute if it is not justified, e.g. in cases where the action giving rise to an adjustment of transfers of profits of the enterprises concerned is liable to a serious penalty[106]. Consequently, the objective is to increase legal certainty by ensuring that DTDRM in the EU work in practice as they should and by providing an independent review of any action/non-action taken. The existing DTDRMs in the EU should be improved with the view to **ensure that they are conclusive, i.e. the dispute is settled.** The improvements should ensure a settlement of double taxation disputes by mandatory binding arbitration for all parties involved and corporate tax issues.

3.2.2 Ensure a level playing field for EU business

A well-functioning DTDRM should be improved in a way that an **appropriate balance is achieved between effort and the expected outcome, i.e.** solving the double taxation dispute. Costs and administrative burden for all stakeholders should be balanced towards the expected outcome. The objective is to design DTDRM in the EU in such an efficient way that results in a cost benefit ratio which makes it a valuable and sustainable way to address double taxation disputes for all stakeholders. One aspect of this is to achieve a resolution of the dispute within an appropriate time frame (Duration).

As DTDRMs are procedures which involve two or more Member States, ensuring that the applicable DTDRM are **available and applied in a homogenous manner throughout the EU** would not only help to reduce economic and administrative costs

[106] See Article 8 1 of the EU Arbitration Convention (90/463/EEC)

and burdens, but also remove some of the uncertainties that companies face in their cross-border situations (e.g. with regard to investment decisions).

3.2.3 Ensure transparency

A further specific objective is to address the criticism expressed towards the existing DTDRM as being a 'black box' for taxpayers and the public. Tax dispute resolution procedures, particularly arbitration, should be public, i.e. not confidential and private, as long as (i) the issue presented is of public interest, (ii) affects the society and (iii) 'transparency would assist other(s) … in understanding the issues involved and would permit more widespread and effective participation in the system' as well as more confidence in it[107].It should be ensured that the procedures set out a degree of transparency which contributes to increasing the trust of citizens and businesses in the public system.

3.3 How the objectives are linked to the problems

Figure 10: linking the objectives to the problems

General objectives	Specific objectives	Link to the problem
An improved EU business environment, contributing to boost of investment, the creation of jobs and confidence of business and citizens in public administration	Ensure legal certainty	Avoid explicit denial of access to DTDRM in cases where it is not justified
		Make accepting an implicit denial of access to DTDRM less attractive for the taxpayer
		Avoid that procedures are unjustified delayed of procedures
		Avoid that disputes are not resolved and double taxation remains
	Ensure a level playing field for EU business	Avoid inappropriate costs and compliance burden
		Remove the differences of application encountered in MS
	Ensure an appropriate level of	Avoid that the level of transparency is below other

[107] See Bertolini M.S. "Mandatory Arbitration Provisions within the Modern Tax Treaty Structure - Policy Implications of Confidentiality and the Rights of the Public to Arbitration Outcomes" ExpressO (2010) Available at: http://works.bepress.com/michelle_bertolini/1/, page 36, also quoting Cindy G. Buys, The Tensions between Confidentiality and Transparency in International Arbitration, 14 Am. Rev. Int'l Arb. 121, 134-135 (2003).

General objectives	Specific objectives	Link to the problem
	transparency	judicial proceedings

4. OPTIONS

As regards the choice of options it should first be recalled that the initiative is a follow up of earlier initiatives, e.g. the 1976 directive proposal, which resulted in the EU Arbitration Convention in 1990. Already this initiative was based on the long standing approach of addressing double taxation by way of bi- or multilateral agreements which set out rules for the allocation of taxing rights and a dispute resolution mechanism. An alternative to this approach is the CCCTB proposal providing for a harmonised tax base with consolidation which would, as demonstrated above, not address all situations and all taxpayers. There are therefore good reasons to continue following the traditional mechanisms and try to improve them where necessary. For this improvement all considerable options have been evaluated which were suggested during the monitoring of previous instruments as well as those received from stakeholder consultations.

An option which combines different forms of legal instruments, e.g. a combination of recommendations and a directive, was discarded due to the fact that a DTDRM only works if it has no weakness, i.e. all problems are addressed with the same strength. Otherwise there would be a risk that the problems would emerge where the DTDRM is weak.

All options are also closely linked to the procedures established by EU Arbitration Convention. Although shortcomings have been encountered it should be recalled that the EU AC is a well-established instrument working properly in the majority of cases. Starting from scratch would therefore not be justified.

All options will envisage the use of tools available in the EU for exchanging of information under the Directive on Administrative Cooperation (DAC)[108].

4.1. Baseline scenario - Status-quo/No Action

If no action is taken at EU level the situation will develop as described in the baseline scenario. This means that it is expected that the uptake of mandatory binding arbitration in DTC will continue at a low level allowing Member States not being obliged to resolve double taxation disputes. In instances where mandatory binding arbitration is agreed like for cases covered by the EU AC, the positive effect of such an agreement compared to a situation with no mandatory binding resolution will remain. However, there will also be situations remaining where due to a lack of enforceability timelines are not respected or disputes not resolved at all. The consequences of the shortcomings described in section 2.3 above will remain for taxpayers facing double taxation disputes and the negative perception of this situation with its detrimental effects for Member States will continue. The expected significant increase of double taxation disputes will further exacerbate this situation in the future.

[108] See http://data.consilium.europa.eu/doc/document/ST-12802-2015-INIT/en/pdf

4.2 Option A - improving implementation of the existing DTDRMs

Option A1 and Option A2 build around improved use, implementation and enforcement of the existing DTDRMs. They aim to maximise the utility and benefits of amicable dispute resolutions. All of them would require different actions to be taken at the Member State level. As the DTDRMs currently agreed in the EU are in DTC and in the EU AC, i.e. are not part of EU legislation, all actions could only be recommended rather than legislated by the EU.

4.2.1. Improve the functioning of DTCs and the EU AC and supplement DTC with mandatory binding ad hoc arbitration (Option A1)

Under this option, the EU would recommend to the Member States to

- to adopt recommendations developed by the OECD on best practice to make dispute resolution mechanisms in bilateral DTCs more effective[109];
- in the context of the EU AC, to adopt recommendations developed by the EU JTPF in its proposal for a revised Code of Conduct[110];
- to provide for mandatory binding arbitration by supplementing the MAP provided for in bilateral DTCs with an arbitration clause along the lines of Article 25 (5) of the OECD MTC.
- to start negotiation for extending the scope of EU AC beyond the area of transfer pricing disputes.

4.2.2. Arbitration by the CJEU (Option A2)

Under this option, the EU would encourage Member States to introduce a specific enforcement mechanism in their bilateral DTCs which refers to Article 273 TFEU[111] and provides powers to the CJEU jurisdiction to ultimately decide on any remaining double-taxation dispute between EU Member States after a defined period of time. An example of such a mechanism can be found in Art. 25 of the German-Austrian tax treaty.

Options A1 and A2 would aim at reinforcing the messages of the OECD and supplement the international developments in the area of double taxation disputes. The suggested policy instrument is a Commission Recommendation.

4.3. Option B – Establishing an enabling legal framework for broadened DTDRM

Under this option, mandatory binding arbitration mechanisms would be extended to areas where they are not yet available, and the shortcomings identified as regards enforcement and effectiveness of these mandatory binding arbitration mechanisms are individually targeted. The suggested policy instrument for Option B is an EU Directive. The suggested policy instrument for Option C is an EU Directive. The nature of an EU

[109] See section I of the OECD's final report on BEPS Action 14 (Making dispute resolution more effective) http://www.oecd.org/tax/making-dispute-resolution-mechanisms-more-effective-action-14-2015-final-report-9789264241633-en.htm

[110] See e.g. JTPF report on Improving the Functioning of the Arbitration Convention, doc. JTPF/002/2015. http://ec.europa.eu/taxation_customs/resources/documents/taxation/company_tax/transfer_pricing/forum/final_report_ac_jtpf_002_2015_en_final_clean.pdf

[111] 273 TFEU provides: The Court of Justice shall have jurisdiction in any dispute between Member States which relates tothe subject matter of the Treaties if the dispute is submitted to it under a special agreement between the parties.

legislative instrument in form of a directive would also allow for a possibility to have the implementation and application by Member States monitored by the European Commission and eventual non-compliance of a certain Member State addressed.

This option builds on the current mechanism of the EU AC. It establishes by way of an EU directive the procedure which is already laid down in the EU AC, *i.e.* providing for a Mutual Agreement Procedure (MAP), initiated by the taxpayer, under which the Member States shall freely cooperate and reach an agreement on how to solve the double taxation dispute within 2 years. If Member States do not reach an agreement within the 2 years, an arbitration procedure is set out which solves the dispute by way of arbitration. Under this supplementary arbitration procedure, a panel of 3 or 5 independent persons/arbitrators will be appointed by the Member States (one or two for each Member State appointing one independent chairman), together with two representatives of each Member States ('the advisory commission'). Member States will provide the rules of functioning of the advisory commission. If they fail to do so, the rules of functioning will be agreed by the advisory commission itself. This advisory commission would issue a final opinion on eliminating the double taxation in the disputed case, which would be binding for Member States, unless they finally agree to a different solution.

It also extends the scope of the EU AC beyond transfer pricing to all cross-border situations subject to double income tax imposed on business profit, and provides for a default fast-track enforcement mechanism by the competent National Courts of each Member State: the National Court act on behalf of the Member States in order to appoint the independent persons.

The latter enforcement mechanism is modelled after the UNCITRAL Model Law on International Commercial Arbitration as regards the pivotal role of 'Court or other authority for certain function of arbitration assistance and supervision' (so-termed '*Juge d'appui*' functions)[112] and limited in the cases at stake to the shortcomings specifically identified as part of the present assessment, *i.e*. denial of access and prolonged procedure exceeding 2 years.

4.4. Option C – A comprehensive new EU-specific double taxation resolution mechanism

Option C would go beyond the improvement of the existing DTDRMs as described in option B. It would contain the same dispute resolution mechanism but in addition propose by way of an EU Directive a new set of specific and targeted rules on how to solve instances of double taxation for all identified conflicting tax legislations triggering double taxation for corporate cross-border situations at EU level. The rules would have to be developed and will identify conflicts that may arise and at the same time provide a solution in a sense of providing which State would be allowed to tax and how double taxation would have to be removed.

[112] For an overview of the current state of play within EU28 as regards the implementation of this UNCITRAL Modal Law on Commercial Arbitration and particularly the provisions on "the Court or other authority for certain function of arbitration assistance and supervision" see Appendix J

5. ANALYSIS OF IMPACT

5.1 Impact on the problems encountered

An important aspect for the analysis of impacts is that an option would only have an impact if it is capable to solve all the procedural problems encountered for the current DTDRM. The monitoring of an existing DTDRM in the EU did show that if a shortcoming remains, the reluctance encountered with respect to the application of the DTDRM would move to this element.

For example:

- a mechanism that ensures the resolution of a double taxation dispute may put higher burdens on the acceptance of the case, i.e. access may more often be denied if not justified,
- strong rules for accepting a case alone will not help if it is not ensured that the procedure is also completed in time or at all or
- if the strong mechanism only applies to a limited set of issues, e.g. the attribution of profits to Permanent Establishments, the procedure would be blocked if there is no strong mechanism for solving a dispute on the existence of a Permanent Establishment.

The following analysis of impact therefore distinguishes between a DTDRM that works, is capable of addressing all issues with sufficient strength and a DTDRM which is at risk of having shortcomings remaining. As options A1 and A2 take the form of a recommendation there is a risk that these recommendations are actually not followed while the nature of option B and C would ensure their actual implementation and application. The more detailed comparison of each option as regards their effectiveness, efficiency and coherence with the Commission's general objectives is reserved for section 6 below.

5.2 Economic impacts

5.2.1 Impact on the competiveness of companies

An effective dispute resolution mechanism would have several implications for companies. A reduction of the compliance burden should allow a reduction of the costs associated with an actual double taxation dispute. The overall procedure should last less than three years, something which fits with currently recommended standards and expectations in terms of investment and transaction cycles of companies. Lastly, the setting up of an effective dispute resolution mechanism will reduce constraints and compliance burden for companies in terms of risk management which is linked to the necessity to publish warnings in case of high amount of double taxation positions and potential reputational costs[113].

For example:

[113] See for illustration of such compliance and risk: Huibregtse et al. A Post-BEPS Primer for Boards: Staying in Control of Transfer Pricing Risks 24 Transfer Pricing Report 1131 01/07/2015

Glaxo Case involving United Kingdom and the United States of America: it has been one of the largest tax disputes in tax authorities' history (USD 3.1 billion). The case dealt with transfer pricing related to a market intangible and patent royalty payments. The case is referred to as 'showcase example of MAP gone wrong'.

Bertolini M.S. , Mandatory Arbitration Provisions within the Modern Tax Treaty Structure – Policy Implications of Confidentiality and the Rights of the Public to Arbitration Outcomes" *University of Hartford*, February 15, 2010

The obligation of results enshrined in all the options is intended to remove the most important drawback of the current system, which is that there is no certainty in the effective and full relief of double tax within a certain period[114], leading to the consequences described in section 2.4.2.1 above.

A procedure that actually ensures that the double taxation dispute will finally be resolved should also remove the need for companies to initiate several procedures in parallel and hope that one of them would result in the elimination of double taxation, i.e. it would avoid duplication of procedures and time-consuming management of the corresponding litigation files. This should lead to a reduction of compliance costs, legal fees and cost of financing of disputes, and finally impact positively the companies' margins. Costs saved will increase companies' free cash flow which will then be available for investments in their profit generating activities. Especially the avoidance of duplication of procedures will have a direct effect which will not have to be counterbalanced with the increase of costs for the main DTDRM taken. The economic impact on competitiveness will therefore depend on the impact of the options on the problems encountered. Given that **options A1 and A2** bear a higher risk of actually not being followed their impact on competitiveness is expected to be lower than for **options B and C**. on the problems encountered meaning.

5.2.2 Impact on the investment, growth and jobs

At this point the reasoning which has led countries to conclude DTC with the aim to eliminate double taxation and to include a procedure for solving disputes should be recalled, e.g. the goal to remove impediments to international trade and investment by reducing the threat of double taxation that can occur when both contracting States impose tax on the same income. Solving disputes between Member States on how to remove double taxation will in the long term contribute to economic growth and remove barriers to the Internal Market. [115].

---

[114] Markham M., The Resolution of Transfer Pricing Disputes through Arbitration, Intertax, Volume 33, Issue 2, 2005

[115] See letter to the US Senate of US business organisations (http://www.transatlanticbusiness.org/wp-content/uploads/2015/02/2015Trade-Association-letter-on-tax-treaties-to-all-Senate-leadership.pdf page 1 " And, for illustration the most recent US tax treaties negotiated with EU MS containing an arbitration clause Ireland (1999), Netherlands (2004), Belgium (2006), France and Germany (2009), Spain (2015) – All containing an arbitration clause similar to the one included in the US-Switzerland tax treaty for which Mr. Kerry (Committee on Foreign Relations) reported as follows in 2011 to the US Senate: consideration of arbitration (page 29) "*Tax treaties cannot facilitate cross-border*

For example: Company A in State A wants to distribute its products and establish client relationship in Member State B. Given an increased double taxation risk in Member State B it decides to mitigate the risk of double taxation by not incorporating a business in Member State B but rather to enlarge the existing distribution centre in State C which deliver its products to clients in Member State B via Member State C.

The reluctance to incorporate a business in a MS with an increased risk of double taxation is confirmed by more than half of the businesses which indicated in the 2016 consultation that mandatory binding arbitration facilitates the incorporation of a business in another State[116]. Consequently, the lower the risk of double taxation and the more effective the procedure for solving a dispute is, the better the perception will be and the more positive the impact on investment, growth and jobs is expected to be. Given that **options A1 and A2** may be perceived as involving the risk of actually not being followed, their impact is expected to be lower than for **options B and C**.

5.2.3 Impact on tax revenues and tax administration efficiency

There is a common acceptance that in the medium and long term, ensuring overall and consistently the actual elimination of double taxation through an effective dispute resolution mechanism increases the level of compliance with international obligations and the potential level of economic activity and tax collection[117].

In the example above, there would be no taxable presence of company A in State B and the profits company A generates from selling its products to Member State A would be taxed in Member State C and/or Member State A.

An effective dispute resolution mechanism with an obligation for a result is an incentive for administrations to design efficient and operational procedures. It has effects on reducing delays and thus administrative and legal costs to tax administrations[118] resulting from long lasting and inefficient procedures. The same applies to the situation where the MAP would pre-empt a mandatory arbitration phase, this being a strong incentive for tax administrations to solve disputes in an efficient and time effective manner, before arbitration (i.e. 2 years). Lastly, a procedure containing arbitration or a dedicated Alternative Dispute Resolution mechanism: being confronted with experts in the domain,

---

investment and provide a more stable investment environment unless the treaty is effectively implemented by the respective tax administrations of the two countries. Under our tax treaties, when a U.S. taxpayer becomes concerned about implementation of the treaty, the taxpayer can bring the matter to the U.S. competent authority who will seek to resolve the matter with the competent authority of the treaty partner. The competent authorities are expected to work cooperatively to resolve genuine disputes as to the appropriate application of the treaty.
The U.S. competent authority has a good track record in resolving disputes. Even in the most cooperative bilateral relationships, however, there may be instances in which the competent authorities will not be able to reach a timely and satisfactory resolution. Moreover, as the number and complexity of cross-border transactions increases, so do the number and complexity of cross-border tax disputes. Accordingly, we have considered ways to equip the U.S. competent authority with additional tools to assist in resolving disputes promptly, including the possible use of arbitration in the competent authority mutual agreement process". http://www.gpo.gov/fdsys/pkg/CRPT-112erpt1/html/CRPT-112erpt1.htm

116 See section 6.11 of the 2016 data collection;

117 *Altman, Z. D. (2005)* Dispute Resolution under Tax Treaties, *IBFD* Chap. 6, 6.2.1.1

118 Idem

tax administrations would limit efforts and investment in preparation of briefs and establishing technical aspects[119].

In summary, the stronger the obligation to resolve the dispute in a given time line is, the more efficiency is required from tax administrations. Due to a lack of an effective enforcement mechanism, **Options A1 and A2** involve the risk of actually not being followed. Their impact on tax administrations' effectiveness is therefore considered to be lower than for **option B and C.** On the other hand Member States would need to assign additional resources in each of the options A - C.

5.2.4 Impact on capital markets

The effective removal of double taxation ensured by a timeliness mechanism shall have positive effect at the level of shareholders: they should reduce both the level and number of warnings by stock listed companies as regards material increase in their tax costs and give investors more certainty in order to assess the related risks attached to their investment[120], thus facilitating the shareholders' investment decisions.

Additionally, the introduction of an effective dispute resolution mechanism shall limit the recognition of uncertain tax positions (for transfer pricing and permanent establishment in particular)[121] avoiding thus not only compliance costs, due to reporting requirements under the international accounting standards such as IFRS 109 and FIN 48, but also direct impact on the share value due to the recognition of losses or potential losses.

Again, the lower the risk of double taxation and the more effective the procedure for solving a dispute is, the better the perception will be and the more positive the impact on the capital markets is expected to be. Given that **options A1 and A2** may be perceived as involving the risk of actually not being followed, their impact is expected to be lower than for **options B and C**.

5.2.5 Impact in terms of level playing field – Implications for SMEs

All options proposed benefit companies of all sizes but **Option B and C** are particularly relevant for SMEs as it facilitates recourses in case of blocked procedures and limits the administrative burdens in a timeliness framework. In particular, Option B aims at setting up an expedited arbitration process with some flexibility options, which are of particular interest for SMEs. First the MAP procedure is limited to 2 years. A shorter hearing and limited fees can be then be applied as the terms and conditions under which the recourse to the National Court and the submission to Arbitration Committee have been designed in such a way to nominate a sole arbitrator or even a mediator[122],.

---

119 Idem

120 See Financial Times US Companies warn tax avoidance crackdown will hit earnings by Vanessa Houlder (also referring to European companies having stepped up their warnings on tax issues).

121 For a description and illustration of the currently contemplated revision of the standards, see Litsky D., Kumar S. and Lesprit E., Strategic considerations for tax controversy risk management and double taxation avoidance, International tax review, 22 March 2016

122 As an example of a precedent procedure being of potential benefits for SMEs, see the « WIPO Expedited Arbitration » diagram for SMEs under « Dispute Resolution for SMEs » www.wipo.int -]

For example: SME A in Member State A producing a specific product has many clients from its neighbouring Member State. The number of customers decrease with increasing distance between the customer's place of living and the business of SME A in Member State A. For an SME, especially if profit margins are relatively small, opening a second distribution/manufacturing facility is a significant investment. This risk of investment is proportionally higher for an SME than for a large MNE. A guarantee that the outbound investment will not result in double taxation and combined with an effective procedure will reduce the risks associated with this investment.

5.3 Social and societal impact

The MAP and the arbitration proceedings are currently kept confidential in order to protect business and commercial secrecy, and also to ensure flexibility and efficiency for the governments[123]. This lack of transparency differs substantially from what prevails under judicial proceedings and is described by some academics as the 'Achilles' heel' of the MAP[124]. This creates issues in terms of overall fairness and effectiveness of the system and contradicts also the overall[125] increased demand and legitimate public interest for more transparency regarding companies' tax affairs[126].

The dispute resolution mechanisms (i.e. both MAP and ADRM) enshrined in the proposed options, particularly in **option B and C**, are aligned with the most recently recommended standards in terms of transparency[127].

In terms of impact, option A1 will not increase the overall confidence in the system while Option A2, provided it is actually followed, and options B and C will increase the consistency and the overall trust in the system at the level of the citizen[128]. As regards mandatory arbitration specifically, it should also ensure sufficient accountability of the arbitrators towards governments at the stage of alternative dispute resolution ('ADR')[129] and, broadly, hold governments to account to a certain extent *vis-à-vis* other governments and taxpayers[130]. In the medium term, the effectiveness of the overall system will benefit from such publicity: it will result in increased availability of materials dealing with international dispute resolution within the EU, allow EU governments to assess whether tax treaties really accomplish its goals, and increase the pressure on the competent

123 Christians (2011), par 121 see also Bertolini M (2010) Available at: http://works.bepress.com/michelle_bertolini/1/

124 Riza (2014) p 11

125 IFA (2015) - 69th IFA Congress in Basel, Switzerland Sept 1, Report by Philip Baker Pasquale Pistone (General Reporters), Practical protection of taxpayers' rights

126 See United Nations Report. Doc E/C 18/2015/CRP.8 §129

127 See UNCITRAL Rules on Transparency (2014)

128 UN report E/C 18/2015/CRP.8 par 123-124

129 See Christians, Allison, How Nations Share (April 19, 2011). Indiana Law Journal, Vol. 87, 2011; Univ. of Wisconsin Legal Studies Research Paper No. 1159.

130 Michelle S Bertolini. "Mandatory Arbitration Provisions within the Modern Tax Treaty Structure - Policy Implications of Confidentiality and the Rights of the Public to Arbitration Outcomes" *ExpressO* (2010) Available at: http://works.bepress.com/michelle_bertolini/1/ page 39

authorities to reach a negotiated settlement while also decreasing the incidence of double taxation at taxpayers' level[131].

5.4 Impact on third countries

Such an initiative taken by the EU in order to improve the mechanisms is bound to have implications beyond the EU. It ensures an efficient and effective management of cases which can be enshrined in triangular situations. It also creates precedents and good practices, positioning the EU as a whole and the EU Member States positively towards other countries and particularly the EU major trade partners. Lastly, it is limiting the negative impact on the EU Member States reputations and avoids diplomatic costs and possible renegotiation of tax treaties. Some authors have demonstrated in this respect how an effective dispute settlement mechanism can positively impact such transaction costs: without such a mechanism, treaty rules are clarified only through renegotiating the treaties, something which is a resource-intensive, slow and cumbersome process[132]. Accordingly, the same authors established that such an effective mechanism provides crucial 'assurance information' to governments regarding how other government's performance and intentions are positioned towards the application and interpretation of treaties: this is naturally fostering an effective and converging application of rules governing cross border transactions[133]. Therefore, the better the respective options address all the problems encountered, the more positive is the impact. Options B and C as taking the form of a directive are expected to have a more positive impact.

6. COMPARISON OF OPTIONS

The following comparison assesses the options against the following criteria:

- effectiveness - whether and how they achieve the objectives
- efficiency - how much costs and burden can be expected for the taxpayer the tax administration to implement the options, and
- coherence - with the Commission's overall objectives but also with the international developments.

6.1 Comparison of Effectiveness

As far as ***effectiveness*** is concerned, the following tables assess how the options achieve the set of objectives compared to the baseline scenario by rating them as neutral/no change to the baseline (0), slightly positive, (+), positive (++) and negative (-).

6.1.1. Option 0, no change

Objective	Effect	Explanation of impact

[131] Bertolini.M. "Mandatory Arbitration Provisions within the Modern Tax Treaty Structure - Policy Implications of Confidentiality and the Rights of the Public to Arbitration Outcomes" *ExpressO* (2010) Available at: http://works.bepress.com/michelle_bertolini/1/ page 40

[132] Robert A. Green Antilegalistic Approaches to Resolving Disputes Between Governments: A Comparison of the International Tax and Trade Regimes (1998à Cornell Law Faculty Publication Paper 939, pages 127 & 128

[133] See footnote 119

Objective	Effect	Explanation of impact
Ensure legal certainty	0	With the EU AC a common DTDRM is available in the EU covering the most often encountered source for double taxation (transfer pricing). There is often no possibility for a taxpayer to enforce action of a Member State nor for one Member State to enforce action of the other Member State involved in the double taxation dispute. Cases will remain where there will not be a possibility to have action or non-action of a MS under an applicable DTDRM. Under the baseline scenario it is assumed that there will not be a full uptake of mandatory binding arbitration in bilateral treaties. Beyond cases falling under the EU AC, mandatory binding arbitration will remain limited with a risk that in these cases the dispute would not be solved at all. Consequently, there is no legal certainty on whether and how a double taxation dispute will be resolved in a justified case.
Ensure a level playing field for EU business	0	Costs and compliance burden per case associated with the current DTDRM will remain at the same level. Some costs, e.g. those relating to the duration of a double taxation dispute are expected to increase. Total costs of stakeholders for double taxation disputes in the EU will increase due to the increased caseload. Member States are following different approaches with respect to the practical application of agreed DTDRM (e.g. the EU-AC). and will continue to do so in the future. While some Member States achieve a balance of cases initiated vs. cases completed over the time, in other Member States a significant and continuous mismatch is encountered which results in an increasing inventory.
Ensure transparency	0	Under the baseline scenario DTDRM will remain a pure State to State procedure with the role of the taxpayer being limited to request the initiation of such a procedure and with no requirement to publish decisions. Although the EU AC includes the possibility of publishing decisions by an advisory commission, it is expected that the current reluctance to actually do so will remain. The criticism that the current DTDRM is more confidential than other judicial proceedings and being contradictory to the overall[134] increased demand and legitimate public interest for more transparency regarding companies' tax affairs will remain

[134] IFA (2015) - 69th IFA Congress in Basel, Switzerland Sept 1, Report by Philip Baker Pasquale Pistone (General Reporters), Practical protection of taxpayers' rights

6.1.2 Effectiveness of Option A i)

Objective	Effect	Explanation of impact
Ensure legal certainty	0	The experience with the EU AC shows that in a significant number of cases the procedure is not followed due to the fact that neither DTC nor the AC contain an instrument ensuring enforceability. There will continue to be no possibility for a taxpayer to enforce action of a Member State nor for one Member State to enforce action of the other Member State involved in the double taxation dispute. Instances will remain where there is no possibility for the taxpayer to have action or non-action of a Member State under an applicable DTDRM reviewed by an independent body. Option A (i) would extend the scope of mandatory resolution of double taxation disputes by recommending: (i) to start negotiation for extending the scope of EU AC beyond the area of transfer pricing disputes or (ii) to supplement bilateral DTC with an arbitration clause. However, a recommendation which would result in replacing the EU AC with a set of diverging bilateral DTDRM would even be detrimental to the current state of play. Recommendations to introduce mandatory binding arbitration and to provide for a possibility to have MS action reviewed by a court have been done in the past[135] and had a positive but rather limited effect on MS actual action. Consequently, the level of legal certainty is expected not to change significantly. For this reason the effectiveness is rated only as 'neutral' but may be negative if the recommendation would weaken the EU AC, i.e. move from one single instrument with one single approach towards a variety of procedures in the EU.
Ensure a level playing field	+	Following the best practices developed by the OECD for MAP under DTC[136] and by the EU JTPF as regards the EU AC[137] would lower the complexity and the compliance burden associated with the current DTDRM. However, a certain degree of complexity and length is inherent to State to State procedures and double taxation disputes. This

[135] The OECD MTC recommends adopting mandatory arbitration in bilateral treaties. The actual uptake by MS was, however, rather limited as currently only 14 of 370 DTC foresee mandatory binding arbitration

[136] See section I of the OECD's final report on BEPS Action 14 (Making dispute resolution more effective) http://www.oecd.org/tax/making-dispute-resolution-mechanisms-more-effective-action-14-2015-final-report-9789264241633-en.htm

[137] See e.g. JTPF report on Improving the Functioning of the Arbitration Convention, doc. JTPF/002/2015. http://ec.europa.eu/taxation_customs/resources/documents/taxation/company_tax/transfer_pricing/forum/final_report_ac_jtpf_002_2015_en_final_clean.pdf

Objective	Effect	Explanation of impact
		creates barriers to the possibility of increased efficiency by way of measures like shortening of deadlines or relief from information requirements. Furthermore, past experience indicates[138] that the effect of a recommendation on MS actual practices is not fully effective. As can also be seen from the past experience, recommendations would not ensure a homogenous uptake in MS practices. For these reasons comparing option A1 with the baseline scenario is assessed as only slightly positive.
Ensure transparency	0	Recommending applying a State to State procedure without involvement of the taxpayer and with no obligation to publish the conclusions reached will not increase the level of transparency. It is rather expected that the reluctance as regards the possibility to publish the decision of an advisory commission will not change. Option A1 will therefore not enhance trust of citizens in the public system. For these reasons comparing option A1 with the baseline scenario is rated as neutral

6.1.3 Effectiveness of Option A ii)

Objective	Effect	Explanation of impact
Ensure legal certainty	+	Option A 2 would extend the scope of mandatory resolution of double taxation disputes by recommending a referral of the case to the CJEU. The referral of double taxation disputes to the CJEU for arbitration in case MS are not able to solve the dispute by mutual agreement would, if agreed by MS, ensure that one Member State may enforce action of the other Member State involved. If adopted, it will ensure that cases which are actually referred to the CJEU will be reviewed by an independent body. There would, however, continue to be no possibility for a taxpayer to enforce action of Member States. Therefore, where none of the Member States actually refers a case to the CJEU when due, there would not be a possibility to have the case under an applicable DTDRM reviewed by an independent body. However, the AC shows that in a significant number of cases the procedure is not followed due to the fact that neither DTC nor the AC contains an instrument ensuring enforceability.

