



Comments from PwC International on behalf of the Network Member Firms of PwC on the Consultation on Improving Double Taxation Dispute Resolution Mechanisms

General Remark

The responses of PwC International on behalf of the Network Member Firms of PwC (“PwC”) on the consultation should be viewed as based upon PwC’s experience with dispute resolution mechanisms. They should not be viewed, however, as commenting on PwC’s or any client’s particular position. The responses to the questions were answered from the perspective and experience of a tax advisor / consultant acting in a tax advisory role and not in the individual capacity of PwC as a company.

Section 1 – Information about you

PwC responds in its capacity as a network of multicompetency professional services Firms. More information can be found at www.pwc.com.

Section 2 – Your Opinion

Question 2.1

The case described is considered to be a case of a Head Office (resident) and its Permanent Establishment (doing business in another State). As described and interpreted, the case does not cover a transaction between two associated enterprises. Hence the case presented covers juridical double taxation only and not economic double taxation.

To the opinion of PwC economic double taxation should also be covered.

PwC notices that the Arbitration Convention is not mentioned separately but only reference is made to the existing tax treaties network. In case the AC is not covered under the existing tax treaties network PwC wishes to point out that the mechanisms under the Convention on the elimination of double taxation in connection with the adjustment of profits of associated enterprises (90/436/EEC) (the Arbitration Convention or AC) should also be strengthened and made more efficient, in line with the narrative of point c) of the question.

In the case of a PE, PwC is of the view that the EU Arbitration Convention should also be made applicable on disputes on whether a PE exists and not only on issues on the attribution of profits to a PE (article 4(2) Arbitration Convention).

Section 3 – The Objectives

On **Reducing costs of tax administrations**: PwC considers cost reduction of tax administrations must be seen as a necessary consequence of elimination of double taxation, but not as an objective as such.

On **transparency**: PwC is in favour of transparency in principle. However confidentiality issues may arise.

On **safeguarding the financial interest of the member states by improving the collection of the tax deemed due**: PwC considers this issue not to be an objective of the effective elimination of double taxation. Rather, this relates to the assistance of the recovery of taxes which is a different discussion.

It is not clear what is meant with the ‘tax deemed due’. PwC considers that both tax authorities would consider their taxation is correct and as a result tax is deemed due (at both sides of the border).

PwC considers this is in contrast with the JTPF guidance under the revised Code of Conduct (CoC) on the Arbitration Convention on the issue of tax collection and interest charges during cross-border dispute resolution procedures. In accordance with this guidance Member States are recommended to take all necessary measures to ensure that the suspension of tax collection during cross-border dispute resolution procedures under the AC can be obtained under the same conditions as under domestic proceedings.

PwC further considers that the suspension of tax collection under dispute resolution procedures should not be linked to the domestic rules, but should be generalised and for example embedded in the text of a multilateral treaty.

Section 4 – EU Action

Point 4.1 – Do you want the EU to pursue the following directions?

- The EU should limit itself to encourage MS to adopt mechanisms in their bilateral relations: PwC considers it is a very minimalistic approach if the EU would encourage MS to adopt mechanisms. PwC International - the Network Member Firms of PwC considers, however, that the EU should be more ambitious in the area of dispute resolution and promote an agreement at EU-level.
- A new and comprehensive legal tool should be developed by the EU to ensure that double taxation disputes are resolved: PwC considers this to be workable although perhaps not the best solution. See also the additional comments. Based upon the gained experience and the revised Code of Conduct on the Arbitration Convention, a new multilateral convention – possibly not limited to transfer pricing – could be developed. For example: disputes on the existence of a PE are not covered by the current Arbitration Convention, which leads to the situation that 2 legal instruments are needed under certain circumstances (a bilateral double tax treaty (DTT) for determining the PE issue and the Arbitration Convention for attributing profit) which lead to unnecessary administrative procedures and potential for denying a timely solution for the case of double taxation at hand.

