

Summary Report of Stakeholders' consultation

a. Survey

The consultation period was between 14 March and 10 May 2024 via a public survey. Public outreach to encourage participation in the survey was conducted through DG TAXUD's Newsletter and Website⁽¹⁾ as well as through the attendance of two Commission representatives at the EuroCommerce Taxation Committee Meeting held on 25 April 2024.

16 Responses were received for the public survey. Out of the 16 respondents, 5 did not reply to any question due to the lack of data although they did attach general position papers on the DRM Directive. 4 other respondents also attached general position papers.

The majority of position papers welcomed the adoption of the DRM Directive while concurrently (7 out of 9 position papers) explicitly acknowledging their limited experience given the timeframe it takes for cross-border disputes to evolve to the stage where taxpayers would invoke the DRM Directive. Due to this limited experience, some position papers expressed that it would be appropriate for the Commission to undertake a further review in a few years' time. More specific comments and suggestions provided for in the position papers are included in the related summary of public survey answers below.

Overall, the responses to the various aspects of the DRM Directive provided a favourable picture, however, on many questions no response was given which might be an indication of a lack of or limited experience with the rules of the DRM Directive.

This was further confirmed in the comments made by many stakeholders that they had insufficient data and experience of the DRM Directive to provide a comprehensive assessment. One respondent noted that the first cases of double taxation that fall under the scope of the DRM Directive are only now emerging as a result of the completion of the tax audits. To evaluate the mechanism properly, a further evaluation must therefore take place in four or five years.

Several respondents considered that the DRM Directive should have an explicit provision which precludes the imposition of interest and penalties as a result of the MAP procedure. Further, several correspondents considered that the taxpayer should also be party to the DRM Directive proceedings, including the MAP stage.

Respondents indicated certain restrictive practices with one respondent citing preemptive adjustments by tax administrations availing themselves of an opportunistic bargaining position and the disguised classification of tax assessments as purely a domestic matter. Several respondents noted concerns that Article 16(6) of the DRM Directive could be misapplied. Article 16(6) permits tax administrations to deny access to the dispute resolution process where penalties have been imposed on taxpayers or a process has been opened that could lead to such penalties. Respondents considered that there should be clearer guidelines or a clarification to define what constitutes tax fraud in order to ensure its consistent application.

¹ See the website: https://taxation-customs.ec.europa.eu/news/commission-launches-targeted-consultation-get-feedback-rules-governing-tax-dispute-resolution-eu-2024-03-13_en

Several respondents noted that the DRM Directive should indicate what justification should be provided by Member States to extend the MAP process under Article 4(1) of the Directive. This Article allows the MAP process to be extended up to 1 year at the request of a competent authority of a Member State concerned to all of the other competent authorities of the Member States concerned.

Issues regarding the scope of the DRM Directive were cited by a number of respondents. The expansion of the scope of the DRM Directive to include taxes related to the Pillar II Directive, Value Added Tax, the Anti-Tax Avoidance Directive (ATAD) and, if adopted by Member States, the Commission Transfer Pricing Directive.

Guidelines on the DRM Directive were sought from Tax Administrations to ensure its effective application. In this regard, clarification was sought for a number of definitions in the DRM Directive: whether an “affected person” includes a permanent establishment in a Member State even if the head office of the permanent establishment is not an EU resident; and to clarify the moment from which this period of maximum three years starts (under Article 3(1) of the DRM Directive for submitting a complaint) to run since some Member States refer to the date of the assessment in question, while other Member States refer to the date of the relevant audit report.

Further suggestions made were to allow the taxpayer, the right to apply for multiple processes, use the one with the most efficient process in the MAP phase and decide which follow-up process it wants to pursue if the MAP phase does not work. To establish a forum where structured dialogue between business representatives and EU institutions is supported and encouraged. To make MAP decision public, subject to consent by the relevant parties, which could serve to enhance the technical quality of the decisions.

b. Member States’ consultation

As part of the review, Member States were also consulted on the DRM Directive via a targeted survey, to which 22 Member States replied. Out of the 22 respondents, 6 did not reply to any question due to lack of data. Therefore, the following analysis is based on information provided by 16 Member States regarding their experience with the application of the DRM Directive.

On the general questions, the majority of the respondents confirmed the efficiency of the Directive in terms of broadening its scope and in terms of enforceability. In particular, regarding the effectiveness of the DRM Directive in providing certainty for the resolution of tax disputes, the 13 Member States that provided an answer replied affirmatively. On the specific objective of broadening the scope of the dispute resolution mechanisms, it was expressed by 11 Member States that the DRM Directive is being applied to a wide range of disputes cases and no replies in the opposite direction. On the specific objective of timeliness and conclusiveness of the procedures, the 12 Member States that replied agreed that the DRM Directive is helping to resolve effectively the dispute in a binding manner within a clear and defined deadline. Finally, when it comes to the taxpayers’ rights, 16 Member States answered that the DRM Directive provides taxpayer(s) with enhanced rights to enforce the setting up of resolution mechanisms.

In terms of entry into application, 2 out of 22 Member States confirmed that they have made use of the retrospective clause allowing them to apply the DRM Directive to

complaints submitted prior to 1 July 2019. However, this fact has not been clearly evidenced in the outcome shown in the statistics presented in the previous section.

In relation to the different phases stated on the directive, 13 Member States reported that they always or generally respect the 6 months deadline to take a decision on the acceptance or rejection of a complaint. One Member State replied that only sometimes this deadline is respected due to delays in receiving required information from counterpart Member States. However, this reply is not relevant, as the deadline established in Article 3 (5) starts from the reception of the complaint or the full set of information. In case the complaint is rejected, 2 Member States indicated that those rejections are based on the list of reasons in Article 5(1), and one Member State indicated that their rejections largely follow the listed reasons. In order to make such decision, 15 Member States have reported they applied the possibility of requesting additional information to undertake the substantive consideration of a particular case, while one Member State stated that it had not used that possibility.

Regarding the potential use of Member States of their prerogative to resolve questions in dispute on a unilateral basis, the majority of respondents answered negatively whereas one Member State claimed to have used this prerogative once. In the same vein, 12 replies reported having applied the right of individuals or small undertakings to submit complaints, replies to a request for additional information, withdrawals and requests solely to the competent authority of the Member State in which the affected person is resident.

Regarding the resolution of the accepted mutual agreement procedures, 5 Member States have resolved them within 2 years starting from the last notification of a decision of one of the Member States on the acceptance of the complaint, while 3 reported not having closed them in due time. These last 3 Member States reported that the relevant mutual agreement procedure has been extended to one more year using the prerogative laid down in Article 4(1), second paragraph, along with 4 other Member States. 5 other Member States have never used this prerogative to extend the mutual agreement procedure by 1 year.

The majority of the respondents have implemented the decisions without delay when an agreement was reached. One Member State claimed that only in some cases the decision has been implemented in due time. This country referred to one case where there was a misunderstanding with the local tax service in charge of the implementations.

Finally, regarding the advisory phase, no Member State has set up an advisory commission or an alternative dispute resolution advisory under the grounds of the DRM Directive either to resolve a dispute after 2 years without agreement under the corresponding mutual agreement procedure or to resolve a rejection of the case by one tax authority. However, 5 Member States have set up an advisory commission or an alternative dispute resolution commission under other legal bases than the DRM Directive. It is worth noting that in one Member State, an advisory commission has been requested by the affected person subject to the DRM Directive because the complaint submitted by such affected person was rejected under Article 5(1) by at least one, but not all, of the competent authorities of the Member States concerned.