[138] Code of Conducts on the functioning of the EU AC have been communicated by the Commission and endorsed by the Council in 2004 and 2009. The 2014 monitoring of the AC revealed that some of these recommendations are actually not followed in practice. see achievements 1 and 5 of the JTPF website http://ec.europa.eu/taxation_customs/taxation/company_tax/transfer_pricing/forum/index_en.htm

Objective	Effect	Explanation of impact
		A further point to consider is that option A2 takes the form of a recommendation. Past experience shows that recommendations are sometimes actually not followed or followed only with a significant delay Option A2 would surely improve the situation but would still lack an effective enforcement mechanism. Taking the form of a recommendation would also not ensure its actual implementation in MS bilateral relations, especially in a short term period. For these reasons the level of legal certainty compared to the baseline scenario is rated as 'slightly positive'.
Ensure a level playing field	+	Under option A2 efficiency will be increased by recommending following the best practices developed by the OECD for MAP under DTC[139] and by the EU JTPF as regards the EU AC[140] for the first phase of the MAP. However, a certain degree of complexity and length is inherent to the State to State procedure and double taxation disputes and limits the possibility of increased efficiency by way of measures like shortening of deadlines or relief from information requirements. As can be seen from the past experience recommendations as regards the common application of DTDRM would not ensure a homogenous uptake in practice. Furthermore, past experience indicates[141] that the effect of a recommendation on Member States actual practices are rather limited resulting in only a 'slightly positive'.
Ensure transparency	+	Option A2 provides that if a case is submitted to arbitration the decision by the CJEU will have the same degree of transparency as other judicial proceedings at CJEU level. There will not be more transparency for double taxation disputes solved by mutual agreement. As option A2 also depends on actually being implemented in MS bilateral relations the impact compared to the baseline scenario is rated only as 'slightly positive'.

139 See section I of the OECD's final report on BEPS Action 14 (Making dispute resolution more effective) http://www.oecd.org/tax/making-dispute-resolution-mechanisms-more-effective-action-14-2015-final-report-9789264241633-en.htm

140 See e.g. JTPF report on Improving the Functioning of the Arbitration Convention, doc. JTPF/002/2015. http://ec.europa.eu/taxation_customs/resources/documents/taxation/company_tax/transfer_pricing/forum/final_report_ac_jtpf_002_2015_en_final_clean.pdf

141 Code of Conducts on the functioning of the EU AC have been communicated by the Commission and endorsed by the Council in 2004 and 2009. The 2014 monitoring of the AC revealed that some of these recommendations are actually not followed in practice. see achievements 1 and 5 of the JTPF website http://ec.europa.eu/taxation_customs/taxation/company_tax/transfer_pricing/forum/index_en.htm

6.1.4 Effectiveness of Option B

Objective	Effect	Explanation of impact
Ensure legal certainty	++	Option B implements mandatory binding arbitration by way of a directive. The scope of DTDRM with mandatory arbitration extended beyond the issues covered by the EU AC and be extended all cross-border situations subject to double taxation of business profits. The nature of the instrument as an EU directive will ensure that it is actually followed in MSs' practice. A key aspect of option B is to ensure that DTDRM in the EU are enforceable by giving the taxpayer the right to have action or non-action of a MS reviewed by its domestic court by way of implementing a default fast-track enforcement mechanism. This access to court will ensure legal certainty for all stakeholders, i.e. it ensures an obligation to resolve double taxation disputes but only in those cases where the court considers it justified, and ensured by the competent courts of each MS for cases of denied access or delayed procedure The taxpayer will also have the possibility of having an explicit denial of access to DTDRM reviewed by a court. The fact that taxpayers are notified of milestones and key steps of the procedure combined with a possibility of review by the domestic court will ensure that cases are not delayed or blocked for an unjustified reason. This certainty of having a dispute resolved within an appropriate time frame will make it less likely that taxpayers will renounce their right to initiate a MAP procedure for an audit settlement (implicit denial). As option B refers to the existing conflict rules MS DTC it creates converging approaches on interpretation of DTCs and is expected to decrease the number of disputes Compared to the baseline scenario the impact of option B is therefore rated with 'positive'.
Ensure a level playing field	++	Under Option B efficiency will be increased by ensuring that the timelines agreed in the DTDRM are actually adhered to and by adding obligations for MS to take action within a certain timeframe. The nature of the instrument as a directive will ensure that its content will be followed. The enforceability mechanisms laid down in option B is expected to mean that tax administrations will be more inclined to solve disputes before they reach the final stage. The enforceability will also ensure a homogenous uptake in the EU. The impact is therefore rated with 'positive'
Ensure	++	By providing the possibility to involve the domestic courts where the

Objective	Effect	Explanation of impact
transparency		taxpayer has doubts on whether the action or non-action of the tax administration is justified, option B will ensure the same degree of transparency as other judicial proceedings at domestic courts. The impact is therefore rated as positive.

6.1.5 Effectiveness of Option C

Objective	Effect	Explanation of impact
Ensure legal certainty	-	As Option C implements mandatory binding arbitration by way of a directive in the same way as option B the assessment as regards the DTDRM of option C is the same as for option B Option C would, however, contain an additional set of default rules on how to solve the dispute between MS in substance. Whilst conflict rules could make sense in a situation where there are no conflict rules between 2 MS already (e.g. in case where there is no DTC as e.g. at the time of the 1976 Arbitration Directive proposal) the situation today is that in the EU, bilateral relationships between MS are already nearly 100 % covered by conflict rules in the form of DTC (broadly following the OECD MTC but also to cover specific features in Member States bilateral relations). Option C would create an additional layer of conflict rules. There is the risk that this additional layer of conflict rules would create differences and inconsistencies, which could be exploited by taxpayers and Member States. Another question which arises with these additional conflict rules is whether MS would have to change their bilateral agreements, a very sensitive issue because it touches on questions of sovereignty. The risk of competing conflict rules with a risk that stakeholders arbitrate between them may even exceed the potential benefit of an improved DTDRM, For this reason and compared to the baseline scenario, legal certainty is regarded as reduced. The impact of option C is therefore rated with 'negative'.
Ensure a level playing field	+	Option C implements mandatory binding arbitration by way of a directive in the same way as option B. The assessment as regards the DTDRM contained in option C is therefore generally the same as for option B. However, the additional layer of conflict rules laid down in Option C bears the risk of causing new inefficiencies. The enforceability will also ensure a homogenous uptake in the EU. The

Objective	Effect	Explanation of impact
		impact is therefore rated with 'slightly positive'
Ensure transparency	++	By providing the possibility to involve the domestic courts where the taxpayer has doubts on whether the action of non-action of the tax administration is justified, option C will ensure the same degree of transparency as other judicial proceedings in domestic courts. The impact is therefore rated as positive.

6.1.6 Summary of the comparison of options against the objectives

Policy option / Objectives	Ensure legal certainty	Ensure a level playing field	Ensure transparency
Option 0: No policy change	0	0	0
Option A1: Adopting OECD recommendations incl. OECD mandatory binding arbitration in DTC and the EU AC Code of Conduct	0	+	0
Option A2: Introduce a referral to the CJEU for mandatory binding arbitration in the DTCs	+	+	+
Option B: Introduce enforced, effective and broader dispute resolution mechanisms	++	++	++
Option C: Comprehensive new EU Legal instrument	-	+	++

6.2 Comparison of efficiency

The comparison as regards efficiency is based on three criteria, i.e.

- cost/efforts when applying the option to double taxation disputes (**costs/efforts of application**)
- **cost of implementation** for stakeholders,

- **timing** needed for agreeing on the option at EU level

The assessment of costs and efforts for application and implementation of the options will determine whether different options are proportionate to the issues at stake.

While it is possible to qualify the different costs/efforts associated with implementing and applying the different options as well as the time needed for agreeing on them, it is hardly possible to quantify them exactly. The reason is that costs/efforts for the implementation of an administrative or legislative instrument (legislative changes, reorganisation etc.) are hard to estimate and will strongly vary between Member States. As regards the costs/efforts connected with the application of the options it is possible to qualify them but not to quantify them due to the fact they often vary depending on the complexity of issue at stake and the amount involved. With respect to the time to complete the initiative it can be assumed that the fewer and less complex issues are to be discussed, the earlier a result of the discussion can be achieved.

As far as ***efficiency*** is concerned, the following tables assess the costs and efforts or the time needed for each of the options. As regards costs/efforts of application, a comparison is made with the baseline scenario, which is in this respect reflected by the status quo. The rating used is neutral/no change to the baseline (0), slightly positive, (+), positive (++) and negative (-).

As regards implementation and timing a comparison against the baseline scenario is not possible the rating used is ++ positive if for no or very low costs/efforts or short timing, + for low costs/efforts or a medium time frame and – for significant costs/efforts or a substantial timeframe needed

6.2.1 Option 0, no change

Criteria	Effect	Explanation of impact
Cost/efforts of application	0	The costs and efforts for application under the baseline scenario are described in the section on the policy context and the problem description
Cost of implementation	./.	./.
Timing	./.	./.

6.2.2 Efficiency of Option A1

Criteria	Effect	Explanation of impact
Cost/efforts vs. expected benefit of application	0	As option A1 is largely built upon the existing instruments already functioning in the EU (the EU AC and DTC), there are no entirely new costs/efforts created for stakeholders. The costs and efforts required for applying the option are therefore unchanged regarded

Criteria	Effect	Explanation of impact
		why the impact is rated as 'neutral'
Cost of implementation	+	As option A1 is largely built upon the existing instruments already functioning in the EU (the EU AC and DTC), there is no need to create an entirely new regulation for MS. MS will however have to amend their bilateral agreements or the EU AC as a multilateral convention. Implementation on a bilateral level involves the risk of diverging approaches. Implementation costs for taxpayers are limited as the recommendation is built on the existing and established system. The impact as regards costs of implementation is rated as 'slightly positive'
Timing	++	Compared to other EU legal instruments, a recommendation is expected to be easier to agree. Efficiency as regards timing is therefore rated as 'positive'

6.2.3 Efficiency of Option A2

Criteria	Effect	Explanation of impact
Cost/efforts of application	0	As regards the initiation of the procedure, the costs for taxpayers and tax administrations remain unchanged. Additional costs will however arise with respect to a referral of a case to the CJEU. These costs should however be comparable to the costs arising for the arbitration mechanism currently set out in the AC. The efficiency of option A2 with respect to this criteria is therefore rated as 'neutral'
Cost of implementation	-	Option A2 requires MS to renegotiate their existing bilateral agreements or to agree on a new multilateral agreement which assigns the role of an arbitrator to the CJEU. The implementation is therefore expected to create a significant amount of costs. For taxpayers the costs of implementation will be rather limited as the general procedure, i.e. requesting the initiation of a MAP and if no agreement is reached, referring the case to an arbitration body does not change. An additional point to consider under this option are the costs which will arise for putting the CJEU in a position to act as arbitrator and to cope with the high caseload expected. The efficiency of option A2 with respect to this criteria is rated as 'negative'
Timing	+	Compared to other EU legal instruments, a recommendation is expected to be easier to agree. As the system suggested is new, agreement will have to be reached on the exact functioning. In addition, time will be needed to put the CJEU in a position to act as an arbitrator. Efficiency as regards timing is therefore rated as only 'slightly positive'

6.2.4 Efficiency of Option B

Criteria	Effect	Explanation of impact
Cost/efforts of application	0	As regards the costs for initiation of the procedure, the costs and efforts for tax administrations and taxpayers remain unchanged. The same applies for cases which have to go to arbitration. In cases of a denial of access to the procedure and in cases where the procedure is not followed a referral to the domestic court is envisaged. The costs arising when involving the court are, however, counterbalanced with the costs arising for tax administrations in case of long lasting procedures and double taxation remaining. In comparison with the baseline scenario the option is therefore rated as neutral
Cost of implementation	+	Under option B MS would be required to provide access to the court in case of denial of access or doubts on the correct application of a DTDRM. While such procedures are already practice in some MS it would have to be implemented by other MS and therefore create costs for implementation. The same applies with respect to the referral of the case to the appointing authority set out under option B. Although such a system is known in other areas it would be rather new in the context of DTDRM and would cause costs/efforts for implementation. As regards the establishment of the appointing authority, most of its tasks like maintaining the list of arbitrators and the CVs are already done at a central level. The task of appointing an arbitrator from a list would have to be added but would be of a rather limited nature. For this reason the costs/efforts for implementation are rated as 'slightly positive'.
Timing	+	Generally, a directive is expected to be more difficult and time consuming to agree. However, given that the procedure in option B builds up on existing systems like the AC is expected to reduce the time expected for its agreement. The time needed is therefore rated as 'slightly positive'.

6.2.5 Efficiency of Option C

Criteria	Effect	Explanation of impact
Cost/efforts of application	-	As regards the costs and efforts needed for applying the DTDRM itself, the assessment of option C is equal to option B above. However, option C sets out an additional layer of conflict rules. while these conflict rules would be beneficial in a situation where there are no conflict rules yet, they are expected to be detrimental when there are already conflict rules as it is the case in the EU where nearly all bilateral relationships are covered by DTCs. MS and taxpayers would have to coordinate these different sets of rules which would cause additional and unnecessary costs and efforts by all stakeholders. For this reason the option is assessed as 'negative' in comparison to the baseline scenario.

Criteria	Effect	Explanation of impact
Cost /efforts of implementation	-	As regards the implementation of the procedure for dispute resolution the assessment of option C is equal to option B. However, the implementation of the conflict rules laid down in option C would create additional costs of implementation. In addition MS may have to renegotiate and adjust their bilateral agreements to align them with the new conflict rules. Given the costs and efforts needed for implementing the option it is rated as 'negative'.
Timing	-	The assessment as regards the procedure for solving a dispute is equal to option B. However, it is expected that the development and agreement of complex substance based conflict rule will take considerable time. The time needed is therefore rated as 'negative'.

6.2.6 Summary

Objectives / Policy option	Cost/efforts of application	Cost /efforts of implementation	Timing
Option 0: No policy change	0	./.	./.
Option A1: Adopting OECD recommendations incl. OECD mandatory binding arbitration in DTC and the EU AC Code of Conduct	0	+	++
Option A2: Introduce a referral to the CJEU for mandatory binding arbitration in the DTCs	0	-	+
Option B: Introduce enforced, effective and broader dispute resolution mechanisms	0	+	+
Option C: Comprehensive new EU Legal instrument	-	-	-

6.3 Coherence with the Commission's overall objectives but also with the international developments

All options go hand in hand with the OECD's Action Plan on Base Erosion and Profit Shifting (BEPS), and in particular Action 14 on improving dispute resolution

mechanism. All options are compatible with these developments and complementing the OECD works. All options are assessed as 'positive'.

As regards coherence with the Commissions objectives, all options are complementing the ongoing Commission initiative on Anti-Tax Avoidance Package (ATAP) and the Common Consolidated Corporate Tax Base (CCCTB) and are therefore assessed as 'positive'

All options will also be in line with the Charter of Fundamental Rights, in particular concerning protection of right to property (Article 17) and right to an effective remedy (Article 47)[142].

6.4 Comparison of options (summary)

Criteria / Policy option	Effectiveness	Efficiency	Coherence
Baseline scenario: No policy change	0	0	0
Option A1: Adopting OECD recommendations incl. OECD mandatory binding arbitration in DTC and the EU AC Code of Conduct	0	+	++
Option A2: Introduce a referral to the CJEU for mandatory binding arbitration in the DTCs	+	0	++
Option B: Introduce enforced, effective and broader dispute resolution mechanisms	++	+	++
Option C: Comprehensive new EU Legal instrument	+	-	++

6.5 Preferred Option

The recommendations described in options A1and A2 would certainly contribute to an increased efficiency of DTDRM in place if followed by Member States. However, experience shows that recommendations are not always followed in practice[143] especially if this is not monitored by an external party. Similar considerations apply to the recommendation to supplement existing DTDRM in DTC with mandatory binding arbitration. The long duration normally encountered for (re)-negotiation of DTC leads to

[142] See Annex K for a detailed assessment of impacts on fundamental rights.

[143] See for example recommendation in 6.3 b the Code of conduct on the EU AC recommending to keep the taxpayer informed about the process of the procedure (COM(2009) 472 final) and NGMs complaint that this is often not done in practice)see paragraph 2.13 doc. JTPF/002/2013

the conclusion that the uptake of mandatory binding arbitration will take considerable time. The multilateral instrument currently developed at the level of the OECD with a limited number of States (including some but not all Member States) may help to accelerate this process but may not result in one common system but rather in bilateral agreements with diverging procedures. In this respect an extension of the EU AC to other areas of taxation would be a preferable approach as it would result in one common instrument applicable to all EU Member States. However, the impact of option A1 and A2 as regards enforceability would be similar to the current impact of the EU AC.[144] This option would not be proportionate to the problems at hand in a sense that it is not expected to effectively address the problems encountered, i.e. significantly changes the situation.

An agreement between Member States to refer to the CJEU double taxation disputes in which no mutual agreement can be reached may address this issue. However, the CJEU has not yet decided about such a case in substance or as regards the question whether such a case would fall under the CJEU's jurisdiction. In addition, the current number of cases pending longer than provided for in the EU AC and the expected increase in short and mid-term would create a significant caseload for the CJEU. Option A2 would need to be implemented in MS bilateral agreements and the CJEU would have to be put in a position to actually act as an arbitrator and manage the cases organisationally. While a referral to the CJEU itself would in general be proportionate to the problem, proportionality is reduced by the costs/efforts required for the implementation and the fact that as an EU recommendation, actual uptake by MS is not ensured.

Option C appears attractive since the DTDRM including mandatory binding arbitration could be designed in the most efficient and effective way, access to domestic court could be ensured and its scope could cover all instances where double taxation should be eliminated. Its nature of an EU legislative instrument would ensure a homogenous uptake in the EU. However, in addition to the concern that the development of such an instrument would probably take considerable time, i.e. would not be applicable in the short term, Option C also ignores the fact that existing DTDRM work satisfactorily in a significant number of cases. In summary, **Option C is considered as going beyond what is actually needed to achieve the objectives outlined above, improving the DTDRM for the instances obtained where they do not work effectively and efficiency.** It is therefore not proportionate to the problems encountered.

The preferred option is Option B. This Option is superior to others because it would supplement the existing DTDRM and improve them by adding a last resort mechanism for cases in which Member States are not able or willing to mutually agree on how to solve a double taxation dispute. It respects the interest of Member States and taxpayers in cases of doubts as regards the DTDRM by referring the respective issues to a national court. The combination of existing DTDRM with Option B achieves a similar result as Option C but by use of a substantially lighter legislative instrument. Moreover, the arbitration procedure as suggested and modelled on the EU Arbitration Convention has the potential of increasing the effectiveness of the pre-arbitration procedures; the fact that

[144] See section 2.3 above

there is a mandatory arbitration for the cases where no mutual agreement could have been reached, seems to have a positive side-effect of tax authorities aiming to conclude the cases before they go to arbitration[145]. A further and important aspect is that the mechanisms set out in Option B only kick in in cases where the existing mechanisms (the EU AC or DTDRM in DTC) do not work as intended. All these aspects make option B proportionate to the problem.

In the public consultation stakeholders regard option A1 less positive. Views on A2) and B are more positive and most positive for C. However, combining the views 'will fully meet the objective' and 'will partly meet the objective' together, the rating of option B and C is similar. The same result is achieved when evaluating the responses for companies only.

7. MONITORING AND EVALUATION

The Commission will monitor the implementation of the policy in cooperation with Member States. The relevant information will be gathered primarily by Member States.

The current monitoring of the AC a the level of the EU Joint Transfer Pricing Forum will be extended to all cases of double taxation disputes in cross-border situation covered by the new legal instrument and gathered on a yearly basis. The following information collected will enable the Commission to assess whether the objectives are met:

- number of initiated/ closed/ pending across the EU
- duration of DTDRM including the reasons for not adhering to the timelines
- number of instances where access was denied by a MS including justification
- amounts of tax involved in cases (in general and for those who go to arbitration)
- number of instances of arbitration requested

As statistical data is already collected and should continue to be collected on a yearly basis, it is expected that the costs of such activity would remain unchanged for MS and for the Commission. Annex L offers a template to be used for collection of the above mentioned monitoring data.

5 years after the implementation of the instrument, the Commission will evaluate the situation with double taxation resolution in cross-border situations for companies in the EU with respect to the objectives and the overall impacts on companies and the internal market. The following will be assessed:

- how the number of incoming cases increased
- whether the number of cases solved increased compared to the past
- whether the number of cases which went to arbitration increased
- whether and how the number of cases taking longer than 2 years for reasons not provided for in the instrument is reduced significantly (50%)

[145] OECD BEPS Action 14 – Public Discussion contributions, p. 24;

In this context, data will be collected from business on their actual cases of double taxation through Commission expert groups or similar consultation. The data collected from stakeholders will be mainly information which is not possible to be collected from MS (e.g. in how many cases no remedies were taken). The evaluation will consider international multilateral developments in the area of dispute resolution, for instance at the level of the OECD[146] or the UN[147].

[146] OECD BEPS Action 14 "Making dispute resolution more effective" and follow up action.
[147] UN Tax Committee (2015)

8. GLOSSARY

Aggressive tax planning (see also: Tax planning)	In the Commission Recommendation on aggressive tax planning (C(2012) 8806 final), aggressive tax planning is defined as *'taking advantage of the technicalities of a tax system or of mismatches between two or more tax systems for the purpose of reducing tax liability. Aggressive tax planning can take a multitude of forms. Its consequences include double deductions (e.g. the same loss is deducted both in the state of source and residence) and double non-taxation (e.g. income which is not taxed in the source state is exempt in the state of residence'*.
APA / Advance pricing agreements	Means any agreement, communication or any other instrument or action with similar effects, including one issued in the context of a tax audit, given by, or on behalf of, the government or the tax authority of one or more Member States, including any territorial or administrative subdivision thereof, to any person that determines in advance of cross-border transactions between associated enterprises, an appropriate set of criteria for the determination of the transfer pricing for those transactions or determines the attribution of profits to a permanent establishment.
Alternative Dispute Resolution (ADR)	This term refers to any means of settling disputes outside of the courtroom. ADR typically includes early neutral evaluation, negotiation, conciliation, mediation, and arbitration.
Arbitration	According to the OECD glossary of tax terms, this term is used for the determination of a dispute by the judgment of one or more persons, called arbitrators, who are chosen by the parties and who normally do not belong to a normal court of competent jurisdiction. A specific clause on arbitration is provided for by the OECD Model Tax Convention (Treaty) under Article 25 of the said OECD Model Tax Convention (Treaty).
Associated Enterprises	According to the OECD glossary of tax terms, generally speaking, enterprises are associated where the same persons participate directly or independently in the management, control or capital of both enterprises, i.e. both enterprises are under common control.
ATAP	Anti-Tax Avoidance Package, proposed by the European Commission on 28 January 2016 It is a package of actions which includes legally-binding anti-avoidance measures necessary to reduce aggressive tax planning. It is part of the Action Plan on Corporate Taxation for fairer, simpler and more effective corporate taxation in the EU.
BEPS	Base Erosion and Profit Shifting. This acronym refers to tax planning strategies that exploit gaps and mismatches in tax rules to artificially shift profits to low or no-tax locations where there is little or no economic activity, resulting in little or no overall corporate tax being paid. The OECD and the EU have developed specific actions to give countries the tools they need to ensure that profits are taxed where economic activities generating the profits are performed and where value is created, while at the same time giving enterprises greater certainty by reducing disputes over the application of international tax rules, and

	standardising requirements.
Common Consolidated Corporate Tax Base (CCCTB)	This term and acronym refer to a policy proposal of the European Commission consisting of the harmonization of the tax base of corporations at the EU level. It also contemplates consolidation and apportionment of the tax base of corporate groups.
Company, enterprise, corporation, undertaking, entity, business, firm	Refers to an economic entity doing business
Country-By-Country Reporting (CBCR)	A report on tax-related information that large multinational entities (those with consolidated revenues of at least EUR 750 million) have to submit to the jurisdictions in which they do business on an annual basis.
Corporate Income Tax (CIT)	Corporate Income Tax Direct taxes levied on the net profits of corporations (gross income minus allowable tax reliefs) of enterprises. It also covers taxes levied on the capital gains of enterprises (source: OECD).
DAC / Directive on Administrative Cooperation (DAC)	Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation
Data Collection 2016	Consulting procedure launched by the Commission in March 2016 repectively with the EU Joint Transfer Pricing Forum (EU JTPF) and the Platform for tax good governance, two expert groups of the Commission, through a questionnaire and aimed at collecting data on the scale and impact of double taxation and direct experience on the current dispute resolution mechanisms
Double Taxation	In the Commission Communication on Double Taxation in the Single Market (C(2011)712 final), double taxation is defined as the imposition of comparable taxes by two (or more) tax jurisdictions in respect of the same taxable income or capital. Although double taxation can also occur in purely domestic situations, in particular as far as it concerns economic double taxation, this Consultation focuses on cross-border situations only. Traditionally, double taxation is divided into two kinds, juridical double taxation and economic double taxation. In the case of juridical double taxation two comparable taxes are applied to the same taxpayer in respect of the same income or capital. Generally the expression economic double taxation is used when different taxpayers are taxed in respect of the same income or capital.
Double Taxation dispute	The term is used for an instance in which two States claim the right to tax a certain item of income despite the fact that there is a double taxation convention in place. The term is used irrespective of whether the respective MS are aware of such a dispute, i.e. whether the affected taxpayer did inform the State (s) involved.
DTC / Double Tax	A bilateral agreement between two countries under that regulates each countries rights to taxation on the income generated within