Point 4.2 – What is your view about possible options?

Option A i) Improve the efficiency of bi- and multilateral instruments – encourage MS to adopt or revise the mechanisms in the DTT with the conclusions of the JTPF and OECD BEPS Action 14, including arbitration: Although this approach is a step in the right direction, PwC is convinced that more is needed than just an encouragement to revise the dispute resolution mechanisms, including arbitration.

Option A ii) - Improve the efficiency of bi- and multilateral instruments – reference to article 273 Treaty on the Functioning of the European Union (TFEU) in the DTT and empowering the Court of Justice of the European Union (CJEU) to decide on remaining disputes: PwC considers that it is essential that for resolving double taxation a specific time line is set and adhered to. Under the Arbitration Convention, such a time line is set (although it is not always respected) to resolve double taxation. With the CJEU, as with all court proceedings, one may not be sure about the time line and it may take several years before the CJEU reaches a decision. PwC is interested to learn about the experience so far under the Austrian-German DTT.

Option B – Enforced, effective and broader dispute resolution – fast track recourse with the national court: PwC considers that the courts will always take some [considerable] time before reaching a decision if no procedure of urgency is available. Further any legal proceeding is exposed to delaying the outcomes. The possibility also exists that the courts consider themselves not to be competent to rule in a certain case or to decide not to appoint an arbitration body. It would therefore be better that a new legal instrument provides directly for an arbitration committee that is appointed automatically if after a certain period of time, no agreement is reached.

Option C – A Comprehensive New EU Legal Instrument – including a dispute resolution mechanism ensuring disputes are solved as well as guaranteed recourses before court: PwC considers strongly that this option is the preferred option. A point for further attention, however, is the potential intervention of the courts (where an automatic solution would be best) and changing legislation. PwC considers that the interventions from the courts should be possible as a last resort.

Point 4.3 – Way forward: To the opinion of PwC, the development of a new instrument would be the preferred way forward, drawing upon the experience of the JTPF, OECD BEPS Action 14, and providing for as much automatic resolution as possible without intervention of the domestic courts or CJEU. The latter can intervene however as a last resort.

Additional Comments

The current procedures for resolving double taxation disputes have a lot of known disadvantages such as (not exhaustive):

- (Very) limited role of the taxpayer(s) in the process;
- No ruling possibility of the CJEU as it lacks formal competence over the Arbitration Convention;
- the AC as a multilateral convention has no direct effect in the national legislations (unlike other EU legislative measures such as directives or regulations);

- Different interpretation of the Arm's length principle and of the provisions of the AC in the Member States;
- No uniform access to the AC as the interpretation of what is considered a transfer of profits that is liable to a serious penalty;
- Tax fraud is better dealt with through other means than not resolving issues of double taxation;
- Timing issues constitute obstacles to the effectiveness of the AC.

PwC is of the opinion that a legal instrument with direct effect in the national legislation, for example an 'arbitration directive' is the preferred way forward. Such instrument would allow a uniform interpretation and ensure certainty and consistency. It has the possibility of resolving double taxation while at the same time and to a large extent close loopholes or mismatches with regard to transfer pricing issues (avoidance of double taxation and of double non-taxation). As a second best option, a new and comprehensive legal tool (for example a new multilateral convention, possibly not limited to transfer pricing) could be developed by the EU to ensure that double taxation disputes are resolved. As a last resort, the application of the directive may be associated with a specifically designated 'Tax Arbitration Court' (for example a specific chamber of the CJEU) where the taxpayer can refer to when (i) a risk of double taxation as a result of a transfer pricing adjustment is likely to arise; or (ii) there is disagreement with the final decision of the competent authorities under MAP or inability of the competent authorities to reach a conclusion within the time frame provided.

Finally, PwC also stresses the importance of implementing the minimum standard developed under BEPS Action 14 to strengthen the effectiveness and efficiency of the MAP. PwC considers that the EU could have an exemplary role in its effective application.