Convention (Treaties)	their territory. The main objective of a DTC is to avoid the double taxation of persons who have income in both countries.
DTDRM	Double Taxation Dispute Resolution Mechanism(s)
EU	European Union
EU Arbitration Convention, EU AC, AC	The term "Arbitration Convention" shall be construed hereafter as the Convention 90/436/EEC on the elimination of double taxation in connection with the adjustment of profits of associated enterprises, which is a multilateral instrument establishing a procedure to resolve disputes where double taxation occurs between enterprises of different Member States as a result of an upward adjustment of profits of an enterprise of one Member State (transfer pricing and allocation of profit to Permanent Establishments (PEs)).
FAS	Financial Accounting Standards
FDI	Foreign Direct Investment
FIN 48	Financial Accounting Standards Board (FASB) Interpretation No. 48, *i.e.* an official interpretation of United States accounting rules that requires businesses to analyze and disclose income tax risks
G20	Group of twenty
GAAP	Generally Accepted Accounting Principles
GDP	Gross Domestic Product
IAS	International Accounting Standards
ICC	International Chamber of Commerce
IFRS	International Financial Reporting Standards
IMF	International Monetary Fund
IP	Intellectual Property
MAP	Mutual Agreement Procedure
MCAA	Multilateral Competent Authority Agreement developed by the OECD for the automatic exchange of Country-by-Country reports
MNE	Stands for Multinational Enterprise. In this document, the MNE is deemed to be the ultimate parent company of an MNE group. An EU MNE is an MNE established in the EU. A non-EU MNE is an MNE established in a third country.
MNE group	Companies / entities / undertakings comprised in a group controlled by an MNE, which altogether form an MNE group An EU MNE group is a group whose ultimate MNE parent is established in the EU. A non-EU MNE group is a group whose ultimate MNE parent is established in a third country.
Model Tax	According to the OECD glossary of tax terms, a model tax

Conventions, MTC (treaties)	convention (treaty) is designed to streamline and achieve uniformity in the allocation of taxing right between countries in cross-border situations. Model tax treaties developed by OECD and UN are widely used and a number of countries have their own model treaties. When it is referred to '*Model Tax Convention(s)*' hereafter, it should be narrowly construed as the OECD Model Tax Convention(s).
Multilateral Instrument or Agreement	A written agreement between three or more sovereign States establishing the rights and obligations between the parties. It can refer hereafter to a specific clause in a multilateral convention (treaty) or to the multilateral convention (treaty) itself.
Mutual Agreement Procedure	A means through which tax administrations consult to resolve disputes regarding the application of double tax conventions. This procedure, described and authorized notably by Article 25 of the OECD Model Tax Convention, can be used to eliminate double taxation that could arise from a transfer pricing adjustment.
NGO	Non-Government Organisation
OECD	Organisation for Economic Co-operation and Development
PE /Permanent establishment	A fixed place of business through which the business of an enterprise is wholly or partly carried on (Article 5, OECD Model Convention on Income and on Capital). This definition is used for tax purposes.
Public Consultation 2010	Consultation on Double Tax Conventions and the Internal Market: factual examples of double taxation cases launched by the Commission from 27/04/2010 to 30/06/2010
Public Consultation 2016	Public Consultation on Improving Double Taxation Dispute Resolution Mechanisms launched by the Commission from 16.02.2016 to 10.05.2016
R&D	Research and development
SME	Small and Medium-sized Enterprises
Tax avoidance	According to the OECD glossary of tax terms, tax avoidance is defined as the arrangement of a taxpayer's affairs in a way that is intended to reduce his or her tax liability and that although the arrangement may be strictly legal is usually in contradiction with the intent of the law it purports to follow
Tax evasion	According to the OECD glossary of tax terms, tax evasion is defined as illegal arrangements where the liability to tax is hidden or ignored. This implies that the taxpayer pays less tax than he or she is legally obligated to pay by hiding income or information from the tax authorities
Tax planning (aggressive)	According to the OECD glossary of tax terms, tax planning is an arrangement of a person's business and/or private affairs in order to minimize tax liability.
Tax ruling	A document which entails any communication or any other instrument or action with similar effects, by or on behalf of the

	Member State regarding the interpretation or application of tax laws
Transfer pricing	Transfer pricing refers to the terms and conditions surrounding transactions within a multi-national company. It concerns the prices charged between associated enterprises established in different countries for their inter-company transactions, i.e. transfer of goods and services. Since the prices are set by non-independent associates within the multi-national, it may be the prices do not reflect an independent market price. This is a major concern for tax authorities who worry that multi-national entities may set transfer prices on cross-border transactions to reduce taxable profits in their jurisdiction.
Treaty on the Functioning of the European Union (TFEU)	This term and acronym refer to one of the Treaties in which the EU is founded. It organises the functioning of the Union and determines the areas of, delimitation of, and arrangements for exercising its competences
UN	United Nations
UNCTAD	United Nations Conference on Trade and Development
UNCITRAL	United Nations Commission on International Trade Law
VAT	Value Added Tax
WTO	World Trade Organisation

9. REFERENCES

Allen & Overy,"Multinational tax practices and growing scrutiny" (2014) - http://www.allenovery.com/SiteCollectionDocuments/Multinational-tax-practices-face-growing-scrutiny.pdf

Altman, Z. D. (2005) Dispute Resolution under Tax Treaties, IBFD

Bakker A. J. (2010) Tax Risk Management: From Risk to Opportunity, IBFD

Brooks, K. and Krever, R. (2015) The Troubling Role of Tax Treaties, In Tax Design Issues Worldwide, Vol. 51 (Eds, Geerten, M., Michielse, M. and Thuronyi, V.) Kluwer Law International, Alphen aan den Rijn, pp. 159-178

Cole, R. T. and Maher, D. J., Jr (2012) Avoiding Double Taxation Without Competent Authority Relief, *Tax Management International Journal*, 41, 71-79.

Council Directive 2003/49/EC, of 3 June 2003 on a common system of taxation applicable to interest and royalty payments made between associated companies of different Member States

Council Directive 2003/123/EC of 22 December 2003 amending Directive 90/435/EEC on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States

Bertolini M.S. "Mandatory Arbitration Provisions within the Modern Tax Treaty Structure - Policy Implications of Confidentiality and the Rights of the Public to Arbitration Outcomes" *ExpressO* (2010) Available at: http://works.bepress.com/michelle_bertolini/1/

Bertolini M.S. and Weaver P.Q., Mandatory Arbitration within Tax Treaties: A Need for a Coherent International Standard, (February 2012). 2012 American Taxation Association Midyear Meeting: JLTR Conference p.20

Bloomberg BNA *Transfer Pricing Report*, March SEC Roundup (04/02/2015, p.1491), November SEC Roundup (11/12/2015, p. 891), August SEC Roundup (09/03/2015, p.443), Securities and Exchange Commission Financial Statements Filed during October 2015, detailing Transfer Pricing Issues (11/12/2015), Securities and Exchange Commission Financial Statements Filed during January 2016 , detailing Transfer Pricing Issues (03/17/2016)

Bradley C., Bryan L. and Smit S., Managing the Strategy Journey, Mc Kinsey Quaterly July 2012

Brown, P. A. (2015) 'Development of the 'North American model' for Arbitration of tax treaty disputes', paper given at the conference on International Tax Disputes: Improving MAP and Mandatory Dispute Settlement, Institute for Austrian and International Tax Law, Vienna

Bühring-Uhle C., Arbitration and Mediation in International Business: Designing procedures for effective Conflict Management app. 1 at 20

Burnett, Chloe, International Tax Arbitration. Australian Tax Review, Vol. 36, No. 3, pp. 173-190, 2007; Sydney Law School Research Paper No. 08/31 page. 188

Chaisse J., The E15 Initiative, ICTSD and World Economic Forum, "Strengthening the Global Trade and Investment System for Sustainable Development – International Investment Law and Taxation: from coexistence to cooperation –January 2016

Choudhury H. and Owens J. "Bilateral Investment Treaties and Bilateral Tax Treaties", International Tax Investment Center Issues Paper, June 2014

Christians, Allison, How Nations Share (April 19, 2011). Indiana Law Journal, Vol. 87, 2011; Univ. of Wisconsin Legal Studies Research Paper No. 1159. Available at SSRN: http://ssrn.com/abstract=1815305 or http://dx.doi.org/10.2139/ssrn.1815305

D'Alessandro, V. (2009) Improving the Resolution of International Tax Disputes, *Tax Notes International*, 55, 1153-65.

Ernst & Young (2003), Transfer Pricing 2003 Global Survey: Practices, Perceptions, and Trends in 22 Countries Plus Tax Authority Approaches in 44 Countries

Ernst & Young (2010) *Global Transfer Pricing Survey. Addressing the challenges of globalization.*

Ernst & Young (2013) *Navigating the choppy waters of international tax. 2013 Global Transfer Pricing Survey.*

European Commission: Consultation paper: Introduction of a mechanism for eliminating double imposition of VAT in individual cases, TAXUD/D1/5 January 2007 and Report on the outcome of the consultation

European Commission (2009). Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee on the work of the EU Joint Transfer Pricing Forum in the period March 2007 to March 2009 and a related proposal for a revised Code of Conduct for the effective implementation of the Arbitration Convention (90/436/EEC of 23 July 1990) - COM (2009) 472 {SEC(2009) 1168} {SEC(2009) 1169}

European Commission (2010-2011): Study on inheritance taxes in the EU Member States and possible mechanisms to resolve problems of double inheritance taxation in the EU
http://ec.europa.eu/taxation_customs/resources/documents/common/consultations/tax/2010/08/inheritance_taxes_report_2010_08_26_en.pdf

European Commission (2011). Summary Report of the Responses Received to the Commission's Consultation on Double Taxation Conventions and the Internal Market: Factual Examples of Double Taxation Cases
http://ec.europa.eu/taxation_customs/resources/documents/common/consultations/tax/summary_report_consultation_double_tax_conventions_en.pdf

European Commission (2013). JTPF Report on Transfer Pricing Risk Management, doc JTPF/007/2013

http://ec.europa.eu/taxation_customs/resources/documents/taxation/company_tax/transfer_pricing/forum/jtpf/2013/jtpf_007_2013_en.pdf

European Commission (2013). Discussion paper on ways to improve the functioning of the AC , JTPF/002/2013/EN http://ec.europa.eu/taxation_customs/resources/documents/taxation/company_tax/transfer_pricing/forum/jtpf/2013/jtpf_002_2013_en.pdf

European Commission (2013) Improving the 'second phase' of the Arbitration Convention: summary of suggestions made by members of advisory commissions. DOC: JTPF/010/2013/EN, submitted to the Joint Transfer Pricing Forum.

European Commission (2014). Report of the Commission Expert Group on Taxation of the Digital Economy

European Commission (2015). EU Joint Transfer Pricing Forum, Statistics on Pending MAPs under the EU Arbitration Convention http://ec.europa.eu/taxation_customs/taxation/company_tax/transfer_pricing/forum/index_en.htm

European Commission (2015). Communication from the Commission to the European Parliament, the Council; A Fair and Efficient Corporate Tax System in the European Union: 5 Key Areas for Action (Action Plan for a Fair and Efficient Corporate Tax System in the EU), COM(2015) 302 final, Brussels https://ec.europa.eu/priorities/sites/beta-political/files/com_2015_302_en.pdf

European Commission (2015). EU Justice Scoreboard (http://ec.europa.eu/justice/effective-justice/files/justice_scoreboard_2015_en.pdf)

European Commission (2015). Commission Staff Working Document on Corporate Income Taxation in the European Union, Brussels, Belgium.

European Commission (2015). EU Joint Transfer Pricing Forum: Final Report on Improving the Functioning of the Arbitration Convention. Brussels, Belgium.

European Commission (2015). EU Joint Transfer Pricing Forum: Statistics on Pending Mutual Agreement Procedures (MAPs) under the Arbitration Convention at the end of 2013. Brussels, Belgium.

European Commission (2015): Expert Group Reports on "*Ways to tackle cross-border tax obstacles facing individuals within the EU*" (http://bookshop.europa.eu/en/ways-to-tackle-inheritance-cross-border-tax-obstacles-facing-individuals-within-the-eu-pbKP0415905/?CatalogCategoryID=dnkKABstlNQAAAEjLpEY4e5L) and "*Ways to tackle inheritance cross-border tax obstacles facing individuals within the EU*" *(*http://bookshop.europa.eu/en/ways-to-tackle-inheritance-cross-border-tax-obstacles-facing-individuals-within-the-eu-pbKP0415905/?CatalogCategoryID=dnkKABstlNQAAAEjLpEY4e5L*)*

European Commission (2015): JTPF report on Improving the Functioning of the Arbitration Convention, doc. JTPF/002/2015

European Commission (2016) Anti Tax Avoidance Package
http://ec.europa.eu/taxation_customs/taxation/company_tax/anti_tax_avoidance/index_en.htm

European Commission (2016): Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee on an action plan on VAT Towards a single EU VAT area - Time to decide COM(2016) 148 final, Brussels
http://ec.europa.eu/taxation_customs/resources/documents/taxation/vat/action_plan/com_2016_148_en.pdf

European Commission (2016). EU Justice Scoreboard (http://ec.europa.eu/justice/effective-justice/files/justice_scoreboard_2016_en.pdf)

European Commission . Transfer Pricing and the Arbitration Convention. Available at http://ec.europa.eu/taxation_customs/taxation/company_tax/transfer_pricing/arbitration_convention/index_en.htm

European Convention 90/436/EEC on the elimination of double taxation in connection with the adjustment of profits of associated enterprises**:** (1990, 90/436/EEC, "European Arbitration Convention"). Official Journal L 225 , 20/08/1990 P. 0010 - 0024 http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:41990A0436:en:HTML

European Parliament – Committee of Economic and Monetary Affairs (2015), Draft Report with recommendations to the Commission on Bringing transparency, coordination and convergence to Corporate Tax policies in the Union (2015/2010(INL)) - Rapporteurs: Anneliese Dodds, Luděk Niedermayer

European Union (2009). The Charter of Fundamental Rights of the EU, Brussels, Belgium.

European Union (2007). Treaty on the Functioning of the European Union, Brussels

Farah, E., Mandatory Arbitration of International Tax Disputes: A Solution in Search of a Problem (March 18, 2008). Florida Tax Review, Vol. 9, No. 8, 2009

Financial Times, US companies warn tax avoidance crackdown will hit earnings 29/03/2016 http://www.ft.com/intl/cms/s/0/b6f04f72-f12c-11e5-aff5-19b4e253664a.html#axzz4AuMH4pbl

French Ministry of Economy and Finance (2013). Note IGF 2012-M-032-03, "*Mission de comparaisons internationales sur la lutte contre l'évasion fiscale via les échanges économiques et financiers intra-groupe*"; Nicolas Colin, Pierre Painault and Nathanaël Maison-Schuler under the supervision of François Auvigne, Mars 2013

Ganguly M., Tribunals and taxation: an investigation of arbitration in recent US Conventions. Wisconsin International Law Journal 10/11/2012 p.744

Gildemeister A.H.; Arbitration of Tax Treaty Disputes Article from:TDM 5 (2007), in Taxation
http://tax-arbitration.com/Gildemeister%20-%20Tax%20Treaty%20Arbitration%20%28TDM%29

Green R.A., Antilegalistic Approaches to Resolving Disputes Between Governments: A Comparison of the International Tax and Trade Regimes (1998 Cornell Law Faculty Publication Paper 939)

Hadari, Y. (2009) Compulsory Arbitration in International Transfer Pricing and Other Double Taxation Disputes. Available at SSRN: http://ssrn.com/abstract=1483621

Hearson, M, *Is tax treaty arbitration really a bad thing for developing countries?.* Retrieved 02 23, 2014, (2013,10 22), Tax, Development, and international Relations: http://martinhearson,wordpress.com/2oi3/io/22/is-tax- treaty-, arbitration-really-a-bad-thing-for-developing-countries/

Huibregtse S. and Valutyte I.,A Post-BEPS Primer for Boards: Staying in Control of Transfer Pricing Risks 24 Transfer Pricing Report 1131 01/07/2015

IASB- International Accounting Standards Board (IFRS Interpretations Committee) (2015)- Draft interpretation "Uncertainty over Income Tax Treatments"

IFA (2015) - 69th IFA Congress in Basel, Switzerland Sept 1, Report by Philip Baker Pasquale Pistone (General Reporters), Practical protection of taxpayers' rights

IMF (2014). IMF Policy Paper: Spillovers in International Corporate Taxation. IMF publications, Washington D.C.

Internal Revenue Service, (2013a, New Mandatory Arbitration *with Germany, Belgium, Canada, and* France, Retrieved 02 23, 2014, from IRS Website: http://www.irs.gov/ Businesses/International-Business/Mandatory-Arbitration -with-Germany

Irish C.H Private and Public Dispute Resolution in International Taxation. November 30, 2011 Contemporary Asia Arbitration Journal, Vol. 4, No. 2, pp. 121-144, 2011

Jogarajan, S., Stamp, Seligman and the drafting of the 1923 Experts' Report on Double Taxation, World tax journal : WTJ.- Amsterdam : IBFD, ISSN 1878-4917, ZDB-ID 25208263. - Vol. 5.2013, 3, p. 368-392 October 2013

Kollmann, J., Koch, P., Majdanska, A. and Turcan, L. (2015) Arbitration in International Tax Matters, *Tax Notes International* 77: 1189-95

Kwatra G.K., 'Arbitration in International Tax Disputes: A New Approach', 5 J. Int. Arb. 151, 161. (Journal of International Arbitration)

Lang M. and Owens J. (Editors), International Arbitration in Tax Matters. IBFD January 2016

Lejour A., The foreign investment effects of tax treaties, CPB Netherlands Bureau for Economic Policy Analysis – Oxford University Centre for Business Taxation, Working paper series 14/03 – February 2014

Lennard, M. (2013). TP arbitration for developing countries: Benefits and burdens. *International lax Review, 24* (ft), 19

Lindencrona, G. and Mattsson, N. (1981) *Arbitration in Taxation* Kluwer, Deventer.

Litsky D., Kumar S. and Lesprit E., Strategic considerations for tax controversy risk management and double taxation avoidance, International tax review, 22 March 2016

Lodin, S.-O. (2014) 'The Arbitration Convention in Practice - Experiences', *Interfax*, 42, 173175.

Madere G. International Pricing: Allocation Guidelines and Relief from Double Taxation. In: *Texas International Law Journal*. 1975. Iss. 10, pp. 108-124

Maktouf L. Resolving International Tax Disputes through Arbitration L Arbitration International 1988 4(1):32-5110.1093/arbitration/4.1.32

Markham M., The Resolution of Transfer Pricing Disputes through Arbitration, Intertax, Volume 33, Issue 2, 2005

Martens J. "France and BEPS: A Changing Transfer Pricing Landscape, Expert Guides 30/09/2015 https://www.expertguides.com/articles/france-and-beps-a-changing-transfer-pricing-landscape/arvkwkwv

McDaniel, P. R. (2001) Trade and Taxation, *Brooklyn Journal of International Law*, *26*,1621.

Mc Dermott Will & Emer International taxation controversy: the coming storm, 17 March 2014

McIntyre, M. J., Comments on the OECD Proposal for Secret and Mandatory Arbitration of International Tax Disputes. Wayne State University Law School Research Paper No. 07-05; Arbitration of International Tax Disputes, March 24, 2006. Available at SSRN: http://ssrn.com/abstract=895633

OECD (2007). Improving the Resolution of Tax Treaty Disputes (Report adopted by the Committee on Fiscal Affairs on 30 January 2007). OECD Publishing, Paris.

OECD (2010), OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations 2010, OECD Publishing, Paris.

OECD (2013), Action Plan on Base Erosion and Profit Shifting. OECD Publishing, Paris.

OECD (2014). Discussion Draft on Transfer Pricing Documentation and CbC Reporting: Public Consultation. OECD Publishing, Paris.

OECD (2014). Guidance on Transfer Pricing Documentation and Country-by-Country Reporting. OECD Publishing, Paris. OECD Publishing, Paris.

OECD (2014). OECD Model Tax Convention on Income and on Capital: An overview of available products.

OECD (2015), *Model Tax Convention on Income and on Capital 2014 (Full Version)*, OECD Publishing, Paris

OECD (2015). BEPS – Frequently asked questions. Top 10 FAQs about BEPS. Available at http://www.oecd.org/ctp/beps-frequentlyaskedquestions.htm#background

OECD (2015). Public Discussion Draft on BEPS Action 14: Make Dispute Resolution Mechanisms More Effective. OECD Publishing, Paris.

OECD (2015), Making Dispute Resolution Mechanisms More Effective, Action 14 - 2015 Final Report, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris

Pit, H. M. (2014) Arbitration under the OECD Model Convention: Follow-up under Double Tax Conventions: An Evaluation, *Intertax*, *42*, 445-469.

Pit, H. M. (2015) Improving the Arbitration Procedure under the EU Arbitration Convention, *EC Tax Review.* 1: 15-33, 2: 78-95.

Polanco L.R., International Arbitration in times of change: fairness and transparency in Investor-State Dispute. Proceedings of the Annual Meeting American Society of International Law Vol 104 2010

PWC Global tax transparency and risk management – The new landscape promtps changes to operations, strategy and budgets (September 2015)

Riza L. Taxpayers' Lack of Standing in International Tax Dispute Resolutions: An Analysis Based on the Hybrid Norms of International Taxation Pace Law Review Volume 34 Issue 3 Summer (July) 2014 p 17

Sidhu, P. K. (2014) Is the Mutual Agreement Procedure Past Its "Best-Before Date" and Does the Future of Tax Dispute Resolution Lie in Mediation and Arbitration?, *Bulletin for International Taxation,* 68, 590-605.

UNCITRAL – United Nations Commission on International Trade Law – UNCITRAL Arbitration Rules (2014) – Available at : http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules-2013/UNCITRAL-Arbitration-Rules-2013-e.pdf

UNCITRAL – United Nations Commission on International Trade Law – UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (2014)

United Nations; Model Double Taxation Convention between Developed and Developing Countries ; United Nations Department of Economic & Social Affairs (2011)

UN Tax Committee (2010) Report by the Subcommittee on Dispute Resolution: Arbitration as an Additional Mechanism to improve the mutual Agreement Procedure, Doc E/C 18/2010/CRP.2, New York 6 October 2010

UN Tax Committee (2015) Secretariat Paper on Alternative Dispute Resolution in Taxation, United Nations Committee of Experts on International Cooperation in Tax Matters, Doc. E/C.18/2015/CRP.8, New York

van Herksen M., Mulvihill P., Liebenberg J. and Shah V. The impact of BEPS on tax controversy, International Tax Review February 2016

Wrappe S C - Do Advance Pricing Agreements Still Make Sense? 24 Transfer Pricing Report 976 A 2015

Wrappe S C - Side Effect of BEPS-Driven Changes: Hiring, Coordinating Additional Transfer Pricing Staff 24 Transfer Pricing Report 791

ANNEX A – PROCEDURAL INFORMATION

1. Lead DG, Agenda Planning and Work Programme

The initiative on improving double taxation dispute resolution mechanisms was prepared under the lead of Directorate General for Taxation and Customs Union. Within the Agenda Planning of the European Commission, the project is referred to under item 2016/TAXUD/007. In the Commission Work Programme for 2015, the Commission committed under the header 'Deeper and Fairer Economic and Monetary Union' to set out an Action Plan towards a fairer and efficient Corporate Tax System in the European Union in order to tackle tax abuse, ensure sustainable revenues and support a better business environment in the Single Market, in particular through improving double taxation dispute resolution mechanisms.

2. Organisation and Timing

Work on improving double taxation dispute resolution mechanisms started in July 2015.

An Inter-services Steering Group assisted DG Taxation and Customs Union in the preparation of this Impact Assessment report. The Steering Group was set up on 21/10/2015 and included colleagues from DG Communication Networks, Content and Technology; DG Competition; DG Economic and Financial Affairs; DG Financial Stability, Financial Services and Capital Markets Union; DG Internal Market, Industry, Entrepreneurship and SMEs; DG Justice and Consumers; DG Research and Innovation; DG Taxation and Customs Union; DG Trade; the Joint Research Centre; the Legal Service; and the Secretariat-General.

The Steering Group met on six occasions between September 2015 and July 2016. The last meeting of the Steering Group took place on 20 July 2016. At each occasion, the members of the Steering Group were given the opportunity to provide comments in writing on the draft versions of the documents presented.

3. Consultation of the Regulatory Scrutiny Board

The Impact Assessment report was reviewed by the Regulatory Scrutiny Board on 7th September and received a positive opinion.

4. External Expertise

DG Taxation and Customs Union used external expertise to substantiate the impact analysis and of the design of the mechanisms improving double taxation dispute resolution. The advice of respectively the EU Joint Transfer Pricing Forum (EU JTPF) and the Platform for tax good governance, two expert groups of the Commission, was sought in March 2016 through a questionnaire aimed at collecting data on the scale and impact of double taxation and direct experience on the current dispute resolution mechanisms, but also, at updating the conclusions and analysis of the study to identify and describe most frequent double taxation cases in the internal market previously commissioned by the Commission with an external consultant (June 2013).

The EU JTPF also provided advice through its extensive work on monitoring the EU Arbitration convention and its conclusions and recommendations in its Final Report on Improving the functioning of the Arbitration Convention (March 2015)148.

148 See JTPF/002/2015/EN http://ec.europa.eu/taxation_customs/resources/documents/taxation/company_tax/transfer_pricing/forum/final_report_ac_jtpf_002_2015_en_final_clean.pdf

ANNEX B – STAKEHOLDER CONSULTATION

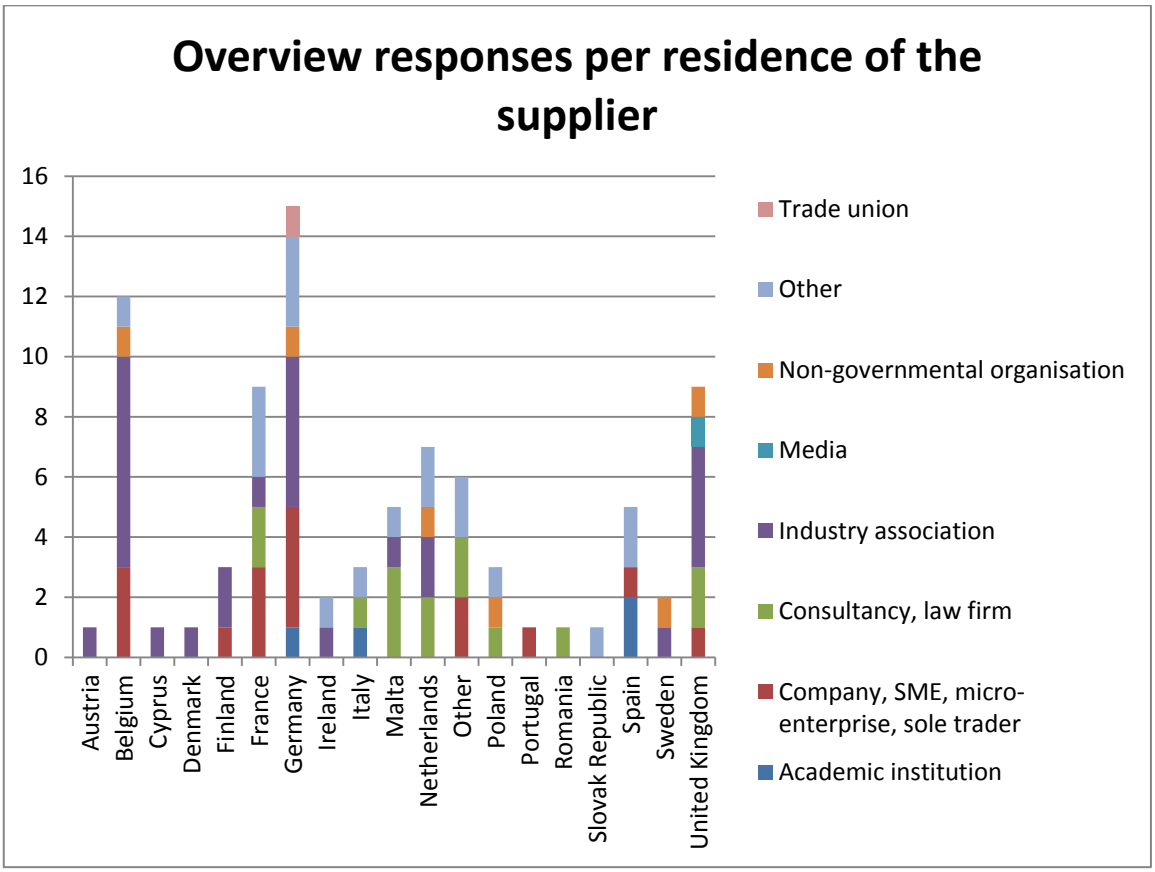
1. Introduction

On 17th June 2015 the Commission published an Action Plan for a Fairer and Efficient Corporate Tax System which proposed 5 key areas for action in the coming months (COM (2015) 302). Improving double taxation dispute resolution mechanisms is one of the actions laid down in this Action Plan in order to ensure a better tax environment for business.

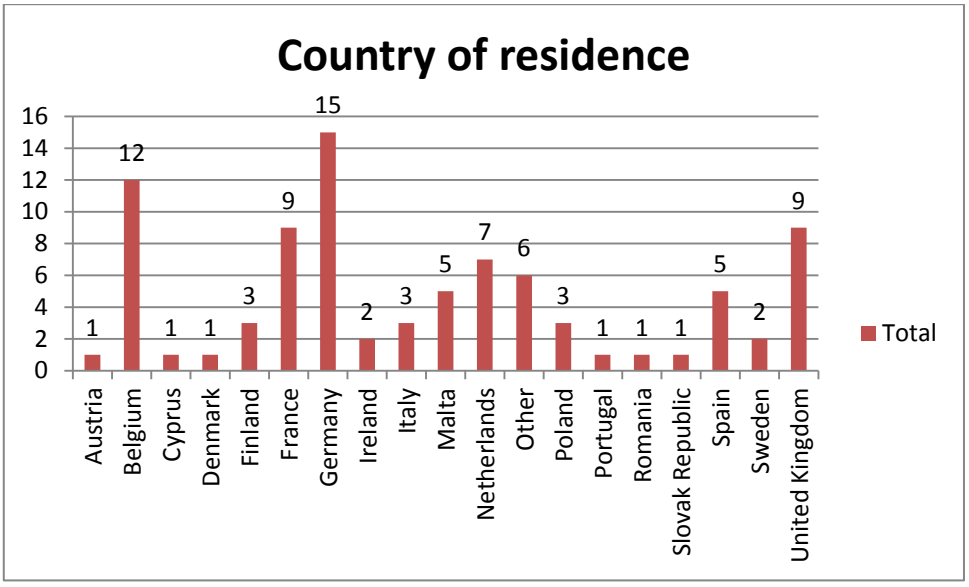
The Commission has run an open public consultation to consult all stakeholders and offer interested parties the possibility to provide their input on improving double taxation dispute resolution mechanisms. 87 participants replied to this consultation.

2. Breakdown of Participants

The majority of respondents were trade or business associations and companies (31% and 22% of responses, respectively). A significant share of the replies was submitted also by Consultancy and law firms (16%) and from other sources (18%). NGOs and Academia also participated (respectively up to 7% and 5%).



A high share of responses came from German Companies and Industry associations as well as 'other' category (about 14%). The second largest group of responses came from trade/business associations in Belgium (some being representations to the EU). Respondents indicating 'Other country' were located in Switzerland and in the USA.

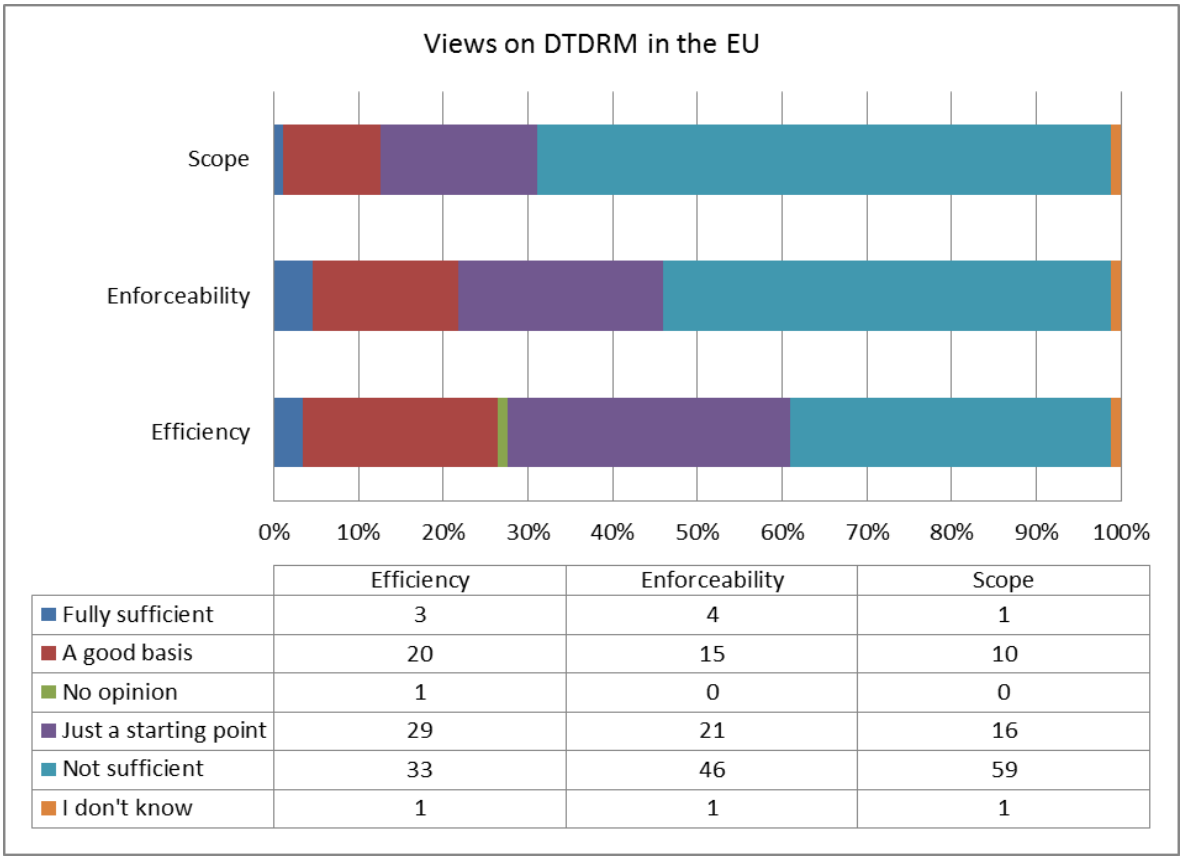


3. Analysis of responses

3.1 State of play: shortcomings and impact of the currently existing double taxation resolution mechanisms

- The vast majority of respondents considers for the case of double taxation described in the public consultation that within the European Union measures should be in place that ensure that double taxation is removed.
- The vast majority of respondents also regards the DTDRM in the EU as not sufficient /just as a starting point with respect to scope, enforceability and efficiency with efficiency being regarded as the most positive (25% fully sufficient/a good basis).

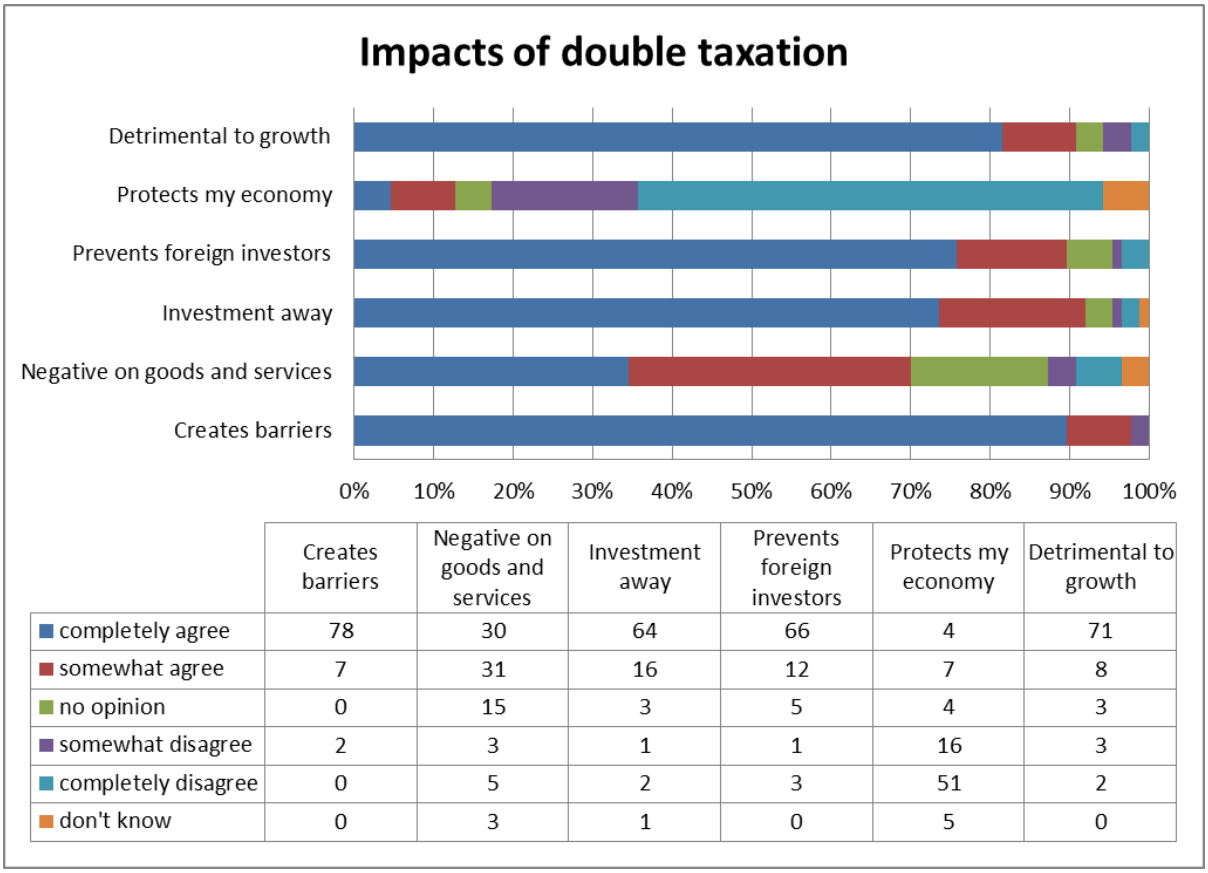
Do you think that the dispute resolution mechanisms currently available in the EU (e.g. DTC or AC) are sufficient as regards scope, enforceability and efficiency?



	Efficiency	Enforceability	Scope
Fully sufficient	3	4	1
A good basis	20	15	10
No opinion	1	0	0
Just a starting point	29	21	16
Not sufficient	33	46	59
I don't know	1	1	1

What do you think are the impacts of double taxation arising in the EU?

As regards the impact of double taxation the vast majority of respondents regard double taxation as detrimental to growth, creating barriers and preventing foreign investors from investing in Member States, as well as driving investments away from MS. Only very few respondents think that double taxation protects the economy of Member States.



	Creates barriers	Negative on goods and services	Investment away	Prevents foreign investors	Protects my economy	Detrimental to growth
completely agree	78	30	64	66	4	71
somewhat agree	7	31	16	12	7	8
no opinion	0	15	3	5	4	3
somewhat disagree	2	3	1	1	16	3
completely disagree	0	5	2	3	51	2
don't know	0	3	1	0	5	0

In addition to the impacts of double taxation noted above many respondents cited problems related to the lack of certainty and the complexity of double taxation legislation. This is especially problematic for taxpayers for tax risk management.

In particular, the administrative burden for both businesses, for example the need to obtain tax certificates for withholding tax purposes, and tax administrations were cited as a particular concern. Cash flow problems for businesses as a result of double taxation were also highlighted. Transfer pricing rules, in particular the lack of certainty for business in setting prices between group companies, exacerbated the problems identified for double taxation. Double taxation was seen as distorting competition between businesses operating nationally and those which operate cross-border leading to a decrease in employment and a loss of welfare for the economy as a whole.

The Commission's work on the Capital Market's Union to enhance the Internal Market was seen as a useful vehicle for moving forward on the issue of double taxation. However, one respondent noted that double non-taxation was more of a concern, and that existing tax rules favour companies operating internationally to the detriment of domestic companies.

Some comments were particularly focused on complexity, lack of certainty and administrative burden:

It wastes both taxpayer and government resources on unnecessary disputes having a net nil effect.

Many of the challenges that tax compliant companies face in Romania have to do with cash flows being blocked due to a presumption of non-compliance. As such, companies

may have a tendency to accept double taxation rather than spend even more money and many years to try to avoid it [OPAD Tax Consulting].

Authors suffer double/ multiple taxation as it is often impossible to provide the tax certificates necessary to apply for a local tax deduction or, due to application of regular withholding taxes, no deduction can take place [Stowarzyszenie Filmowców Polskich]

As the EC pushes the DSM (through audiovisual (AV) & copyright policy reform), double taxation currently represents an administrative burden for authors and their collective management organisations, discouraging multi-territory licensing solutions and mobility of creators. Authors suffer double/ multiple taxation as it is often impossible to provide the tax certificates necessary to apply for a local tax deduction or, due to application of regular withholding taxes, no deduction can take place [Society of Audiovisual Authors – SAA].

We would urge the Commission and Member States to address the practical difficulties of withholding tax reclaim procedures which can lead to investors suffering the effects of double taxation and pose a barrier to investment. We are supportive of a relief at source system. We note the Commission's work in this area as part of the 2015 Action Plan on Capital Markets Union (CMU). We would be happy to provide any input to this work-stream if helpful [Association for Financial Markets in Europe]

Cases of double taxation are currently on the rise, due to, amongst others, the uncertainty created by interpretation and implementation of international guidelines and the plethora of available information, leading to an increasing number of taxation disputes. This has a negative impact on global growth and reduces cross border trade and investment [International Chamber of Commerce]

Member States often claim that the EU Arbitration Convention is very effective but corporates actually face a lot of hurdles in practice. Some MS (e.g. Italy) make the corporates sign a declaration that they cannot approach the corresponding country under this instrument in case of an increase in profit due to a primary adjustment [Transfer Pricing Associates]

Accounting and cash tax impact as a result of paying taxes in advance of resolution. Otherwise, taxpayers face risks of interest charges and penalties being levied

Some other comments related to uncertainties and legal insecurity for businesses:

Enterprises acting in more than one country have relevant administrative expenses in order to comply with tax legislations have effect on a cross border basis (i.e. transfer pricing procedure, allocation of profits and costs among the mother company and its foreign branches, etc.). Such procedural duties and the related administrative costs do not necessary involve an effective and consistent reduction of potential tax liabilities connected with double taxation issues involving strong limitations [University of Parma - Dipartimento di Giurisprudenza]

The lack of dispute resolution creates uncertainty for business as no indication on how the situation should be fiscally treated is given. In the TP area, the absence of agreement between States (on the method or on the amount) maintains the taxpayer in total legal

insecurity on the way to correctly deal with the transaction in the future. Placing the burden of responsibility and the threat of a future tax adjustment of the company because of State's disagreement is not acceptable [MEDEF (Mouvement des entreprises de France]

Various other aspects were also commented:

The supposed dangers of double taxation for corporations have been greatly exaggerated to the point where international tax rules have come to facilitate double non-taxation, which distorts competition, damaging domestic enterprises and undermining taxation, to the detriment of growth and jobs [BEPS Monitoring Group]

Double taxation has a negative impact on purchasing power since it ultimately leads to increased price levels [EY]

Double Taxation may also lead to economic distortions between businesses of different size and place of trading [DIE FAMILIENUNTERNEHMER - ASU e.V].

Double taxation leads to reduced employment and lower Welfare [Confederation of Swedish Enterprise]

Allows tax competition between MS and create a tax obstacle within the Single Market, since the countries with an efficient system on solving tax conflicts would be in better conditions to compete for international investments [Fernando Serrano Antón]

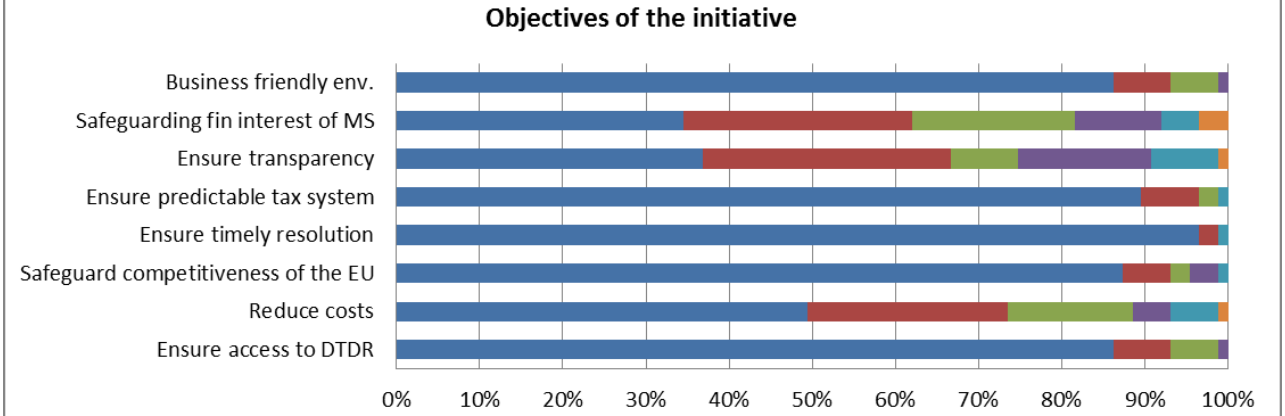
We are concerned with the impact of double taxation on Risk Management activity. Managing tax risk has always been a point of concern to us. With the implementation of the new measures, we foresee a potential increase of double taxation and on the number of tax disputes. TP related disputes will also most likely increase as well. The current insufficiency of dispute resolution mechanisms is self-evident, and it often acts as a deterrent for our foreign investment decisions [International Tax Committee of the International Association of Financial Executives Institutes – IAFEI].

Double taxation is also detrimental to the competitiveness of multinational companies in the EU [Insurance Europe].

3.2 Views on the objectives

There is generally a broad support for most of the objectives suggested in the consultation. A lower support is encountered for safeguarding the financial interest of the Member States and a strongest support is encountered timely resolution, business friendly environment, and ensuring access to the mechanism as well as predictability.

Do you want the EU to pursue the following objectives to achieve effective elimination of double taxation for business transactions?



	Ensure access to DTDR	Reduce costs	Safeguard competitiveness of the EU	Ensure timely resolution	Ensure predictable tax system	Ensure transparency	Safeguarding fin interest of MS	Business friendly env.
completely agree	75	43	76	84	77	32	30	75
somewhat agree	6	21	5	2	6	26	24	6
no opinion	5	13	2	0	2	7	17	5
somewhat disagree	1	4	3	0	0	14	9	1
completely disagree	0	5	1	1	1	7	4	0
don't know	0	1	0	0	0	1	3	0

Many respondents noted that whilst they understood the importance of transparency the rights of businesses to maintain commercial confidentiality should be preserved, and that their business interests should not be jeopardised. A couple of respondents noted that the initiative should also take into account residents of third countries which, due to globalisation, may well become a more important feature in the future for business arrangements. Dispute resolution mechanisms were seen as useful for other taxes like VAT, and the work by the Commission on the Common Corporate Consolidated tax base was regarded by some as being able to address the issue of double taxation in the EU. Member States were requested to improve their Mutual Agreements Procedures (MAP), and that taxpayers should have the opportunity to become actively involved in the process. The establishment of a Permanent Arbitration Court, which would develop the standard rules and practice for efficient resolution of tax disputes, was cited by one respondent as a solution. Harmonisation of Double Taxation Treaties was also suggested as a way forward.

Transparency

We can see the benefits of transparency by publishing main parts of the double taxation dispute cases/decisions where the decision relates to a legal interpretation of a treaty matter. This would contribute to a better understanding of the dispute resolution processes. However, it would be crucial to ensure that commercial confidentiality would be preserved when publishing any data publicly [Confederation of British Industry].

Reduction in the number of cross border disputes once a body of cases and decisions is available - provided that confidentiality is maintained for commercially sensitive information when cases and decisions are published. Safeguarding of taxpayer's interest by the suspension of collection of taxes which would result in double taxation, whilst the Member States seek to resolve the issues.

*NB: *Ensuring transparency by publishing main parts of the double taxation dispute cases/decisions": Without having an in-depth understanding or more details of how this would be done in practice, EBIT Members reply here with: "completely disagree". Other objectives: The EU should lead the way toward a world-wide effective double taxation mechanism and could develop a comprehensive legal tool to resolve double taxation disputes: yet the challenges of this should not be underestimated*! [European Business Initiative on Taxation (EBIT)]

With respect to above: (i) transparency of dispute cases/decisions should be guided by a norm framework for publication and at same time not create a (publication) barrier to enter the dispute resolution process; (ii) "tax deemed due" appears different from tax due. Hence disagreed [International Chamber of Commerce]

With regard to the publishing of tax cases and decisions, this should only be done on the basis that the identity of the parties involved remains anonymous. Additionally, with regard to improving the collection of tax this should only relate to final agreed tax only and not the disputed amount.

With respect to the publishing of decisions I would agree but only on an anonymous basis due to the need for commercial confidentiality.

Residents of third countries

Extending agreements to apply in cases where the beneficial owner is resident in a third country. • There is a need to update of existing treaties on non-double taxation as they do not include modern form of businesses. In practice in different Member States exist different Tax certificates and not all Tax Authorities accept documents from other M.S. there is a need of cooperation between M.S [Stowarzyszenie Filmowców Polskich].

In many cases only EU Member States will be involved, however, situations will arise - potentially increasing in number - which also (in part) involve non-EU Member States. Preferably in OECD-context a principle is created for the commencement of legal proceedings, i.e. an OECD arbitration convention that States can sign up to. The arbitration must be mandatory and binding on those States that sign up [de Nederlandse Orde van Belastingadviseurs (the Dutch Association of Tax Advisers) (NOB)].

Investment

Efficiency and low costs for tax authorities, whilst clearly desirable, are not the prime focus of dispute resolution and alleviation of double taxation mechanisms. Consequences

for investment, growth and jobs of an uncompetitive, costly and uncertain environment are likely to have an impact on future tax receipts in any event. Transparency is helpful only where the matter relates to legal interpretation and has precedent value. Confidentiality of commercial information must be maintained [Deloitte LLP]

To create jobs by reducing costs to enterprises [EUROCHAMBRES – The Association of European Chambers of Commerce and Industry]

The elimination of double taxation for business transactions promotes and enhances the internal market [Confederation of Swedish Enterprises]

VAT

Another objective is the harmonisation of the dispute resolution process across all types of taxes – especially with indirect taxes, in line with the VAT Action Plan. Regarding the above responses: - Main elements of double tax decisions should be published anonymously – a precedent for this exists in the area of indirect tax - Safeguarding financial interests of Member States should not be a major objective - this could lead to some Member States choosing to do nothing to save costs and protect their tax base [The Federation of European Accountants].

CCTB

Safeguarding competitiveness of EU companies by implementing a swift (less than one-year) and red-tape-free procedure; promote the common consolidated corporate tax base (CCCTB) [Jordi BONABOSCH]

By far the best approach would be to minimise the possibility of conflicts and double taxation by adopting a common consolidated corporate tax base with consolidation [BEPS Monitoring Group].

Other

Updating existing DTCs to include modern forms of business; • Predictable taxation systems and tax policy in Member States (MS) & the Single Market; • Harmonising rates, required documentation & conditions attached to double taxation relief treaties; • Harmonising implementation & interpretation of existing OECD MTCs e.g. some MS consider CMOs as beneficial owners of royalties & others don't; • Extending agreements to apply in cases where the beneficial owner is resident in a third country [Society of Audiovisual Authors – SAA]

Improving collection is not an issue of the elimination double taxation but relates to recovery of tax. The term 'tax deemed due' is unclear: both tax authorities would consider their taxation correct and tax deemed due. Under the 2015 CoC on the AC suspension of tax collection for cross-border dispute procedures can be obtained under

the same conditions as under domestic proceedings. Such suspension should not be linked to domestic rules but generalized and embedded in the text of a multilateral treaty [PwC International on behalf of the Network Member Firms of PwC ("PwC")

Ensure that in bona fide cases the resolution of the dispute is "interest neutral" for taxpayer [EY]

All OECD countries have agreed to improve their MAP regimes on foot of BEPS Action 14 and the main objective of the EU should be to support Member States in this process. This will require an investment in MAP resources so it is difficult to see how reducing the cost of tax administrations would be a feasible objective of the EU. Another objective should be to ensure more taxpayer involvement in MAPs, e.g. updating taxpayers on the progress of MAPs and allowing them to compel arbitration [Irish Tax Institute]

Ensuring taxpayers rights by establishing a Flexible Multi-Tier Dispute Resolution which offers various procedures for various kinds of disputes ("tailor made dispute resolution") and uses Mutual Agreement Procedures (MAP) as one of the first steps of the procedure. Involvement of the taxpayer in the process of the MAP and Arbitration

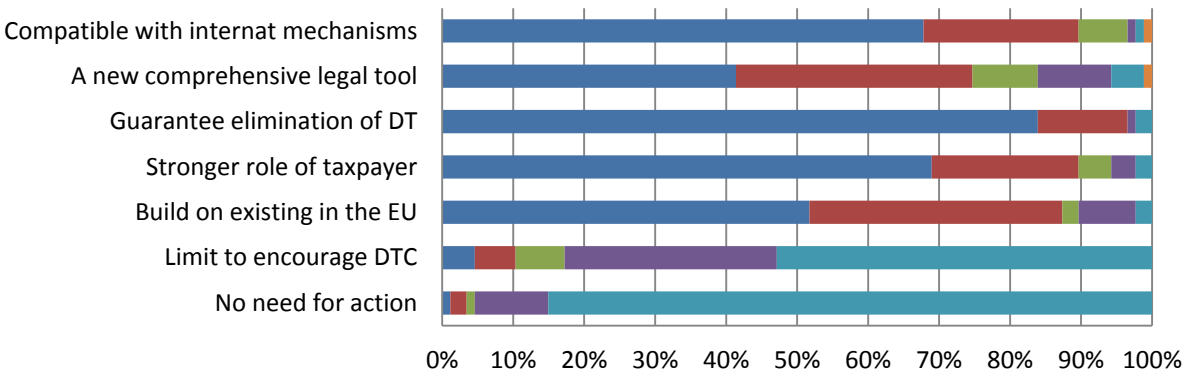
- enable taxpayers to play an active role in the dispute resolution process (right to initiate the proceedings, submit evidence) - develop a mechanism of fair imposition of penalties that would mitigate the detrimental effect of double taxation on taxpayers - support the establishment of a permanent arbitration court that would develop the standard rules and practice for efficient resolution of tax disputes (see attached CFE Opinion Statement FC 4f/2016 on BEPS Action 14) [CFE (Confédération Fiscale Européenne)].

3.3 Views on the kind of Action

Respondents generally see a need for taking action. As regards the kind of action, the vast majority of respondents see a need action as regards guaranteeing elimination of double taxation, compatibility with international developments and stronger role for the taxpayer.

There is also more support for building the EU action on mechanisms already available than for a new comprehensive legal tool. Very few respondents think that the EU should limit itself to encouraging MS to adopt mechanisms in their bilateral relationships.

Do you want the EU to pursue the following directions?



	No need for action	Limit to encourage DTC	Build on existing in the EU	Stronger role of taxpayer	Guarantee elimination of DT	A new comprehensive legal tool	Compatible with internat mechanisms
completely agree	1	4	45	60	73	36	59
somewhat agree	2	5	31	18	11	29	19
no opinion	1	6	2	4	0	8	6
somewhat disagree	9	26	7	3	1	9	1
completely disagree	74	46	2	2	2	4	1
don't know	0	0	0	0	0	1	1

Deterrents were suggested as a way to prevent Member States from benefiting from delaying a favourable resolution. The need to align the work of the Commission with international standards, in particular, the work of the OECD BEPS project for Action 14 Dispute Resolution Mechanisms, was suggested by respondents. The role of the Commission's Joint Transfer Pricing Forum was seen as providing a useful role in monitoring the resolution of double taxation cases. Other suggestions for actions included: Central contact points should exist instead of requiring applicants to deal directly with the tax authorities in both the home country and other countries; quarterly reporting obligation from Member States to European Commission on the type and/or number of disputes; and an escalation mechanism for cases that do not get resolved under the current available dispute resolution mechanisms to be transferred to an independent forum which makes a decision to resolve double taxation.

In more details, the above-mentioned aspects were commented as follows:

Deterrents

Deterrents should be put in place to prevent tax authorities from benefitting from double taxation in cases where delaying a favourable resolution benefits them [OPAD Tax Consulting]

Dispute resolution

1. Enhance dispute resolution measures for other non-TP aspects; 2.Ensure any measures' compatibility with BEPS; 3.Encourage Member States to sign up to the OECD's mandatory binding arbitration process [Confederation of British Industry]

The EU should ensure that Member States do not seek to deny access to dispute resolution mechanisms

Transfer prices

The EUJTPF's work should be completed by a forum of competent authorities responsible for annually publishing the way double taxation is solved (number of cases, time for cases, countries involved) [MEDEF (Mouvement des entreprises de France)]

International

The EU should implement a legal tool for dispute resolution which is aligned with international standards but tailored to fit all legal requirements [The Consultative Committee of Accountancy Bodies-Ireland [(CCAB-I)]

EU should play its role not only in the bilateral relationships among Members States but also considering EU treaty and the effect on the fundamental freedom granted also in a multilateral prospective [University of Parma - Dipartimento di Giurisprudenza]

We consider that EU action must work with existing global standards (the OECD BEPS Action 14 recommendations), and should include all EU states joining the mandatory binding arbitration process [Association for Financial Markets in Europe]

CCTB

Adopt the Common Consolidated Corporate Tax Base. While corporate taxation continues to rest on the independent entity principle it is unreasonable to expect elimination of economic double taxation [BEPS Monitoring Group]

Other

Central contact points should exist instead of requiring applicants to deal directly with the tax authorities in both the home country and other countries [Society of Audiovisual Authors – SAA]

Quarterly reporting obligation from Member States to EC on the type and/or number of disputes [Transfer Pricing Associates]

In order to have a broader scope, the EU Action could consider as well the introduction of MAP and Arbitration in other tax areas in which there is a high rate of conflicts, not only double taxation [Fernando Serrano Antón].

Allow for an escalation mechanism for cases that do not get resolved under the current available dispute resolution mechanisms to an independent forum that makes a decision that resolves double tax

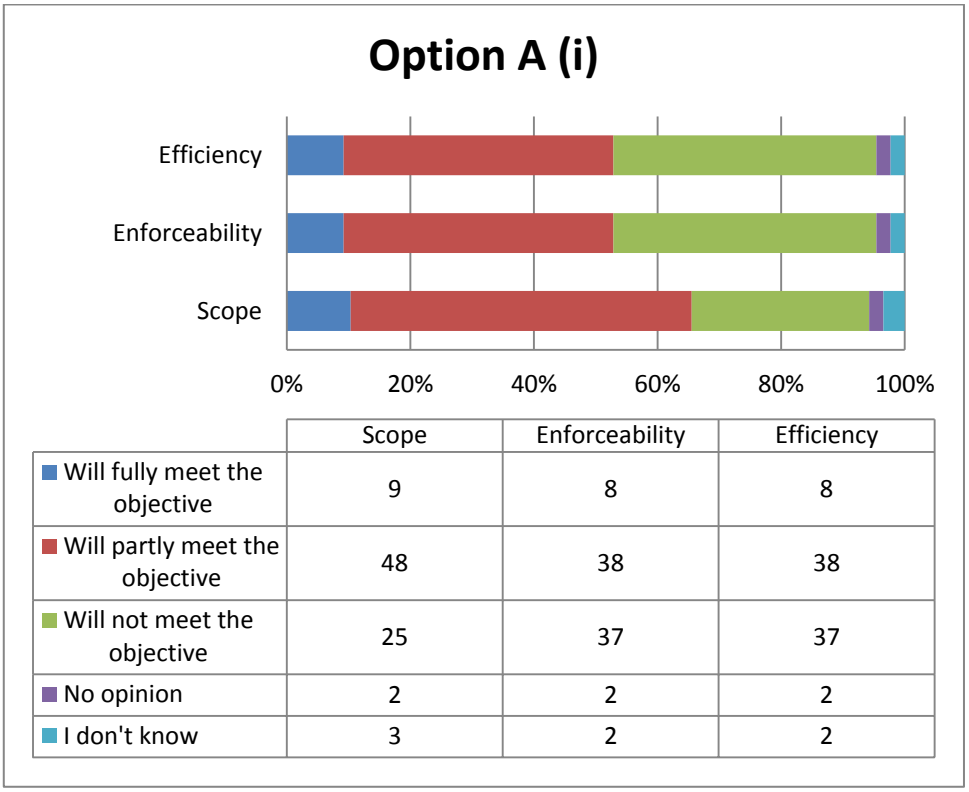
Development of clearing house system between EU Member States with respect to tax collection with taxpayer providing just guarantee for amount relative to rate differential [EY]

3.4 Views on the Options

As regards the options suggested, the views are less positive on option A i) [*Improve the efficiency of bi- and multilateral instruments : following conclusions of the OECD BEPS Action 14 and of the EU Joint Transfer Pricing Forum on improving the functioning of the EU AC*], positive for A ii) [*Improve the efficiency of bi- and multilateral instruments :adopting an arbitration clause similar to the one provided for by Article 25 of the Austrian-German tax treaty*] and B [*Enforced, effective and broader dispute resolution mechanisms*], most positive for C [*A comprehensive new EU legal instrument*]. However, combining the views 'will fully meet the objective' and 'will partly meet the objective' together, the rating is similar.

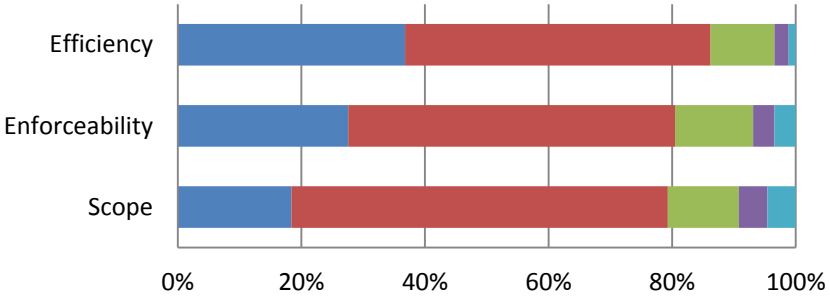
When it comes to the question on the way forward, half of the respondents regard Option C as fully appropriate for application in other areas of income taxation. Low support is encountered for Options A i) and A ii). For option B most respondents view it as partly appropriate for a broader application.

In your opinion would Option Ai), Option Aii), Option B and Option C meet the general objectives of scope, enforceability and efficiency?



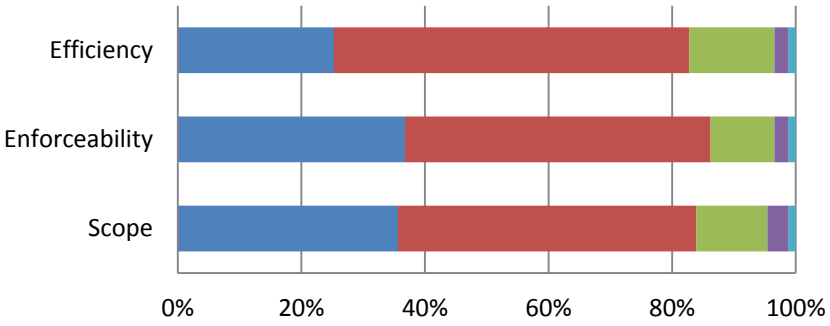
	Scope	Enforceability	Efficiency
Will fully meet the objective	9	8	8
Will partly meet the objective	48	38	38
Will not meet the objective	25	37	37
No opinion	2	2	2
I don't know	3	2	2

Option A (ii)

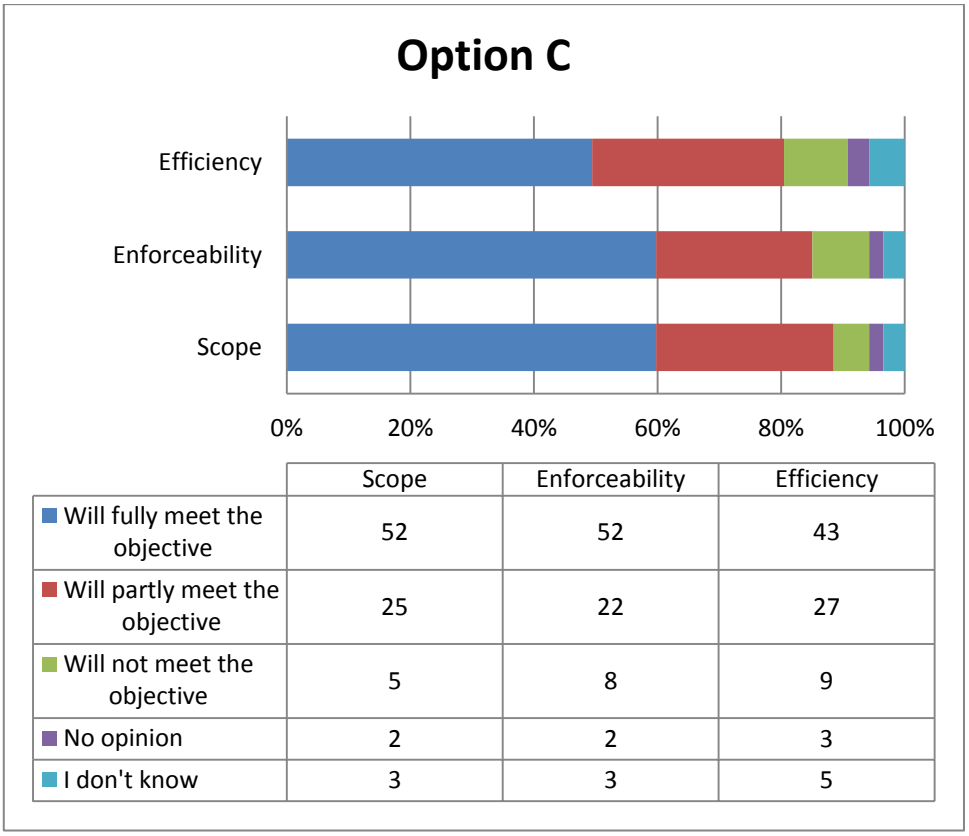


	Scope	Enforceability	Efficiency
Will fully meet the objective	16	24	32
Will partly meet the objective	53	46	43
Will not meet the objective	10	11	9
No opinion	4	3	2
I don't know	4	3	1

Option B



	Scope	Enforceability	Efficiency
Will fully meet the objective	31	32	22
Will partly meet the objective	42	43	50
Will not meet the objective	10	9	12
No opinion	3	2	2
I don't know	1	1	1

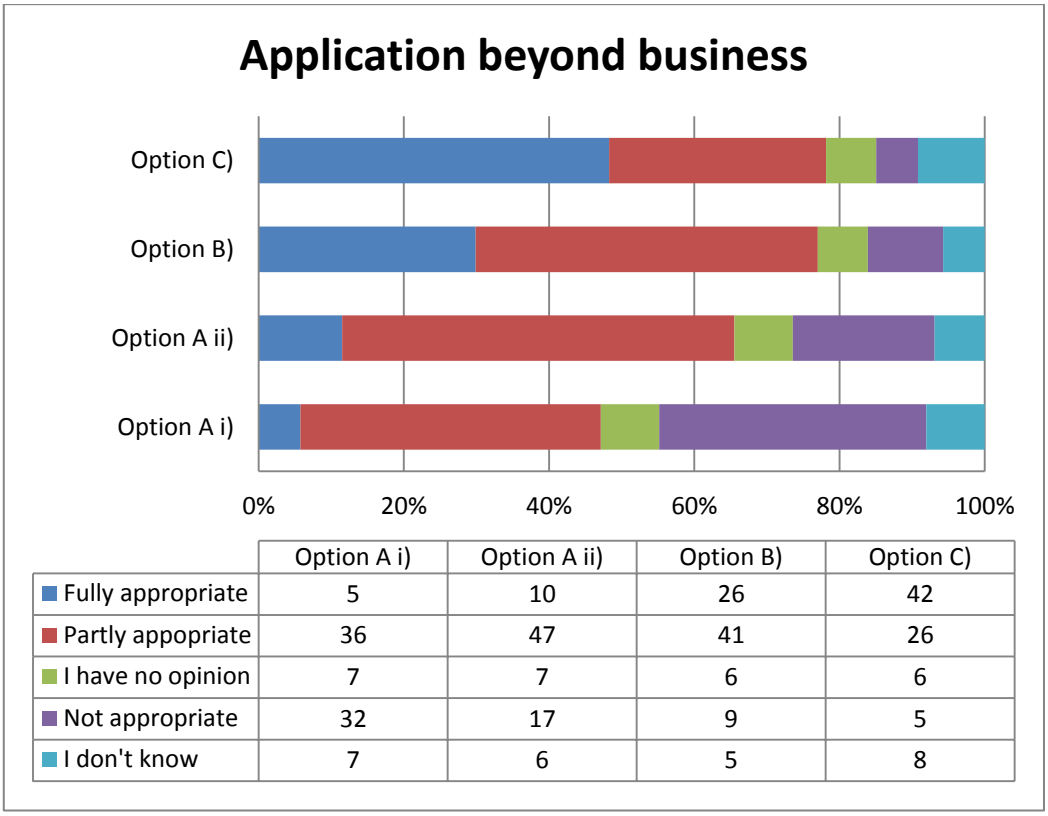


	Scope	Enforceability	Efficiency
Will fully meet the objective	52	52	43
Will partly meet the objective	25	22	27
Will not meet the objective	5	8	9
No opinion	2	2	3
I don't know	3	3	5

Conclusion and views on the way forward

As illustrated by the diagram below, in conclusion, views expressed were most positives for B and C than for the options A.

In your opinion would the dispute resolution mechanisms discussed [in section 3.4 above] be appropriate for double taxation disputes arising in other areas of income taxation e.g. personal income tax (cost benefit ratio)?



	Option A i)	Option A ii)	Option B)	Option C)
Fully appropriate	5	10	26	42
Partly appopriate	36	47	41	26
I have no opinion	7	7	6	6
Not appropriate	32	17	9	5
I don't know	7	6	5	8

ANNEX C - WHO IS AFFECTED BY THE INITIATIVE AND HOW

The objective of this annex is to set out the practical implications of the initiative for different types of companies and for national tax administrations.

The initiative directly affects companies who are subject to corporate income tax on their business profit.

Large companies would be placed in a situation similar to the one currently existing at the Mutual Agreement Procedure Stage but will be in a position to submit all cases of double taxation to the advisory commission under the arbitration phase. This may involve some additional costs in terms of procedure, both to prepare the cases which can be fact intensive and possibly to initiate procedures with the National Court in cases of denial of access to the arbitration or blocked procedure in the second face. However, given the obligation of results the large companies will be in a position to outweigh such additional costs with the benefit of removing the double taxation at stake, which will be defined with full certainty under the proposal. In all cases, recourse to MAP and arbitration is not mandatory for the taxpayers and remain an option for which they can arbitrate in terms of costs and benefit.

SMEs are placed in the same position as large companies. The level of additional cost potentially incurred in case of referral to the Advisory commission in the arbitration cost would create a burden which would be proportionally higher for SMEs then for large companies. However, the design of the proposal in terms of timeliness of the procedure, possibility of a fast track referral with the National Court and Alternative Dispute Resolution procedures which can be opted for by Member States in the second phase is such that having recourse to this procedure would be cost efficient for SMEs. Those among these companies that consider the possibility to submit their cases to arbitration would have to conduct a cost-benefit assessment to decide whether they would benefit from applying it.

Tax administrations will incur costs for implementing the new system, notably on staff resource allocation or hiring and staff training. Eventually, the implementation of the new system should in the medium term ensure a more consistent and smooth processing of arbitration cases with the EU with less duplication of tax litigations (both at the level of the MAP and arbitration procedures and before domestic courts) and shall also lead to increase know-how and mastery of fact-intensive and complex cross border tax cases as well as some converging approaches on key interpretation issues. Transaction costs linked to the need to renegotiation of double tax treaties in cases of recurring unsolved disputes would also decrease in the medium and long term.

Overview of cases pending under the EU Arbitration Convention at year end and estimation of pending MAP cases under DTC and future development

1. Development of cases under the EU Arbitration Convention

The basis for the calculation is the statistics on cases pending under the EU Arbitration Convention as reported by MS on a yearly basis from 2004 until 2014[149]. Numbers for the end of 2015 are not yet available.

Inventory at year end												
	year	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014
	cases pending	107	140	148	186	198	244	294	370	428	492	640

The reliability of this self-reported data in the statistics is increased by the fact that MS report bilateral cases from their perspective only which is then matched with the cases by the other MS involved in the case. The numbers reported are therefore considered as a reliable basis.

There is a continuous increase of pending cases. Comparing the increase of total cases with cases on MS level shows a similar development. The increase is therefore is not grounded in the fact that new MS joined the EU.

A similar development is encountered at OECD level:

Based on the historical data an extrapolation is made assuming that this increase will continue in the future if no measures are taken (baseline scenario). The following observations confirm the assumption of an increase of cases pending under the AC:

- The responses of stakeholders to the 2016 data collection[150] where 64% of the respondents expect a significant increase of instances of double taxation
- there is a trend of a significant increase of audits in the field of transfer pricing with an expected increase of tax reassessments[151] Given the bilateral nature of transfer pricing, the adjustment of the prices for one company (primary adjustment) automatically results in the need for a corresponding adjustment for the other company which is not done automatically and therefore causes a double taxation dispute.

149 http://ec.europa.eu/taxation_customs/resources/documents/taxation/company_tax/transfer_pricing/forum/jtpf0082015acstatistics2014.pdf

150 See section 5.3 of the 2016 data collection, Annex H

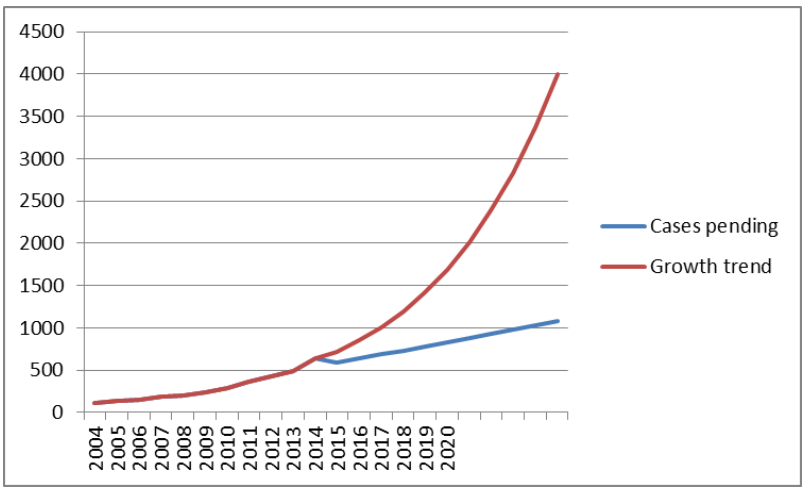
151 See e.g.
Germany: PwC Study "Betriebsprüfungen 2015" (tax audits 2015 translated)
http://www.pwc.de/de/pressemitteilungen/2015/in-grossunternehmen-fuehrt-nahezu-jede-betriebspruefung-zu-mehrsteuern.html
Denmark announced that for 2016 (as in 2015), its efforts would focus on transfer pricing cases involving: (1) goods and services; (2) intangibles; and (3) financial transactions.
http://www.skm.dk/media/1340763/aktuelle-skattetal_transfer-pricing_020516.pdf

- The views expressed in various articles[152]

Starting from 107 cases in 2004 to 640 cases at the end of 2014, a linear increase would result in 830 cases at the end of 2020. Assuming a growth trend based on historical figures with the assumption of a further increase would result in 1690 cases by the end of 2020.

- The views expressed in various articles[153]

Starting from 107 cases in 2004 to 640 cases at the end of 2014, a linear increase would result in 830 cases at the end of 2020. Assuming a growth trend based on historical figures with the assumption of a further increase would result in 1690 cases by the end of 2020.



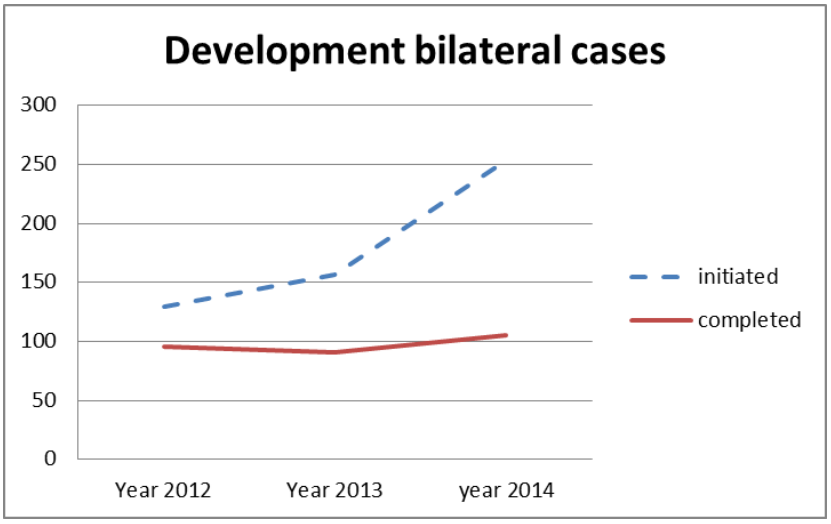
For this impact assessment and under the assumption that no action is taken to improve the situation, a moderate growth trend is assumed by taking the mid-point between a linear increase and the growth trend, which would result in a working assumption of around 1200 cases pending at the end of 2020.

There are several reasons for the assumed increasing number of pending cases:

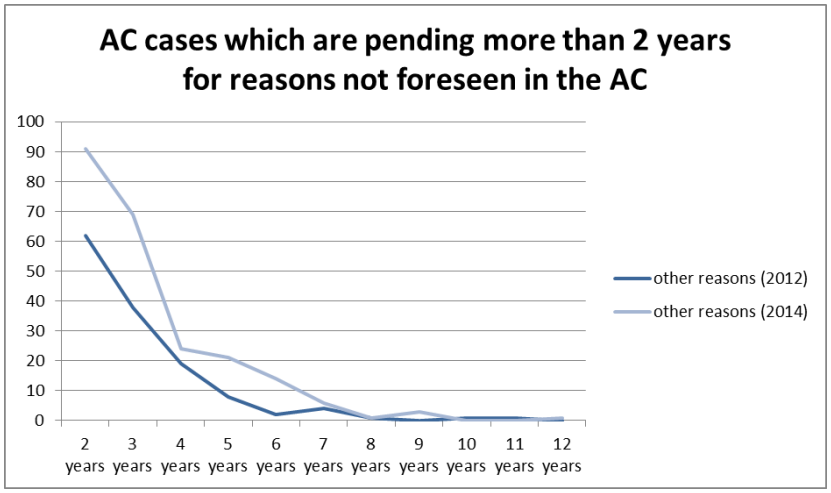
- the gap between the initiated cases and completed cases have been systematically growing in the past years

[152] See e.g. Martens (2015) or Allen&Overy,"(2014) http://www.allenovery.com/SiteCollectionDocuments/Multinational-tax-practices-face-growing-scrutiny.pdf

[153] See e.g. Jan Martens "France and BEPS: A Changing Transfer Pricing Landscape, Expert Guides 30/09/2015 https://www.expertguides.com/articles/france-and-beps-a-changing-transfer-pricing-landscape/arvkwkwv or Allen&Overy,"Multinational tax practices face growing scrutiny" http://www.allenovery.com/SiteCollectionDocuments/Multinational-tax-practices-face-growing-scrutiny.pdf



- A longer duration for solving cases



2. Estimation of cases addressed in the MAP under DTC (i.e. cases not falling under the AC) and total number of disputes

As the statistics available for the double taxation disputes ('cases') ending under the AC only include cases of double taxation in the context of transfer pricing/profit attribution to permanent establishments, an additional calculation is needed for the double taxation disputes to which the MAP under applicable DTCs applies. For this calculation a full coverage with DTC in the intra EU bilateral relations is assumed[154].

The 2016 targeted consultation showed a 75% share of transfer pricing cases for the EU (a substantial increase from the 34% reported in the 2010 open public consultation)[155] in all pending cases. At the same time, also the statistics from other major countries, notably the US (70 %)[156] and the focus on transfer pricing observed in audit trends[157], seem to

154 The number of bilateral relationships where there is currently no DTC is very limited (8 of 378).

155 See section of public consultation 2010 "Some highlights from the public consultation",

156 Litsky, Kumar and Lesprit, "Strategic considerations for tax controversy, risk management and double taxation avoidance, International Tax Review March 2016 http://www.internationaltaxreview.com/Article/3539707/Strategic-considerations-for-tax-controversy-risk-management-and-double-taxation-avoidance.html

confirm the breakdown of the scope of double taxation disputes. On the basis of these estimations it is assumed that the transfer pricing cases constitute around 70% of all (pending) cases

Starting from the 640 pending transfer pricing cases at the end of 2014 the number of non- transfer pricing cases is estimated with around 270 cases (640 x 30/70) resulting in a total case load of around 910 cases at the end of 2014. For 2020 the number is estimated with 1200 transfer pricing cases[158] and 515 non-transfer pricing cases (MAP cases), resulting in a total case load of around 1715 cases.

The OECD statistics on the double taxation disputes[159], a worldwide total of 1821 MAP cases were reported by the EU Member States. Putting the total number of 910 estimated case in relation to the total number of 1821 MAP), we conclude that around 50 % of cases where the EU Member States are involved are intra EU cases.

3. Cases where no remedies are sought

There may be various reasons why taxpayers do not seek remedies, reaching from non-awareness of applicable DTDRM, to deprival by a tax administration ('implicit denial of access') or cases where an applicable DTDRM is considered as too lengthy, costly or non-conclusive[160].

In the 2010 consultation, the percentage of cases where no remedies were sought was 15 % of total cases. The percentage for the cases in the 2016 data collection is around 30% of total cases. The discussion at the level of the EU JTPF indicates that the occasions where finally no remedies are taken did increase. As a conservative working assumption we assume that in 25% of cases per year no remedies are sought. Calculated on the basis of 250 cases initiated under the AC in 2014 (transfer pricing only)[161] and extrapolated to a total number of all double taxation disputes of 360 cases (250x100/70) the number of double taxation disputes where taxpayers did not seek remedies for various reasons is therefore estimated with around 120 cases p.a.

---

157 See e.g. E&Y 2014 global transfer pricing tax authority survey http://www.ey.com/Publication/vwLUAssets/EY-global-transfer-pricing-tax-authority-survey/$FILE/ey-2014-global-transfer-pricing-tax-authority-survey.pdf

158 See Number 1 above

159 For an overview of OECD MAP statistics see: http://www.oecd.org/ctp/dispute/map-statistics-2014.htm

160 For details on the problems encountered for the Arbitration Convention see section 2.3

161 See statistics on pending cases under the AC 2014: http://ec.europa.eu/taxation_customs/resources/documents/taxation/company_tax/transfer_pricing/forum/jtpf0082015acstatistics2014.pdf

ANNEX E - ESTIMATION OF AMOUNTS OF TAX INVOLVED IN DTDRM

1. Responses received from MS on amounts of tax involved in cases pending under the AC 31.12.2014:

On 2 May MS were asked for an estimate of the taxes involved in the cases pending under the AC at the end of 2014. For the purpose of the estimate the tax was calculated as the adjustment disputed as requested by the taxpayer multiplied with the tax rate of that MS and not considering loss carry forwards or other items with implications on the actual tax.

Given the complexity of calculating exact amounts MS were invited to allocate the number of cases into rather broad categories.

The following numbers were received from 8 MS.

	MS 1	**MS 2**	**MS 3**	**MS 4**	**MS 5**	**MS 6**	**MS 7**	**MS 8**	**Total**
up to 10,000 €	4			2	1	1			**8**
10 - 100 000 €				8	3	3	8		**22**
100 000 - 1 million €	9	1	1	13	15	11	8	2	**60**
1-10 million €	7	3	2		11	14	19		**56**
10-100 million €					9	5	14		**28**
> 100 million €	1	1				1	1		**4**
									178

One of these MS provided the actual amount of tax within the respective category.

MS 1	**Number of cases**	**amount involved**	**average**
up to 10,000	4	9 916	2 479
10,000 - 100 000€			
100 000 - 1 million€	9	4 197 299	466 367
1-10 million€	7	23 041 581	3 291 654
10-100 million€			
> 100 million€	1	308 777 052	308 777 052

The actual number provided by this MS indicates that the average amounts per category are around 30% of the maximum amount in the respective categories.

The following overview of cases under the AC and amounts involved in 2014/at the end of 2014 are calculated based on the distribution of cases under the AC in the various categories, extrapolated to the total number of cases. The amounts involved are calculated based on the conservative assumption that the tax involved per case is around 30% of the upper number of the respective category.

	Cases repor-ted by MS	**%**	**Extrap olated to all AC cases**	**amount (30% of highest per category)**	**total amount in Euros**	**Cases pen-ding 2 years plus**	**Amounts cases pending 2 years plus in Euros**
up to 10,000	8	4.5	29	3 000	87 000	5	15 000
10,000 - 100 000€	22	12.4	79	30 000	2 370 000	14	420 000
100 000 - 1 million€	60	33.7	216	300 000	64 800 000	39	11 700 000
1-10 million€	56	31.5	201	3 000 000	603 000 000	36	108 000 000
10-100 million€	28	15.7	101	30 000 000	3 030 000 000	18	540 000 000
> 100 million€	4	2.2	14	300 000 000	4 200 000 000	3	900 000 000
Total	178		640		**7 900 257 000**	115	**1 560 135 000**

Applying this model to the number of cases initiated under the AC in 2014 (253) results in the following estimation:

	Cases reported by MS	**%**	**Extrapol. cases initiated 2014**	**amount (30% of highest per category)**	**total amount**
up to 10 000	8	4	11	3 000	33 000
10 000 - 100 000€	22	12	31	30 000	930 000
100 000 - 1 million€	60	34	85	300 000	25 500 000
1-10 million€	56	31	80	3 000 000	240 000 000
10-100 million€	28	16	40	30 000 000	1 200 000 000
> 100 million€	4	2	6	300 000 000	1 800 000 000
Total	178		253		**3 266 463 000**

2. Estimation of amounts involved in cases pending under DTC

There is no statistical information available on the amounts involved in disputes pending under DTCs. An indication of the amounts of tax at stake can only be taken from the 2010 consultation as in the 2016 data collection did not provide meaningful information.

45 cases were reported in 2010 and the amounts of tax reported were converted into the categories used under this impact assessment. The respective percentages were then applied to the estimated number of 270 disputes pending under DTC.

Under a conservative working assumption i.e. not calculating an increase of the amounts involved it is assumed that the amounts of tax involved in these cases pending under DTC at the end of 2014 is around EUR **2.500.000.000.**

minimum in €	maximum in €	total number of DTC disputes reported 2010 public cons.	% of total	extrapola-ted to cases estimated under DTC	tax involved 30% of maximum value	amount of tax involved
1,000	10,000	12	27	72	3,000	216,000
10,000	100,000	8	18	48	30,000	1,440,000
100,000	1,000,000	13	29	78	300,000	23,400,000
1,000,000	10,000,000	8	18	48	3,000,000	144,000,000
10,000,000	100,000,000	3	7	18	30,000,000	540,000,000
100,000,000	1,000,000,000	1	2	6	300,000,000	1,800,000,000
		45		270		**2,509,056,000**

In summary amount of tax involved in the cases pending at the end of 2014 is EUR 10.5 billion.

If no action is taken this amount will increase by the end of 2020 as follows:

	Cases reported by MS	%	Extrapolated to 1200 AC cases estimated in 2020	amount (30% of highest per category)	total amount
up to 10 000	8	4.5	54	3 000	162 000
10 000 - 100 000€	22	12.4	148	30 000	4 440 000
100 000 - 1 million€	60	33.7	404	300 000	121 200 000
1-10 million€	56	31.5	378	3 000 000	1 134 000 000
10-100 million€	28	15.7	189	30 000 000	5 670 000 000
> 100 million€	4	2.2	27	300 000 000	8 100 000 000
					15 029 802 000

maximum in €	Distribution of DTC disputes in 2010 public consultation	% of total	extrapolated to 515 cases estimated to be pending under DTC	tax involved 30% of maximum value	amount of tax involved

up to 10 000	12	27	137	3 000	411 000
10 000 - 100 000€	8	18	92	30 000	2 760 000
100 000 - 1 million€	13	29	149	300 000	44 700 000
1-10 million€	8	18	92	3 000 000	276 000 000
10-100 million€	3	7	34	30 000 000	1 020 000 000
> 100 million€	1	2	11	300 000 000	3 300 000 000
					4 643 871 000

In summary the amount of tax disputed in the cases pending by the end of 2020 is therefore estimated at around **EUR 20 billion.**

In addition the amount of tax involved in the 120 cases where no remedies are sought has to be taken into account. However, given that in many of these instances a lower tax re-assessment is agreed in exchange for not taking legal remedies and that no data on these kinds of agreements is available it is not possible to reliably estimate the amount of tax involved in these cases.

ANNEX F: SHORTCOMINGS IDENTIFIED IN DETAIL AND FOR THE DTDRM IN THE EU

A. Shortcomings identified for DTDRM in the EU in detail

1. Lack of enforceability

1.1 Deprival from accessing DTDRM ('implicit denial of Access')

Taxpayers stress that the number of cases in which they are factually deprived from initiating an applicable procedure is substantially higher[162]. They assume factual deprival of access *e.g.* in cases where a taxpayer considers that accepting double taxation is less costly/burdensome than engaging into a DTDRM where there is a fear for further investigations or where a reduced amount of double taxation was made conditional to withdrawal of remedies (**'implicit denial of access'**). The number of such instances is for example estimated with 120 cases in 2014.

1.2. Explicit denial of access to available DTDRM

Taxpayers report that in a substantial number of cases access to a dispute resolution procedure is denied by tax administrations i.e. a request for initiating a mutual agreement procedure is refused ('explicit **denial of access'**). E.g. in 2014 MS reported that access to the EU Arbitration Convention was explicitly denied in 14 cases[163]. Roughly extrapolated to the total number of double taxation disputes for corporations there would for 2014 be 25 instances with an explicit denial of access. The number may increase to until 2020 as well. It should be stressed however that this impact assessment does not address whether such a denial of access is justified under provisions in the respective DTDRM or not.

1.3. Blocked/Delayed Procedure

In situations where there is mandatory resolution of double taxation disputes within fixed timelines the question whether a case is considered as initiated is of great importance as the date of the initiation marks the starting point for the time period for solving the case. A tax administration may therefore be particularly keen to have all the information at its disposal which it considers necessary for justifying its position as all requests made after initiation of the case will go to the expense of the time for reaching an agreement with the other State.

Instances were reported where a long time passed between the first request for initiating the DTDRM and the actual initiation/acceptance of the case. While for taxpayers the delay was caused by ongoing and overly comprehensive requests from tax administrations tax administrations justified a deferral with unsufficient information provided by taxpayers when making the request[164]. The statistics 2012 – 2014 on pending

---

[162] See e.g. comments from non governmental Members of the EU Joint Transfer Pricing Forum JTPF/020/2012/EN repeated in subsequent discussion. and outcome

[163] See EU Joint Transfer Pricing Forum, Statistics on Pending MAPs under the EU Arbitration Convention at the end of 2014 http://ec.europa.eu/taxation_customs/resources/documents/taxation/company_tax/transfer_pricing/forum/jtpf0082015acstatistics2014.pdf

[164] refer to discussion at EU JTPF

MAPs under the AC as the most relevant DTDRM within the EUreveal that there are indeed cases where there is a (sometimes significant) delay between making the request and initiation of the case. However in 87 % of the cases reported[165] the initiation takes place within 0-6 months after receipt of the request a delay of 6-12 months is encountered in 10% of the case and a delay beyond 12 months in 3%.

As regards the cases not covered by the AC but by a DTC with mandatory resolution within a fixed timeline one may expect a similar situation. If the DTC only provides for endeavouring to reach a solution there may be less pressure for tax administrations to make sure that all information is received before initiation the procedure as there is no obligation to come to a conclusion within a certain timeframe. The problem is therefore mainly relevant for DTDRM with mandatory settlement.

An important shortcoming encountered by stakeholders is the duration of the DTDRM[166] in the EU up to situations where no agreement is reached.

Even in cases where a DTDRM applies which provides for mandatory resolution within certain timelines, significant delays are encountered. Within the EU, the procedure laid down in the EU Arbitration Convention is the most important DTDRM. In addition there are bilateral DTC which contain a dispute resolution mechanism with mandatory settlement. The number of treaties containing such a mechanism is however rather limited (14 DTC of 370 DTC) within the EU and statistical data not available. The estimation of the size of the problem based on the statistics on the functioning of the EU Arbitration Convention covering all MS and the most frequent issue of double taxation (70%) is regarded as providing a suitable basis for estimating the size of the problem. Furthermore the timelines laid down in the DTC with arbitration is mostly similar to those set out in the EU Arbitration Convention.

Although the Arbitration Convention and most of the few DTC with an arbitration clause foresee a resolution of the dispute within 3 years from the initiation of the procedure a substantial number of cases take longer. From the 640 bilateral cases pending within the EU at the end of 2014 260 (42 %) cases are pending longer than 2 years. Within these 260 cases the procedure is delayed with the agreement of the taxpayer in 62 cases (corresponding to 9.5% of total cases) in 83 cases (corresponding to 13 % of total cases) the delay is justified under the provisions of the Arbitration Convention but in 115 (corresponding to 18 % of total cases) the delay is not justified.

An important shortcoming encountered by stakeholders is the duration of the DTDRM[167] in the EU up to situations where no agreement is reached.

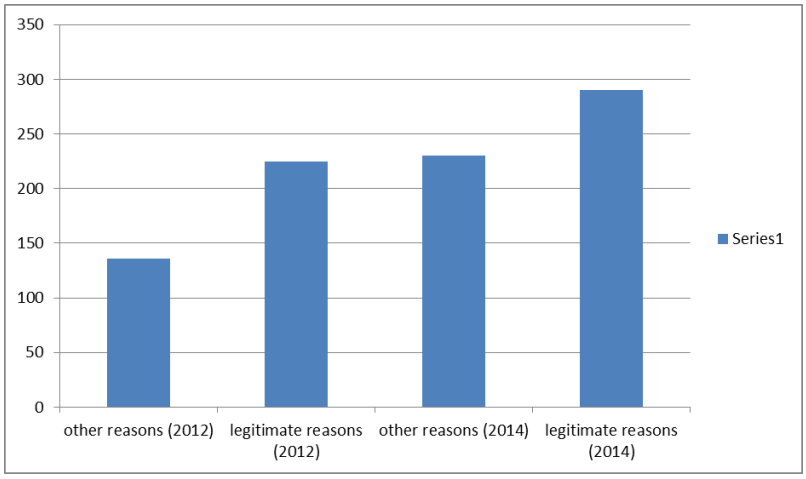
Even in cases where a DTDRM applies which foresees a mandatory resolution within certain timelines significant delays are encountered. Within the EU the procedure laid down in the EU Arbitration Convention is the most important DTDRM. In addition there are bilateral DTC which contain a dispute resolution mechanism with mandatory settlement. The number of treaties containing such a mechanism is however rather

[165] Average 2012 – 2014
[166] See recommendation C9 of the Dodds Niedermayer report
[167] See recommendation C9 of the Dodds Niedermayer report

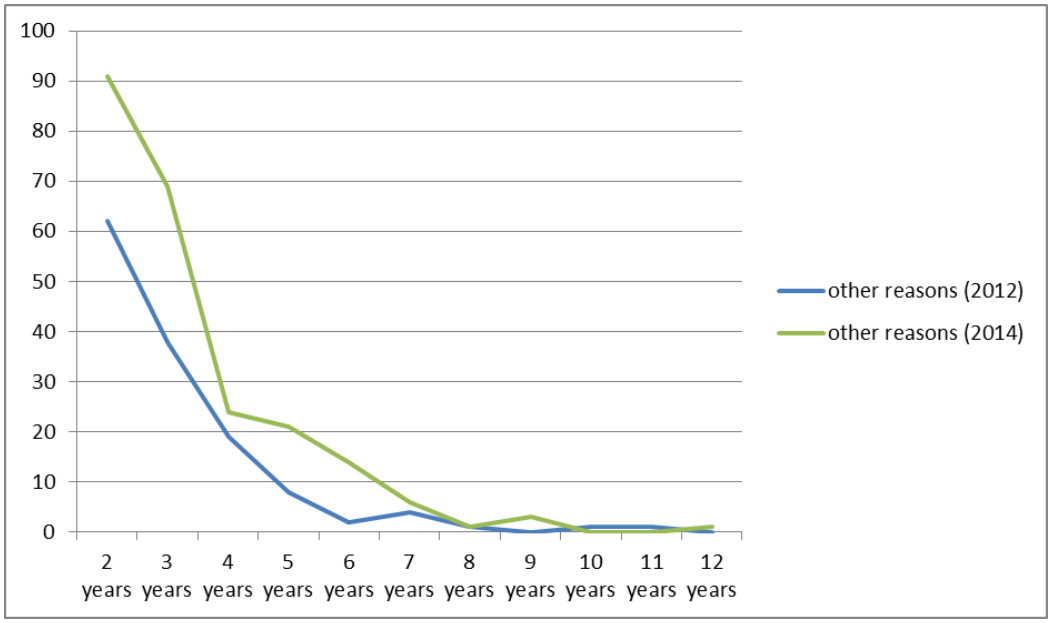
limited (14 DTC of 370 DTC) within the EU and statistical data not available. The estimation of the size of the problem based on the statistics on the functioning of the EU Arbitration Convention covering all MS and the most frequent issue of double taxation (70%) is regarded as providing a suitable basis for estimating the size of the problem. Furthermore the timelines in the DTC with arbitration is mostly similar to those of the EU Arbitration Convention.

Although the Arbitration Convention and most of the few DTC with an arbitration clause foresee a resolution of the dispute within 3 years from the initiation of the procedure a substantial number of cases take longer. From the 640 bilateral cases pending within the EU at the end of 2014 260 (42 %) cases are pending longer than 2 years. Within these 260 cases the procedure is delayed with the agreement of the taxpayer in 62 cases (corresponding to 9.5% of total cases) in 83 cases (corresponding to 13 % of total cases) the delay is justified under the provisions of the Arbitration Convention but in 115 (corresponding to 18 % of total cases) the delay is not justified.

The number of cases taking longer did increase in the past



The timeline until these cases are solved varies. While the majority of these cases seem to be solved within 3-4 years there are some cases however are taking considerably longer.



2. Inefficient and costly procedures

2.1 Costs of DTDRM

The costs associated with solving a double taxation dispute were reported as being an important shortcoming of the current DTDRM.[168] However there were only a limited number of exploitable answers to the question in the 2016 data collection[169]:

In Euro		Legal advisory and procedure costs	in-house costs (e.g. salary of dedicated resources)	Other external administrative costs	Interest costs	Penalties	Other costs
between 100 001 and 1 million €	min	15 000	23 500				
	max	30 000	23 500				
between 1 million and 10 million €	min	40 000	10 000		100 000		
	max	750 000	400 000			32 5000	
between 10 million and 100 million €	min	35 000	10 000		8 000 000		
	max	200 000	100 000		30 800 000	23 000000	
above 100	min	100 000			10 000		

[168] See section 2.5 of the 2016 data collection
[169] See section 2.6 of the 2016 data collection

million €	max	1 000 000				100 000 000	18 000

Given the broad variety of reasons of double taxation underlying the disputes the background underlying the reassessment the duration of the procedure etc. it would not be sound to try to determine/estimate a kind of range of costs per case. Therefore the conclusion as regards the costs involved for taxpayer may be summarized in accordance with the predominant view expressed by most stakeholders indicating that the costs associated are regarded as being significant/excessive[170]

2.2 Non-homogenous uptake of DTDRM in the EU

The statistics available for the EU AC also show differences in the application of the AC. While some Member States manage to keep their inventory (i.e. number of active cases) over the years for other Member States a continuous mismatch between cases initiated and cases solved is encountered.[171]

As it was explained in section 1.2 the taxpayer has several possibilities to seek solution. Since 2008 the OECD MTC foresees extending the MAP with an arbitration procedure for cases where competent authorities cannot reach an agreement on one or more issues so that the resolution of the case is prevented.[172] The arbitration procedure provided for in the OECD MTC is not fundamentally different to the arbitration procedure set out in the EU AC. However the uptake of arbitration procedures in DTCs within the EU is rather limited; as of today an arbitration clause was agreed only in 14 out of 370 bilateral DTC within the EU.[173] On the other hand there are very few situations where there is no dispute resolution mechanism at all. In the EU only 8 out of 378 bilateral relations between MS are not covered by a DTC.[174]

3. Non conclusive DTDRM

The DTDRM traditionally set out in DTC require the States involved in the dispute only to endeavour reaching an agreement on how to eliminate double taxation. Consequently there is a risk that double taxation is finally not resolved. Since 2008 the OECD MTC foresees extending the mutual agreement procedure with an arbitration procedure where the competent authorities cannot reach an agreement on one or more issues that prevent the resolution of the case[175]. The arbitration procedure suggested by the OECD is broadly similar to the arbitration procedure of the EU Arbitration Convention. However the uptake of arbitration procedures within the EU is rather limited. Up to date an arbitration clause was agreed only in 14 DTC of 378 bilateral relationships within the EU which, however, vary as regards the procedure[176].

170 See section 2.6 in data collection 2016 and section
171 See Annex G for an overview of AC cases initiated vs. cases completed per MS
172 See paragraphs 63 ff. of the Commentary on Article 25 OECD MTC
173 See bilateral DTC involving the following Member States: AT/DE, BE/UK, EE/NL, FI/NL, FR/DE, FR/UK, DE/LU, DE/SE, DE/UK, IT/SI, NL/PT, NL/SI, NL/UK, ES/UK
174 See bilateral DTC involving the following Member States: CY/LV, CY/LU, CY/NL, CY/FI, CY/HR, DK/ES, DK/FR, HR/LU
175 See paragraphs 63 ff. of the Commentary on Article 25 OECD MTC
176 AT/DE, BE/UK, EE/NL, FI/NL, FR/DE, FR/UK, DE/LU, DE/SE, DE/UK, IT/SI, NL/PT, NL/SI, NL/UK, ES/UK

In addition there are situations with no dispute resolution mechanism at all. In the EU 8 of 378 bilateral relationships between MS are not covered by a DTC[177].

B. Shortcomings identified for DTDRM in the EU overview

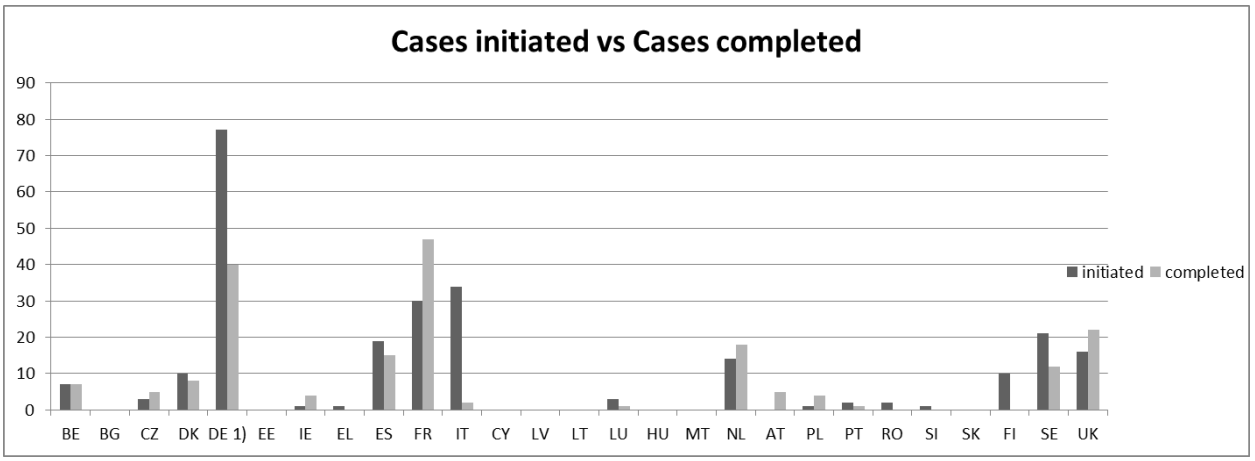
The Table bellows presents an overview of the shortcomings identified per double taxation resolution mechanism. For all DTDRM problems as regards enforceability and efficiency have been encountered. As regards the scope of mandatory resolution the EU Arbitration Convention is limited to issues of transfer pricing/profit attribution to permanent establishments and DTC which contain an arbitration clause are only available in a very limited number of bilateral relations between MS:

	Enforceability			Efficiency			Scope of mandatory resolution		
DTDRM	Implicit denial	Explicit deni-al	Block	Admin. burden and costs		Non homog. uptake in the EU	Not mandatory	Limited to certain issues	Limited to certain MS
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		

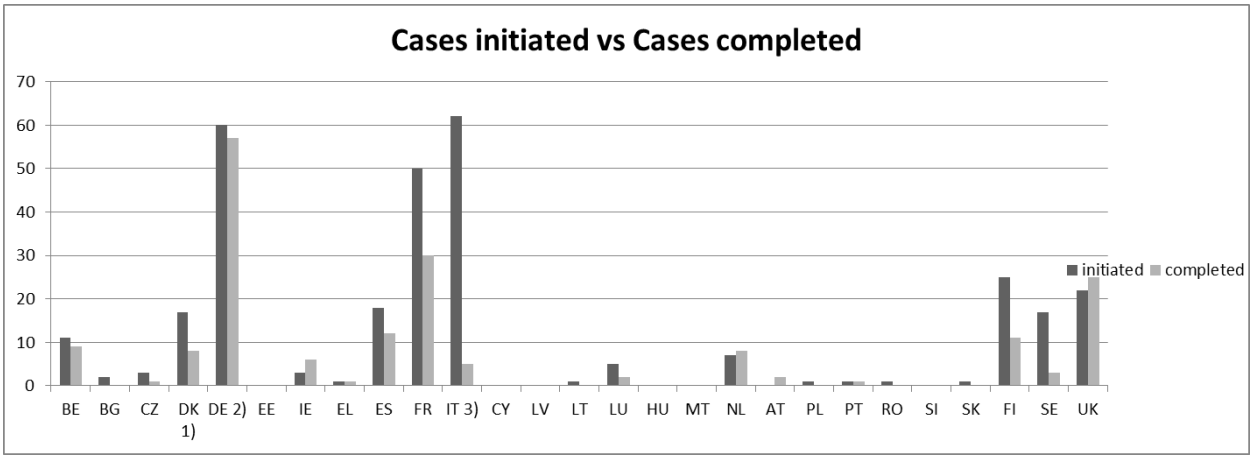
[177] CY/LV, CY/LU, CY/NL, CY/FI, CY/HR, DK/ES, DK/FR, HR/LU

ANNEX G: VERVIEW OF CASES INITIATED UNDER THE AC VS. CASES COMPLETED PER MEMBER STATE

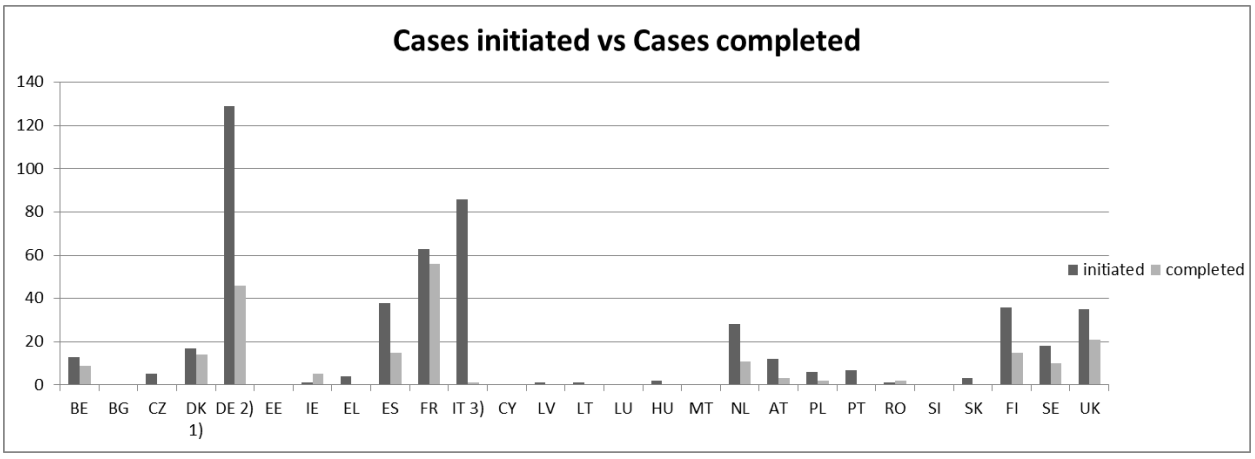
2012



2013



2014



ANNEX H: ASSESSMENT OF DATA COLLECTION ON IMPROVING DOUBLE TAXATION DISPUTE RESOLUTION MECHANISMS

A. Information About You

We received 27 responses. 25 responses where from an organization or company 2 answers were received from a consultancy firm summarizing the responses received from its network.

In 15 cases it was the ultimate parent company responding to the questionnaire in 4 cases an intermediate parent and in 3 cases a subsidiary.

Qualification of the respondents

5 respondents did not give an answer to the questions to assess the size of the respondents. 3 respondents fall under the EU definition of Small and Medium Sized Enterprises ('SME').[178] The others are big Multinational enterprise Groups

The respondents were resident in the following States:

In 15 cases it was the ultimate parent company responding to the questionnaire in 4 cases an intermediate parent and in 3 cases a subsidiary.

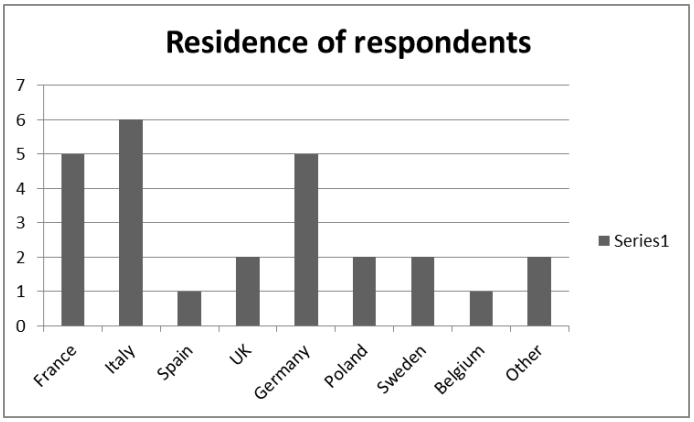
Qualification of the respondents

5 respondents did not give an answer to the questions to assess the size of the respondents. 3 respondents fall under the EU definition of Small and Medium Sized Enterprises ('SME').[179] The others are big Multinational enterprise Groups

Qualification of the respondents

5 respondents did not give an answer to the questions to assess the size of the respondents. 3 respondents fall under the EU definition of Small and Medium Sized Enterprises ('SME').[180] The others are big Multinational enterprise Groups

The respondents were resident in the following States:

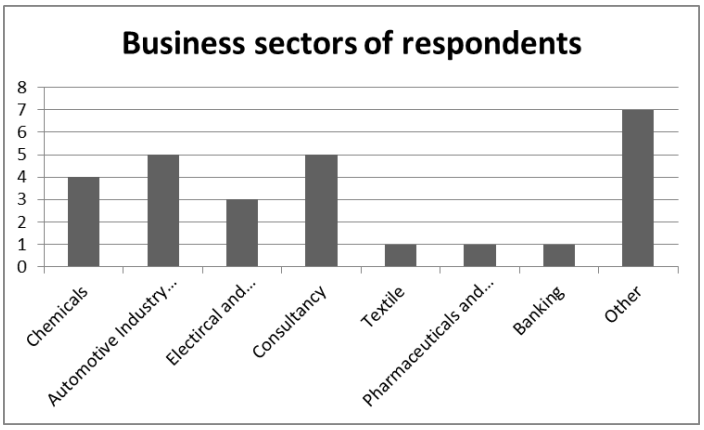


22 of them are doing business at international level including the EU 5 only in their State of

[178] EU recommendation 2003/361
[179] EU recommendation 2003/361
[180] EU recommendation 2003/361

residence

The respondents are active in the following business sectors:



B. Your Opinion

1. Double Taxation within the EU

1.1 Did you encounter any case of double taxation in a cross-border situation within the EU?

21 respondents did encounter double taxation within the EU 5 did not and 1 respondent did not provide an answer.

1.2 If yes please indicate the cases of double taxation in a cross border situation you experienced between 2010 and 2015 within the EU (the term 'case' refers to an instance of double taxation resulting e.g. from a reassessment and is not restricted to a single tax year).

Of 21 respondents who did encounter double taxation within the EU cases were reported as follows:

Year	Exploitable responses	Number of cases reported	Relating to tax years	Procedure to eliminate double taxation initiated		Amount provisioned for the cases	
				Yes	No	Yes	No
2010	9	24	2002 (2) 2003 (2) 2004 (2) 2005 (4) 2006 (5) 2007 (5) 2008 (3) 2010 (1)	6	3	70.5 M EUR (10 cases)	
2011	7	16	2002 (1) 2003 (2) 2004 (3) 2005 (3) 2006 (4) 2007(4) 2008 (2) 2010 (1) 2011 (1)	4	3	45.6 M EUR (4 cases)	
2012	7	19	2002 (1) 2003 (1) 2004 (1) 2005 (1) 2006 (2) 2007 (2) 2008 (3) 2009 (3) 2010 (3) 2011 (1) 2012 (1)	5	2	210 M EUR (3 cases)	2
2013	4	18	2002 (1) 2003 (2) 2004 (2)	5	0	2	2

			2005 (2) 2006 (2) 2007 (2) 2008 (3) 2009 (4) 2010 (2)				
2014	6	26	2002 (1) 2003 (2) 2004 (2) 2005 (2) 2006 (2) 2007 (2) 2008 (3) 2009 (5) 2010 (4) 2011 (2) 2012 (1)	6	2	38.5 M EUR (7 cases)	1
2015	6	9	2008 (1) 2009 (1) 2010 (5) 2011 (4) 2012 (3) 2013 (2) 2014 (1)	1	5	65.3 M EUR (7 cases)	1

1.3 In the following table please provide us with your best estimate of the relative impact of the double taxation cases as listed above based on consolidated account information (or if not available on other accounting information). The information below should provide information about the impact of the disputed tax at the level of the whole MNE Group

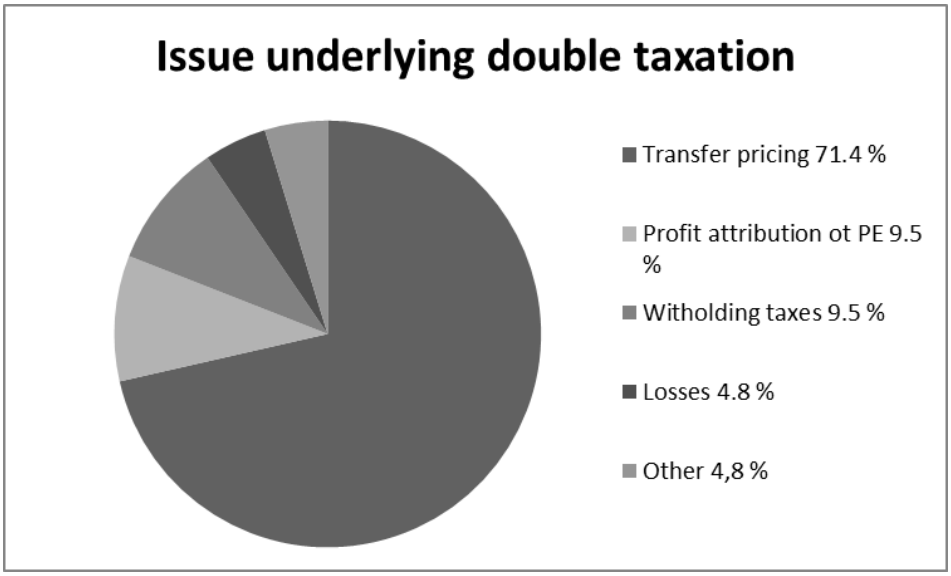
There were only a limited number of exploitable answers allowing only a min/max overview

Year	Exploitable answers	Amount of DT		% of total income tax		% of tax re assessed		% of tax liabilities		% of turnover		% of net pre-tax profit	
		Min	Max	Min	Max	Min	Max	Min	Max	Min	Max	Min	Max
2010	4			0.002	10	2	15	0.002	20	0.0015	1	0.004	5
2011	4			0.005	20.37	2	2	0.005	177.66	0.0019	0.14	0.005	14.8
2012	5			0.003	40	2	35	0.003	30	0.0014	8	0.003	20
2013	3			0.005	14.36	2	2	0.005	11.91	0.002	0.09	0.005	
2014	3			0.006	11.66			0.006	10.77	0.0025	10.77	0.005	
2015	5			0.008	10	0	100	0.008	40	0.0033	45	0.007	20

2. Your cases of double taxation within the EU

2.1 What was the main reason for the double taxation? (only one choice possible)

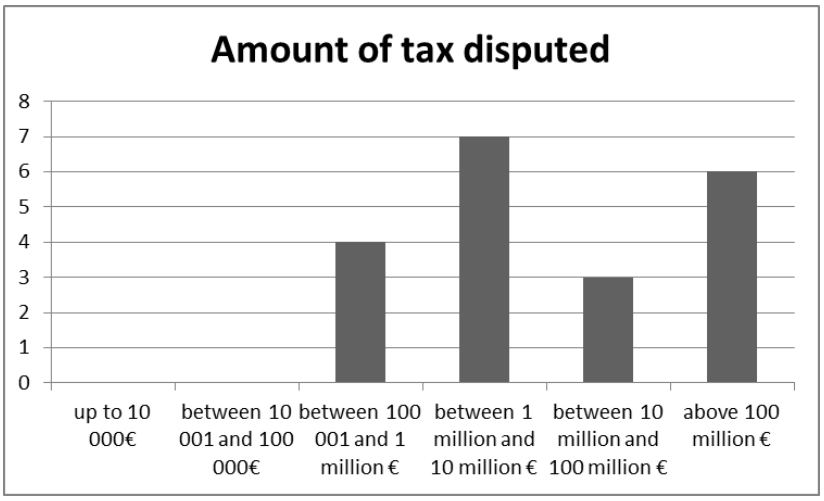
Within the 21 responses the major reason for the double taxation was transfer pricing



2.2 Which Member State(s) was (were) involved? (multiple choices possible)

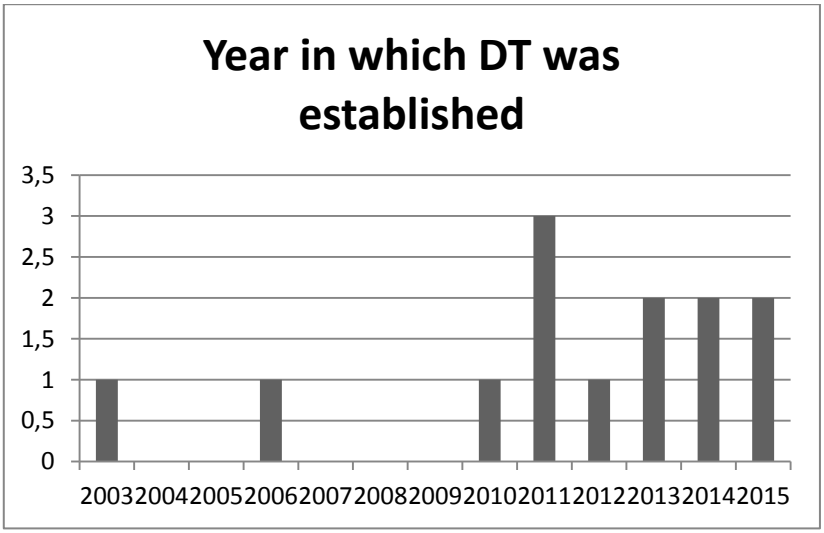
2.3 What was the amount of income tax/corporate tax disputed in your case of double taxation within the EU?

Information was received from 20 respondents



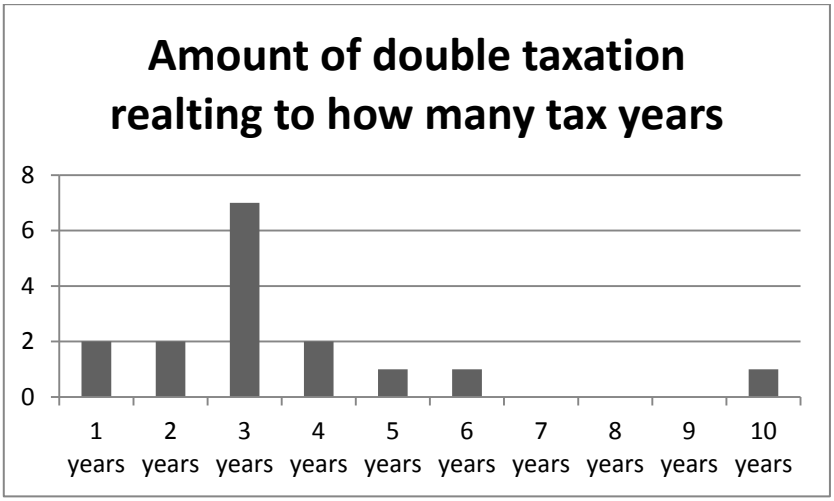
2.4 a) In which year was the double taxation established?

Information was received from 13 respondents



2.4 b) To how many tax years did this amount relate?

Information was received from 16 respondents



2.5 What have been/will be the approximate costs of the case of double taxation you are reporting? (in Euros)

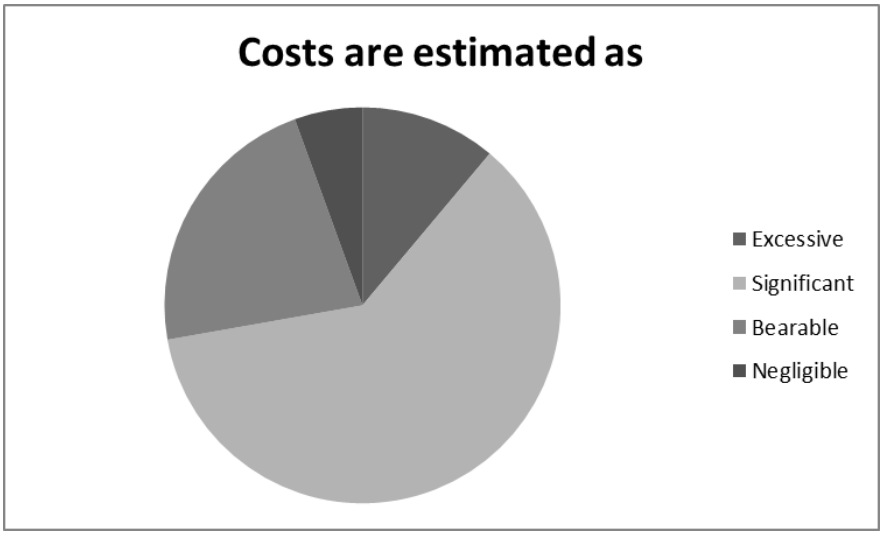
There were only a limited number of exploitable answers allowing only a min/max overview

In Euro		Legal advisory and procedure costs	in-house costs (e.g. salary of dedicated resources)	Other external administrative costs	Interest costs	Penalties	Other costs
between 100 001 and 1 million €	min	15.000	23.500				
	max	30.000	23.500				
between 1 million and 10 million €	min	40.000	10.000		100.000		
	max	750.000	400.000			32.5000	
between 10 million and 100 million €	min	35.000	10.000		8.000.000		
	max	200.000	100.000		30.800.000	23.000000	
above 100 million €	min	100.000			10.000		
	max	1.000.000				100.000.000	18.000

Other costs were specified as costs arising for translation

2.6 If you cannot estimate the costs how do you perceive these costs within the total costs arising for fulfilling your tax obligations of the company during the period in which the double taxation did remain?

In 18 responses received on this question and costs were estimated as


Costs are estimated as
Excessive
Significant
Bearable
Negligible

2.7 a) In the following tables please provide us with your best estimate of the relative impact of the disputed double taxation case based on consolidated account information (or if not available on other accounting information). The information below should therefore inform about the impact of the disputed tax at the level of the whole MNE

9 responses were received on the question in the first column (amount of double taxation with a minimum amount of double taxation 3.400.000 Euro and a maximum of 260.000.000 Euro resulting in an average of around 45.000.000 per case.
For the other columns very limited information was received.

2.7 b) Amount provisioned in the consolidated accounts of the MNE Group for the case described in 2.1

6 responses were received on this question. 2 respondents provisioned for the full amount of double taxation2 1 respondent provisioned 50% and 3 respondents did not provision for potential double taxation

2.7 c) The allocation and relevance of the mount provisioned for the case of double taxation described in 2.1 to the MS involved

No information was received on this question/table

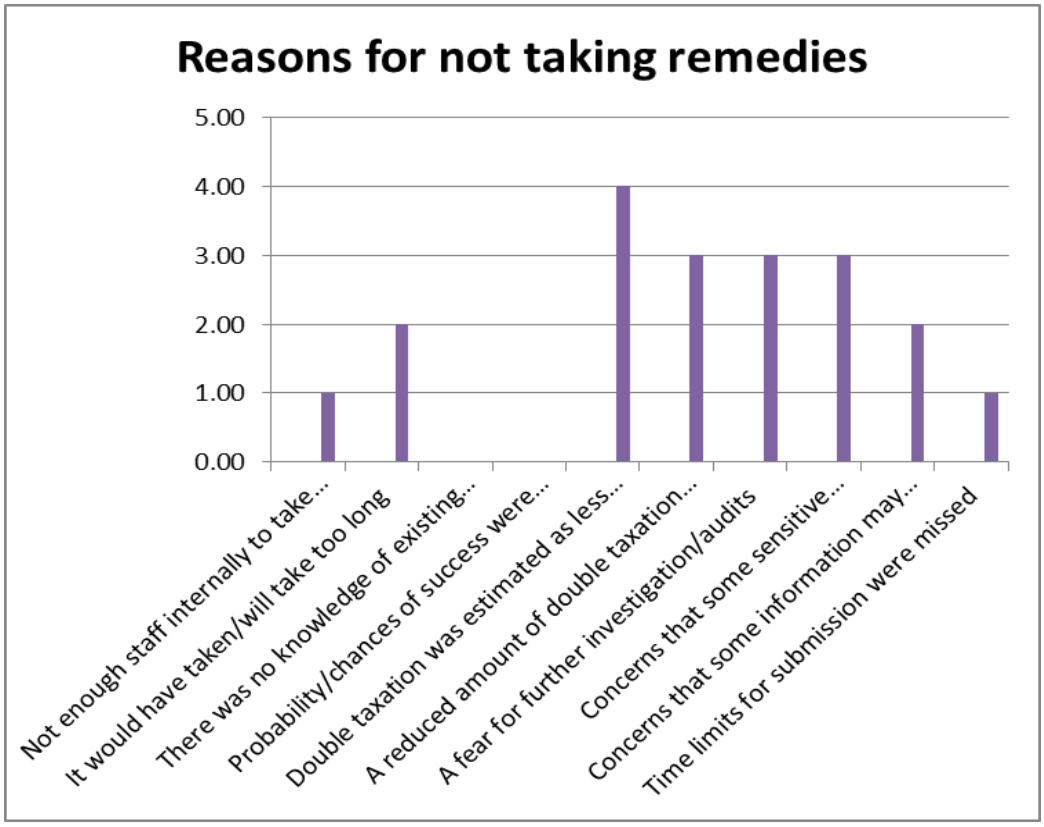
3. Measures Taken to Resolve Your Case of Double Taxation

3.1 Did you seek remedies to remove double taxation in the case reported?

20 responses were received on this question. 14 (70%) respondents did take remedies 6 (30%) respondents did not.

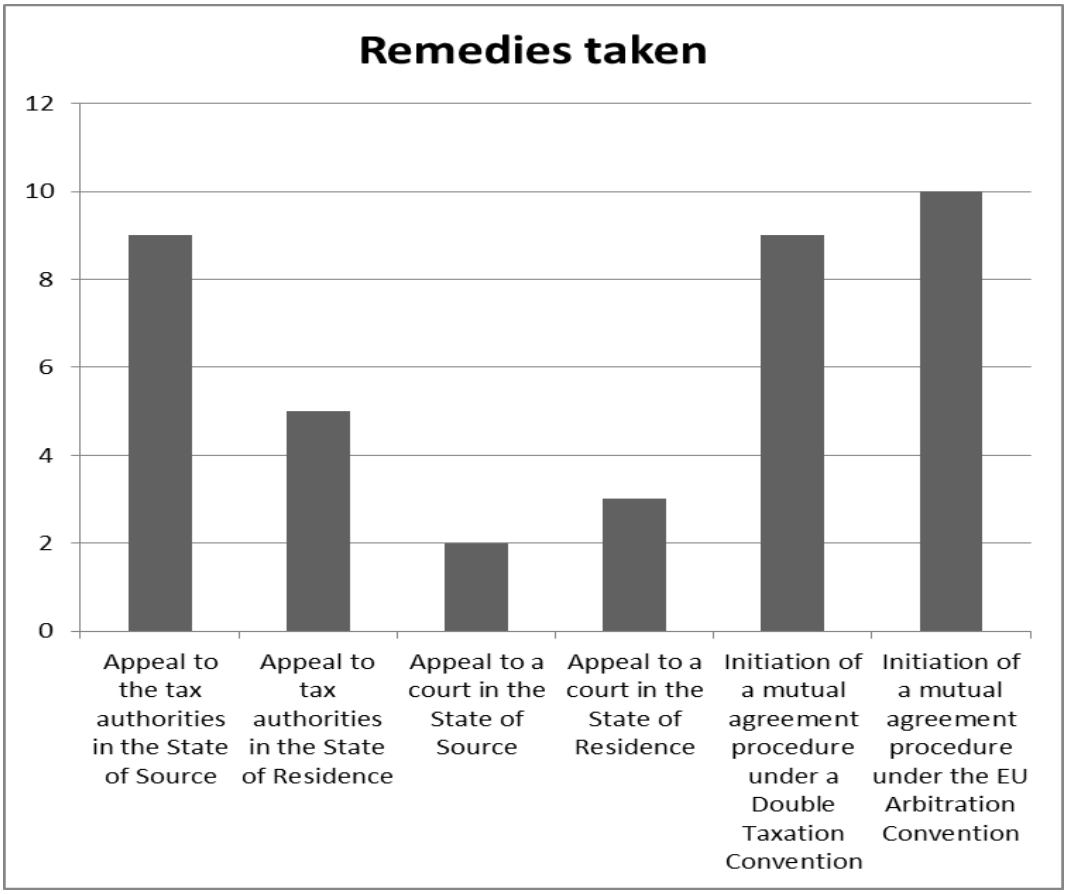
3.2 What was/were the reason(s) for not having sought remedies to remove double taxation? (multiple choice possible)

Those respondents who did not take remedies provided the following reasons:



3.3 a) What remedies did you seek to resolve your double taxation case? (multiple choice possible)

The 16 respondents who tool remedies responded as follows which also shows that often more than one kind of remedy was taken:



3.4 How effective was the solution?

13 responses were received on this question which resulted in the following

Arbitration Convention	
The double taxation was entirely eliminated	2
The double taxation was partially eliminated	1
I withdrew my application during the procedure	
The procedure is ongoing	5
My request was rejected by Member States	
Other	
MAP under Double taxation	
The procedure is ongoing	3
Remedies under domestic law	
The procedure is ongoing	1
I withdrew my application during the procedure	1

3.5 a) In case the procedure is finished: How long did it take?

Arbitration Convention	months
Duration min	36
Duratoin max	60
DTC	
Duration	36

3.5 b) In case the procedure is not yet finished: since how long has it been ongoing since you have requested to initiate the procedure?

Arbitration Convention	months
Duration min	20
Duratoin max	56
DTC	
Duration min	36
Duration max	63
Domestic	
duration min	4
duration max	

3.6 According to your opinion what are the biggest advantages of the procedure you have used? (multiple choice possible)

Arbitration Convention	Number
The Member States are obliged to reach a solution	6
The procedure can be solved in an appropriate timeframe	1
There is a possibility to be involved in and contribute to the discussions during the procedure	1
DTC	
The Member States are obliged to reach a solution	1
The procedure can be solved in an appropriate timeframe	1
There is a possibility to be involved in and contribute to the discussions during the procedure	1
Domestic	
There is a possibility to be involved in and contribute to the discussions during the procedure	1

3.7 According to your opinion what are the biggest disadvantages/problems of the procedure you used? (multiple choice possible)

Arbitration Convention (8 cases)	Number
It takes too long	8
It is too costly	3
It is not conclusive	4
It is not transparent enough	3
It is ineffective when more than two countries are involved	3
There is only a limited possibility for the taxpayer to contribute to the discussions during the	5
Double Taxation Convention (3 cases)	
It takes too long	3
It is too costly	
It is not conclusive	3
It is not transparent enough	3
It is ineffective when more than two countries are involved	
Dom law (2 cases)	
It takes too long	1
It is not conclusive	1
It is ineffective when more than two countries are involved	1

4. The EU Arbitration Convention as a specific Double Taxation Dispute Resolution Mechanisms available in the EU

4.1 Did you ever apply for the double taxation dispute resolution mechanism under the EU Arbitration Convention?

21 responses were received on this question. 14 respondents did apply for a procedure under the AC 7 respondents did not.

4.2 a) Was access to the Arbitration Convention accepted by a tax authority?

In the 14 cases where a request was made under the EU Arbitration Convention the request was accepted in 10 cases and denied for 4 cases.

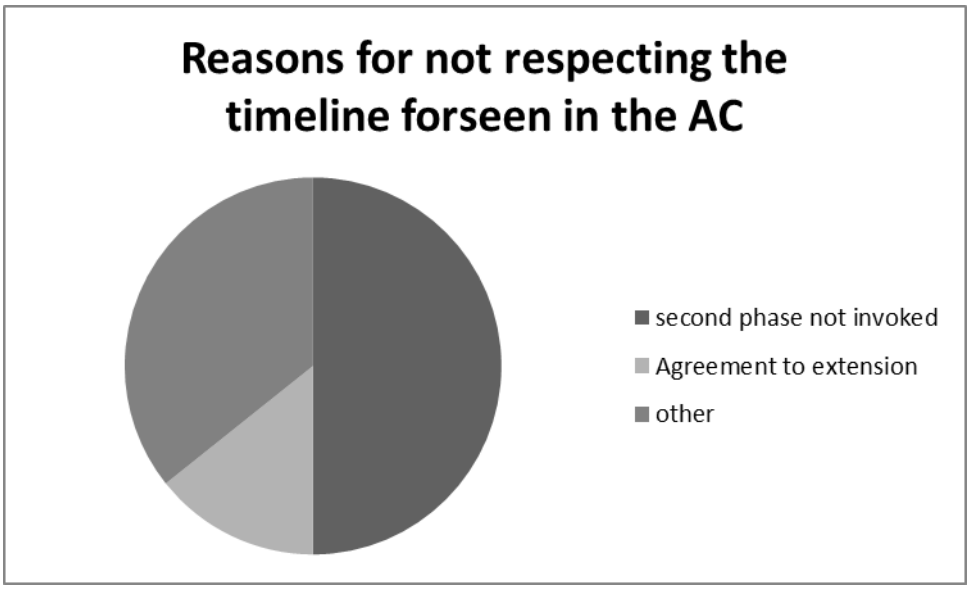
4.2 b) What was the reason for the denial of access?

In 1 case access was denied because the case was regarded as not covered by the Arbitration Convention. In the other 3 cases access was denied for the following reasons:

1 case: *We obtained acceptance for some cases. The acceptance has been granted after many years.*
2 cases: All reasons listed are used to deny access to the AC. Other reasons may include: non-recognition of the double taxation or divergence in interpretation of Article 4 of the AC

4.3 The EU Arbitration Convention foresees certain deadlines to be respected. Were they followed?

Within the 14 cases the deadline was followed in 1 case. In 13 cases the deadline was not followed for the following reasons.



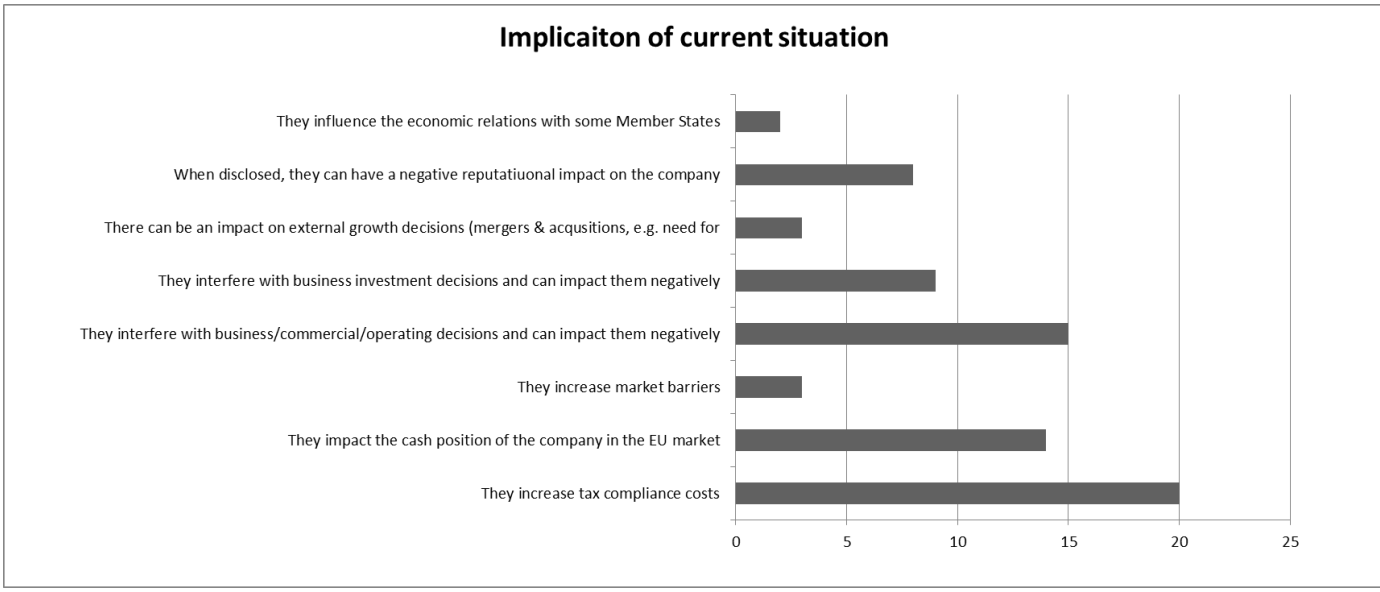
Other reasons mentioned were:

- either the arbitration phase is not started or the acceptance of the filing is not granted.
- No news from tax authorities
- The procedure is still ongoing
- one competent authority involved denied communication with the other one involved
- All reasons mentioned above. Useful to explore reasons why implementation took longer than expected.

5. The Implications of Double Taxation within the EU

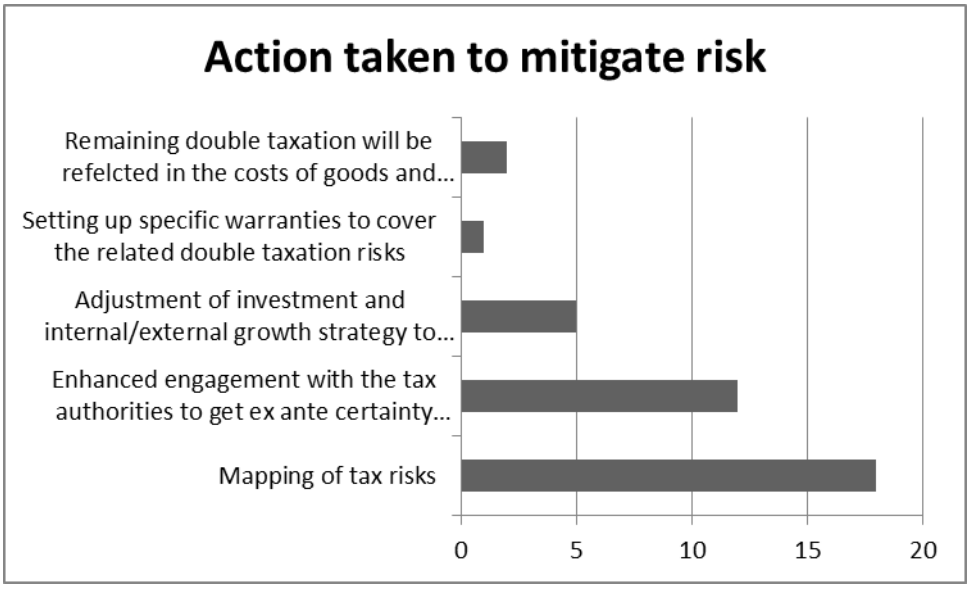
5.1 In your view what are the implications for your company/group from the current situation with double taxation disputes in the EU overall (multiple choices possible)?

23 responses were received on this question:



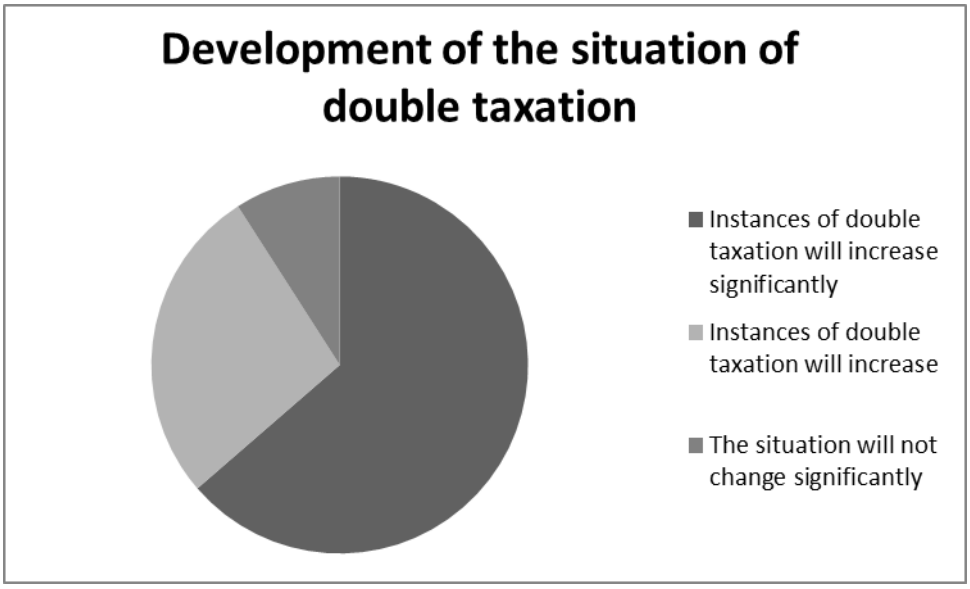
5.2 What does your company/group mainly do to mitigate these issues? (multiple choices possible) Mapping of tax risks?

23 responses were received on this question



5.3 In your opinion how do you think the situation as regards double taxation within the EU will develop within the next 5 years?

22 responses were received on this question estimating the future development of double taxation. 14 respondents (64%) expect a significant increase 6 (27%) expect an increase and 2 (9 %) respondents think that the situation will not change.


Development of the situation of double taxation
Instances of double taxation will increase significantly
Instances of double taxation will increase
The situation will not change significantly

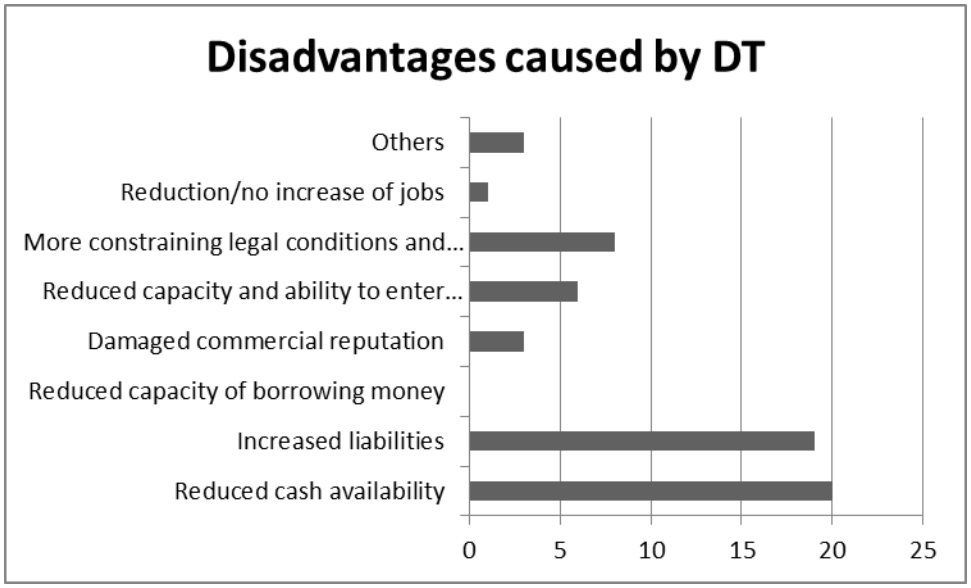
5.4 How do you rate the implication of the aspects listed under 1-5 in the rows of the table on the number of cases of double taxation?

	It will result in the number of double taxation disputes increasing significantly	It will result in the number of double taxation disputes increasing somewhat	They will not change the current situation	It will result in the number of double taxation disputes decreasing somewhat	It will result in the number of double taxation disputes decreasing significantly	I have no opinion
1. EU proposals in the area of direct taxation	9	3	6	2	0	2
2.Globalisation of business	11	7	2	0	0	2
3. The implementation of the conclusions of the OECD/020 BEPS project	15	4	1	1	1	0
4. Frequent changes in business models	9	11	1	0	0	1
5. Business focus on intangible assets	10	10	1	0	0	1

6. The Implications of Double Taxation Disputes on Your Worldwide Operations

PLEASE NOTE: THE QUESTIONS IN THIS SECTION ARE NOT LIMITED TO INTRA EU SITUATIONS

6.1 Did you face disadvantages caused by your cases of double taxation? If so please specify the kind of damage? (multiple choices possible)



Do you consider cross border tax disputes as one of the risks which would potentially lead you to book a reserve/provision in your accounts?

24 of 26 respondents answered with Yes i.e. for the vast majority cross border tax disputes lead to book a reserve in the accounts

If yes would the existence of a Mutual Agreement Procedure with no arbitration mechanism lead you to not book fully or partly corresponding reserves/provisions?

On this question 16 of 22 respondents answered with No i.e. for the vast majority the existence of MAP without arbitration would not lead them to book corresponding reserves

If yes would the existence of an arbitration mechanism lead you to not fully or partially book corresponding reserves/provisions?

On this question 10 of 18 respondents answered with yes i.e. the existence of an arbitration mechanism would lead the majority of respondents to not book a corresponding reserve.

Did you book a provision for taxes in your accounts in relation to cross border tax disputes?

18 of 23 respondents booked a provision for taxes in their account

If you answered yes to one of the questions above what is the amount in your consolidated accounts of the respective financial year?

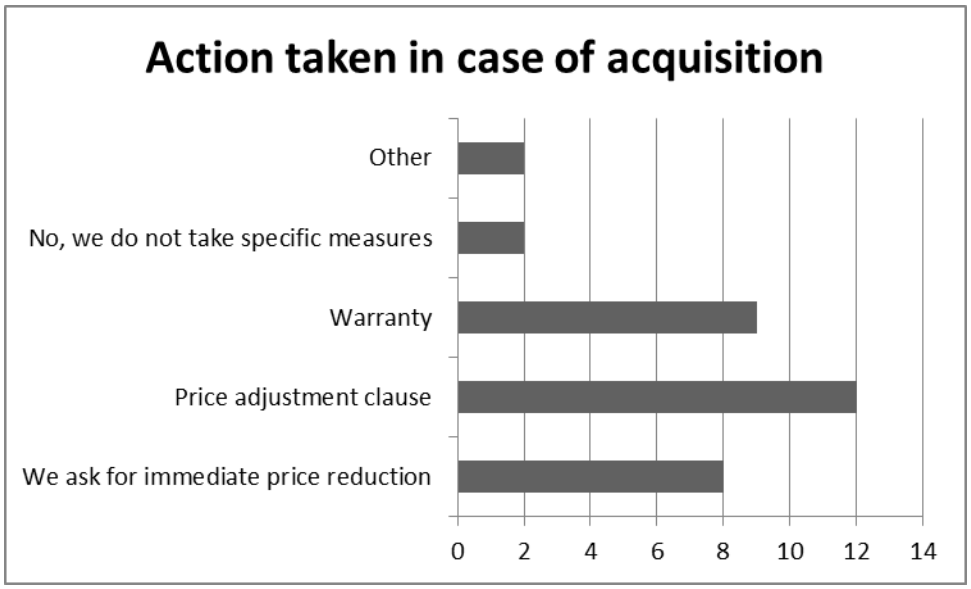
Only 4 respondents provided information on this question:

	Respondent 1	Respondent 2	Respondent 3	Respondent 4
2010	4 000 000	2 000 000	17 000 000	
2011		2 000 000		
2012		3 000 000		
2013		5 000 000		
2014		7 000 000	10 000 000	69 900 000
2015		7 000 000	19 000 000	83 200 000

6.7 In case of acquisition of a business or a company do you regard the identification of significant unresolved cross border tax disputes as a potential deal breaker i.e. did you decide not to enter into a transaction envisaged?

From 26 respondents 15 respondents regard such a cross border tax disputes as potential dealbreakers 11 respondents don't do so. .

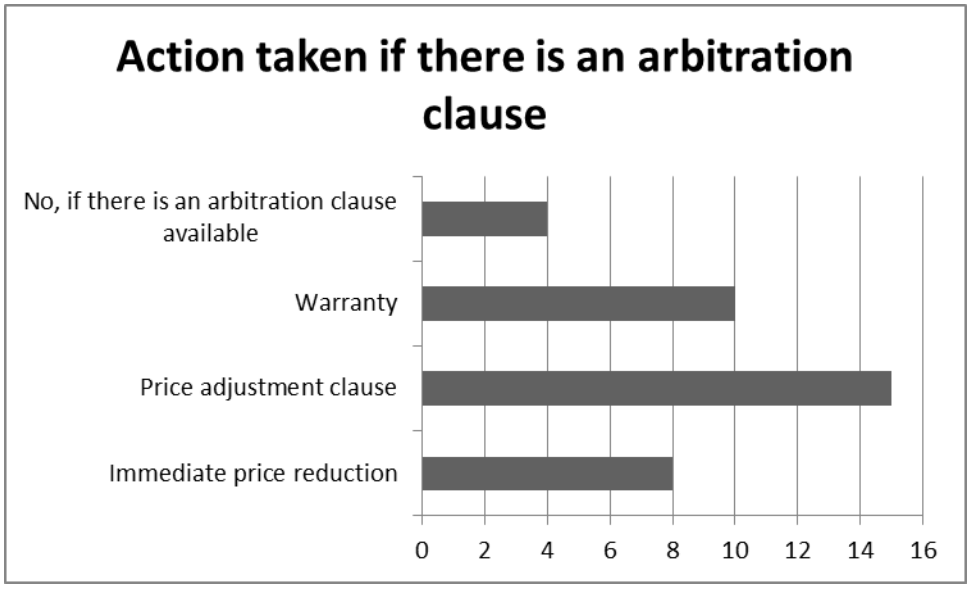
6.8 In case of acquisition of a business or a company do you ask for warranty or price adjustment clause or an immediate price reduction in relation to a pending double taxation dispute?



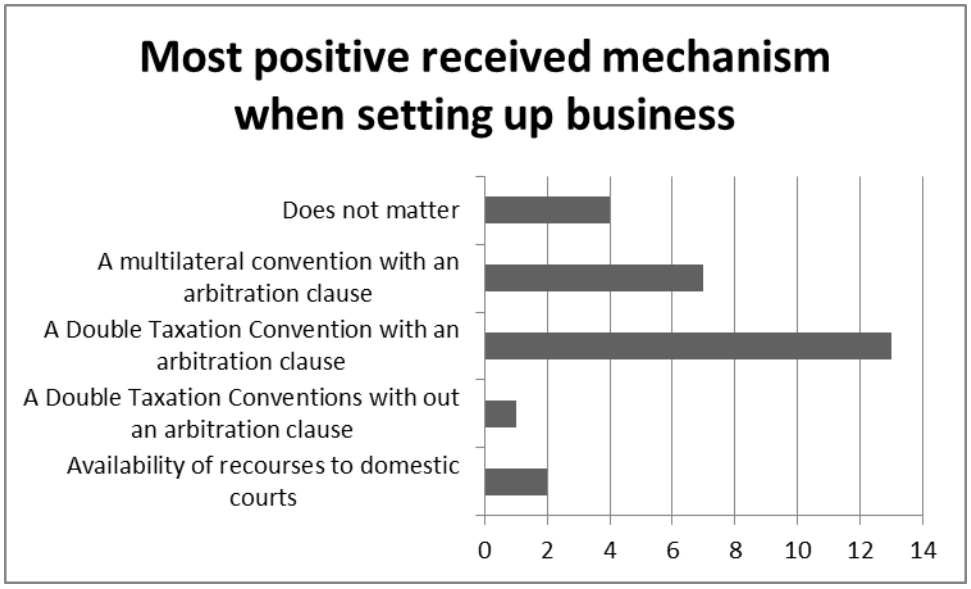
Other actions mentioned are

- Indemnity from seller
- Case-by-case decision
- Various - usually a negotiation mix

In case an arbitration clause is available for a pending double taxation dispute do you ask for a warranty or price adjustment clause or an immediate price reduction in relation with the pending dispute resolution?



When you set up a business in another State which of the following mechanisms do you consider as the most positive factor for investment as regards double taxation dispute resolution?



6.11 If you answered yes to one of the factors in 6.10 do you consider that they facilitate the incorporation of a business or setting up a branch at an earlier stage (shortening of the preparatory investment period)

On this question 12 of the 23 respondents answered with yes and 11 with no

6.12 In the following table please provide us with your best estimate of the relative impact of all your disputed double taxation cases based on consolidated account information (or if not available on other accounting information). The information below should therefore inform about the impact

of all disputed double taxation at the level of the whole MNE

On this question no exploitable answers were received

ANNEX I: CONSULTATION STRATEGY

A. Origin/Past Consultation

1. Origin: A consultation was launched in 2010 and resulting the following main conclusions:

- Most corporate taxpayers who responded encountered double taxation
- All MS are involved
- The problem is not limited to intra EU situations
- Transfer Pricing is the most frequent reason
- The scale of tax involved is significant

2. Follow up: As a follow-up to the result of the 2010 public consultation COM examined the scope and magnitude of the problem by the following measures/consultations:

- November 2011: Communication From the Commission on double taxation in the Single Market (COM (2011) 712 final
- March 2012: Change of statistics on functioning of the EU Arbitration Convention to better assess the problem as regards transfer pricing
- December 2012: Organisation of a Fiscalis seminar on double taxation issues and insufficiency of international agreements
- March 2013: Launch of Study to identify and describe most frequent double taxation cases in the internal market (delivered by E&Y in June 2013)
- April 2013: Discussion incl. questionnaires to MS and stakeholder meetings
- October 2013 to March 2015: Consultation of EU JTPF and comprehensive discussion in EU Joint Transfer Pricing Forum ('JTPF') on improving the functioning of the Arbitration Convention
- June 2014: Creation of an expert group on cross border tax obstacles for individual and on inheritance tax within the EU
- March 2015: Report of the JTPF ('JTPF') on Improving the functioning of the Arbitration Convention

B. Ongoing/Future Consultations

1. Public Consultation (all stakeholders)

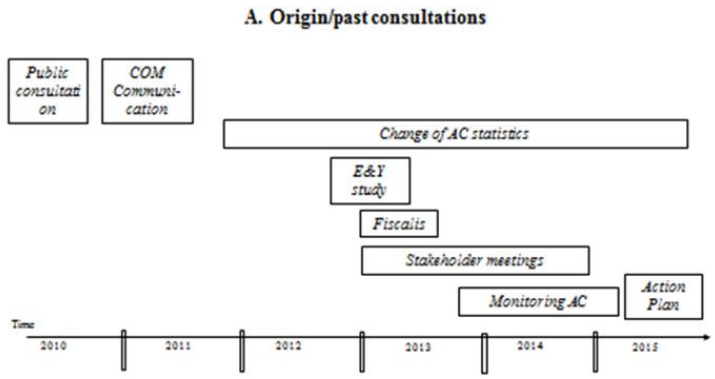
- **Objective**: To allow interested parties to provide their views and opinions in order to inform the policy development process
- **Whom**:
  - An **open consultation** which is designed to capture general views and opinions of any interested persons (citizens economic operators NGOs academics local public authorities public organisation or authority etc.)
- **How**: Online questionnaires (Europa web-site EU-survey).
- **When**: launched on 16 February – close 10 May (cob)
- **Publicity**: Action Plan + Press release + Europa web-site + targeted e-mailings + EU JTPF and Platform for Tax Good Governance as EU Expert Groups
- **Acknowledgement**: as per public consultation procedures
- **Processing of comments**: Stratification / statistics attentive reading

- **Feed-back**: Each response fed into Europa web site + summary of comments in ad hoc document to be posted on the web site + use in IA work.

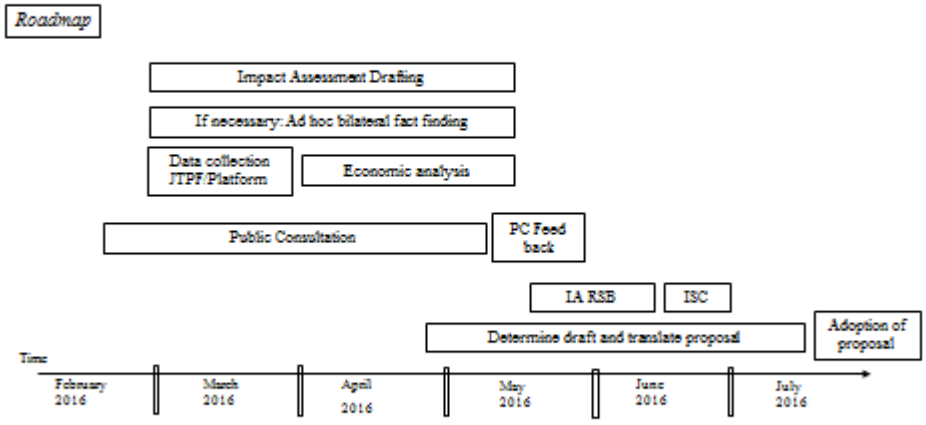
2. Data collection via a questionnaire to Commission Expert Groups namely the EU Joint Transfer Pricing Forum and the Platform on Tax Good Governance

- **Objective**: To collect meaningful data on the size and possible impact of the problem inter alia on:
  - the origin of the dispute
  - the amount of taxes involved
  - the measures taken
  - the costs associated with the procedures taken
  - the implications on investment decisions M&A creditworthiness
- **Whom**: The parties that are member organisations represented in the Forum/Platform
- **How**: targeted emails to Member organisations with a link and a password to enter the questionnaire in EU-survey
- **When**:
  - EU JTPF: launched 4 March closing 31 March
  - Platform : launched 9 March closing 31 March
- **Publicity**: in accordance with the rules of the JTPF/the Platform
- **Processing of comments**: Evaluation of results via EU-survey statistics extrapolation.
- **Feed-back**: Results fed into the IA work and draft proposal – minutes fed into Europa web site

Improving Double Taxation Dispute Resolution Mechanisms



B. Ongoing Consultation Strategy Impact Assessment



ANNEX J: UNCITRAL MODEL LAW ON COMMERCIAL ARBITRATION (2006) – EU28 - OVERVIEW

Adoption of the fast-track default mechanism for appointing arbitrators – Role of the National Court or Other Authority for certain function of arbitration assistance and supervision[181]

Adoption and application of the UNCITRAL Model articles 6 11(3) and 11(4)	Appointment by default within 30 days of the Arbitrator(s) by the competent judge or authority instead of the failing party or failing arbitrators (for cases related to the appointment of the third arbitrator)
	National Competent Court: BE CZ DE EE IE EL ES FR HR DK CY HU MT AT PT RO S l FI *Other Authority*: BG SK
Adoption of other alternative rules which are compatible with the UNCITRAL Model Law on Commercial Arbitration (2006)	LT/IT: shortened period of 20 days NL: period of 2 months PL/UK: shorter period depending on notice by one party LV: general principle according to which 'the parties can delegate the appointment of the arbitrators to any natural or legal person'

[181] See UNCITRAL Model Law on Commercial Arbitration 1985 – With amendments as adopted in 2006, Articles 6, 11(3) and 11(4) as well as the appended Explanatory Note by the UNCITRAL secretariat on the 1985 Model Law on International Commercial Arbitration as amended in 2006 (Part Two), Section B.1.b 'Salient features of the Model Law – Delimitation of court assistance and supervision': §15 "Recent amendments to arbitration laws reveal a trend in favour of limiting and clearly defining court involvement in international commercial arbitration. This is justified in view of the fact that the parties to an arbitration agreement make a conscious decision to exclude court jurisdiction and prefer the finality and expediency of the arbitral process."

ANNEX K: IMPACT ON FUNDAMENTAL RIGHTS

With the entry into force of the Treaty of Lisbon on 1 December 2009 the Charter of Fundamental Rights of the European Union ('the Charter')[182] has become legally binding. All legislative proposals of the Commission are subject to a systematic check to ensure their compliance with the Charter[183]. This annex assesses the impact on the following relevant fundamental rights embodied in the Charter

Right to property (Article 17)

All policy options on effective DTDRM have a positive impact on the protection of right of property. Indeed taxpayers or businesses being subject to unresolved situations of double and even multiple taxations considering also the increasing investigatory powers of tax administrations and the high amounts at stake[184] could conclude that their right to property is impacted. This is reinforced by the fact that there is no certainty in terms of enforceability and implementation of an inter-State decision eliminating double taxation: some authors argue that ultimately governments are not constrained by such decisions particularly arbitration decisions under DTCs since no international mechanism exists for the enforcement of international obligations such as arbitration awards. According to the same authors domestic courts might not be able to enforce these awards given the questionable application of the New York Convention on tax arbitration and the doctrine of sovereign immunity and public policy[185]. The policy options on effective DTDRM respect the right of property by offering a recourse to taxpayers before National Courts in order to ensure that a final decision is ultimately taken to eliminate double taxation and also by ensuring the enforceability and implementation of this decision under the control of National Courts.

Right to an effective remedy (Article 47 of the Charter)

All policy options on effective DTDRM respect the right to an effective remedy. The policy options on do not affect the right of taxpayers or businesses to an effective remedy. None of the policy options deprives taxpayers or businesses of their right to go to court in case their rights and freedoms guaranteed by EU law are violated.

The DTDRM mechanisms envisaged particularly under option B are not designed to replace court procedures but to offer taxpayers a complementary tool to solve their disputes before going to court if necessary. Recourse to DTDRM before going to court will not be made a mandatory first step.

In addition the initiative will set common standards for DTDRM mechanisms along the lines of standards under the right to a fair trial. The DTDRM mechanisms have to be impartial disputes shall be dealt with in a short period of time and the taxpayers will have a right to be heard and represented as well as to be kept informed about the progress of the MAP.

---

182 OJ 2010 C 83/02, 389

183 Communication from the Commission Strategy on the effective implementation of the Charter, COM(2010) 573 final, available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0573:FIN:EN:PDF

184 Debelva F. (2015) Excessive international taxation European Association of Tax Law Professors (EATLP) - Doctoral Poster Program, Milan, 28-30 May 2015

185 See Altman, (2005) chap 6

ANNEX L TEMPLATE FOR MONITORING

TABLE 1: STATISTICS ON THE FUNCTIONING OF DTDRM FOR REFERENCE YEAR

Member State:

Year MAP cases were initiated	Opening inventory on 01/01/x	Cases initiated in year x	Cases completed in year x	Ending inventory on 31/12/x	Average cycle time for cases completed in x (in months)
A	B	C	D	E	F
<2003					
2004					
2005					
2006					
2007					
2008					
2009					
2010					
2011					
2012					
2013					
2014					
2015					
TOTAL					

Explanatory notes:

Column B / Opening inventory on 01/01/x: Enter in this column the number of pending AC MAP cases as on the first day of the reference year for which data is being provided, i.e. 01/01/x. (The figures in this column will duplicate the "ending inventory" figures included in the respective column for the previous reference year.) The total number of pending AC MAP cases should be broken down according to the year in which these pending cases were initiated and reported in the appropriate row of the template. (see Column A: Year MAP cases were initiated). The reference year cell is blacked out, as cases could have only been initiated during the actual reference year, not before. A Competent Authority's (CA's) inventory would include both cases arising from a request submitted directly to that CA and cases arising from a request submitted by the taxpayer to another CA and subsequently presented by the latter CA to the former CA. As this would otherwise lead to double counting of cases in the overall statistics (e.g. total number of cases) the actual number of cases for year x will be calculated by way of dividing the resulting total number of cases by 2.

Column C / Cases initiated in x: Enter in this column the number of AC MAP cases initiated during the reference year. Note that it is only possible to enter data in this column in the row for the reference year for which statistics are being provided (the other rows in this column are blacked out), given that pending AC MAP cases initiated in earlier reference years should be reported in Column B. **An "initiated" case** is one that has been considered as well-founded by a competent authority on the basis of 6.3(g) of the CoC. By definition this column will include only cases initiated during the current reference year. A case initiated by the reporting CA but rejected by the other CA has to be included in table 1. This column will include both cases arising from a request submitted directly to your CA and cases arising from a request submitted by the taxpayer to another CA and subsequently presented by the latter CA to the former CA.

Column D / Cases completed in x: Enter in this column the number of cases: (1) that have been resolved by mutual agreement (including arbitration) or by unilateral action on the part of the competent authority, where taxation not in accordance with Article 4 of the AC has been eliminated in line with Article 14 of the AC; (2) that have been withdrawn by the taxpayer; (3) that have been closed otherwise (e.g. final Court decision). A case shall be considered completed on the date the closing letters relating to the MAP have been exchanged or, in absence of closing letters, at the date the CAs closed the case during a bilateral meeting where there has been an agreement that the signed minutes close the case and no further closing letters will be exchanged. At this point, the only remaining action by the tax administration should be the processing of the result of the resolution, which should be accomplished fairly promptly (e.g. within 30 days).

Column E / Ending inventory on 31/12/x: Enter in this column the number of pending AC MAP cases as on 31/12/2015. The total number of pending MAP cases should be broken down according to the year in which these pending cases were initiated and reported in the appropriate row of the template. The figures presented here will be reported in the "opening inventory" column of the questionnaire for the next reference year. The figures in this column are obtained by adding the figures in columns B and C and by substracting the figures in column D.

Column F / Average cycle time for cases completed during the reference year (in months): Enter in this column the average time for AC MAP cases to be completed. This average is computed with reference to the year in which AC MAP cases were initiated (i.e. the cycle time is for AC MAP cases initiated in a particular year) and reported in the appropriate row of the template. The average is computed by aggregating the number of months it took to complete each AC MAP case during the reference year. The second step is to divide this aggregated number of months by the total number of such completed AC MAP cases. The result is the average cycle time of a MAP case in months – that is, the average number of months to complete an AC MAP case.

TABLE 2: ANALYSIS OF PENDING CASES 2 YEARS AFTER THE DATE A CASE WAS INITIATED AS AT 31/12/x

Member State:

A	B	C	D	E	F	G	H	I
2017								
2018								
2019								
2020								
2021								
Total								

Explanatory note:

Column B / Number of cases: please note that years x and y are blacked out because the 2-year period cannot have expired on 31/12/x.

Column C / Two year point not reached due to CoC 5(b)(i): the 2-year period starts on the latest of the following dates: (i) the date of the tax assesment notice, i.e. a final decision of the tax administration on the additional income or equivalent; (ii) the date on which the competent authority receives the request and the minimum information as stated under point 5(a). Thus, if the tax assessment notice (as defined in 5(b)(i)) was not yet issued when the case was initiated, the 2 year period starts some time after initiation, at the the day of the tax assessment notice

Column D / Cases pending before Court: this column covers cases where 2-year period has not yet expired because of Article 7(1) (2nd sentence) of AC and Article 7(3) of AC

Column E / Time limit waived with agreement of the taxpayer: see Article 7(4) of AC

Column F / To be sent to arbitration: to include cases for which the 2-year period has expired, but which have not been referred to an advisory commission

Column G / In arbitration: to include cases referred to an advisory commission and awaiting its opinion

Column H / Settlement agreed in principle, awaiting exchange of closing letters for MAP (or, in absence of closing letters - signed minutes following a bilateral meeting between CAs where there has been an agreement that the signed minutes close the case and no further closing letters will be exchanged): to include cases (i) where CA have agreed MAP; (ii) where the advisory commission has delivered its opinion and the 6-month period where CA can deviate has not yet expired

TABLE 3: REQUESTS REJECTED IN x

Member State:

	Reasons for rejection				**TOTAL**
	Cases not presented within 3-year period	**Cases not within AC scope**	**Cases with serious penalty**	**Other reasons**	
	A	B	C	D	E
Rejected requests submitted to reporting CA					
Cases accepted by the reporting CA which were rejected by other CAs					

Explanatory note:

This table aims to collect information on the number of cases rejected and on the reasons for rejection. Cases to be reported are those rejected by the reporting CA (and therefore not initiated), as well as those accepted by the reporting CA but rejected by the other CA involved (thus initiated but not processed further). Cases initiated by another CA and rejected by the reporting CA are reported by the CA initiating the case.

TABLE 4: Time between submission of AC MAP request and initiation of the case

Member State:

Year MAP cases were initiated	Number of cases	Time from the date of AC MAP submission to the date on which a case is initiated			If more than 12 months between submission and initiation: reasons for the delay
		0-6 months	6-12 months	>12 months	
A	B	C	D	E	F
x					

Explanatory note

Columns C to E / Time from the date of AC MAP submission to the date on which a case is initiated (in months): the purpose is to collect data for the period between the date of submission by a taxpayer of a request for AC MAP and the date on which the case is initiated (i.e. the case has been considered as well-founded by a CA on the basis of 6.3(g) of CoC). The date of submission is the date the request is received by the tax administration. Cases are divided in three categories: period between 0 and 6 months; period between 6 and 12 months; period beyond 12 months. Only cases submitted in the reporting MS should be included. "Date of AC MAP submission" should be understood as the date on which the request was received by the tax administration regardless of whether it already contained the necessary minimum information. If the request did indeed contain the necassry minimum information, the case could be considered as well-founded and could be initiated immediately. Such cases would fall under coulumn C ("0-6 months").

TABLE 5: Estimated amounts of tax involved in cases

Member State:

Year X	Number of pending cases	total amount involved	average per case
up to 10,000			
10,000 - 100 000€			
100 000 - 1 million€			
1-10 million€			
10-100 million€			
> 100 million€			