Fiscalis Project Group (FPG) 093

Working Paper on the Implementation of Article 10 of Directive (EU) 2017/1852 on Tax Dispute Resolution Mechanisms in the European Union

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DISCLAIMER

This technical paper is based on the work of a Fiscalis project group FPG/093 of Member States' tax experts, which was initiated by the Federal Republic of Germany. The group met six times during October 2018 – July 2019. The paper outlines possible options Member States have under the Directive (EU) 2017/1852 on Tax Dispute Resolution Mechanisms in the European Union (the Directive) to set up an alternative dispute resolution commission (ADRC). It serves as a technical document for further possible steps by the Member States. The paper should give the necessary background to decide whether and if so, how and to what extent they want to make use of Article 10 of the Directive (Article 10).

The information and views set out in this working paper do not necessarily reflect the official opinion of the Member States and should be considered as not having any binding implication when it comes to the application and interpretation of the Directive or any other tax dispute resolution mechanisms.

1 INTRODUCTION

The Directive provides for a mutual agreement procedure to resolve disputes on the interpretation and application of covered agreements and conventions. In the absence of an agreement between the competent authorities within a certain time frame, the case should be submitted to a dispute resolution procedure. For this purpose, according to the Directive, an Advisory Commission (AC) is to be set up to give an opinion on how to resolve the question in dispute. As an alternative to the AC, Article 10 allows the competent authorities of the Member States concerned to agree to set up an ADRC.

On 23 May 2017, the following statement was made in the minutes of the ECOFIN Council that agreed politically the Directive: "Member States shall endeavour to explore the possibilities to further enhance the resolution of disputes among Member States relating to the interpretation and application of tax agreements and conventions by way of a permanent body, including the possibilities provided for under Article 273 TFEU."

Based on this, the Fiscalis project group analysed the conception of Article 10 (see below section 2) and discussed the competency of an ADRC (see below section 3), the possible solutions for the form of an ADRC including the structure of a standing committee (see below section 4), the composition of an ADRC (see below section 5), and the types of dispute

resolution process that may be used by an ADRC (see below section 6). The last sections of this paper focus on the implementation of an ADRC. A short description of the options can be found in **Appendix 1** and an evaluation of these options taking possible objectives and challenges into account can be found in **Appendix 2**.

2 CONCEPTION OF ARTICLE 10

2.1 Description

This section aims to provide an overview of the objectives that Member States may wish to achieve by the implementation of an ADRC as well as possible challenges. In particular, it should be explored to what extent Article 10 allows Member States to differ from the procedure laid down in Article 6 of the Directive.

2.2 Objectives and challenges

Any option under Article 10 should be tested against the objectives of introducing an ADRC, especially in the form of a standing committee as well as any challenges that should be answered when drafting the specifics.

The Fiscalis project group has, therefore, compiled the following aspects. It should be noted that the various aspects are interdependent and cannot all be given the same impetus simultaneously. Member States will have to consider the relevance of the different possible objectives. For orientation, an evaluation taking the following possible objectives and challenges into account can be found in **Appendix** 2.

2.2.1 Objectives

- **Quality** – composition and form including the degree of permanency may, among others, have an impact on the quality of the work of an ADRC taking into account the following aspects:
    - Expertise of arbitrators (the focus may be either developing a pool of expertise and exchange of experiences and knowledge in the relevant panel itself, or on choosing the most experienced members case-by-case looking at the specifics of each question in dispute and the professional background of each candidate);
    - Availability of arbitrators (an ADRC may give an answer to the issue of a sufficiently secured availability of potential members of the relevant panel);

- **Efficiency** – a gain in efficiency may provide an answer to a possible increase in arbitration cases:
    - Efficient process to set up the relevant panel (an objective may be to have a quicker and more established process to set up the relevant panel);
    - Efficient process on forming of the opinion by the relevant panel (an objective may be to gain efficiency for the opinion-making process itself);
    - Independence of arbitrators (an objective of setting up an ADRC may be to simplify the selection of the members of an ADRC);
- **Flexibility** – an objective in itself may be to promote flexibility:
    - Regarding the type of the relevant panel (it may be an objective that Member States can choose on a case-by-case basis whether to make use of the ADRC);
    - Regarding the method (it may be an objective to choose the dispute resolution method on a case-by-case basis, depending on the type of question or on the specifics of each individual question in dispute).

2.2.2 Challenges

- **Implicit precedence / consistency** – one may want to either avoid implicit precedence or to seek benefits for further questions in dispute with regard to similar cases or different taxable periods of the same case:
    - In respect of the relevant panel itself (the members of a more permanent panel may internally develop and apply a set of consistent principles);
    - Vis-à-vis the competent authorities, the taxpayers and the public (this issue also arises when using the AC);
- **Acceptability** – an ADRC should be designed in a way that it can find common acceptability:
    - Acceptability to the competent authorities (the relevant panel and the dispute resolution process should be designed in a way giving confidence to the competent authorities; this may be influenced by the degree of involvement of the competent authorities concerned in the arbitration case);
    - Acceptability to the taxpayer concerned (the relevant panel should be transparent in respect of its procedure; its design should give confidence to the taxpayers);

- Acceptability to public sovereignty (the procedure of the relevant panel should be transparent; its design should give confidence to the public);

- **Costs** – the issue of costs will have a strong impact on the form of an ADRC:
  - Reasonable and foreseeable costs for all stakeholders (especially at the initial stage, the future caseload of an ADRC is not fully predictable; this may especially be a challenge for an ADRC with a more permanent nature);
  - Fair distribution of the costs (the distribution of costs should account for the fact that the number of questions in dispute will differ from State to State).

2.3 Legal Framework

- Article 10 allows competent authorities of the Member States to differ from the rules of Article 6 of the Directive as regards the explicitly mentioned aspects of the dispute resolution procedure. Article 10 provides for the possibility of setting up an ADRC. The ADRC shall function within the scope of the Directive and can differ from the AC under Article 6 in accordance with what is allowed under Article 10, namely in relation to the form, composition and dispute resolution method. In addition, Article 10 allows for the creation of an ADRC of a more permanent nature in the form of a standing committee.

- If the procedure under the ADRC differed in more aspects than what is allowed by Article 10, an amendment to the Directive would be needed. Also, the Directive forms a legal base for setting up a dispute resolution mechanism to apply between Member States only. If one would wish to include certain questions in dispute between Member States and third States or to extend the scope of application in general to third States, a separate legal base would be necessary.

- To set up an ADRC in the form of a standing committee within the scope of the Directive does not mean creating an international court or tribunal for tax disputes. Neither the AC nor the ADRC forms part of the judiciary. Rather, the dispute resolution procedure as stipulated in the Directive is a decision-making process between the tax authorities of sovereign states with the involvement of independent persons as well. The ADRC (as well as the AC) delivers an opinion that is a basis for the competent authorities to make a final decision. According to Article 15 para. 1 of the Directive, the competent authorities should take a final decision after an opinion of the ADRC (or AC) is issued.

- Article 47 of the Charter of Fundamental Rights cannot be relied upon by the taxpayer in MAP or dispute resolution under the Directive. The rights to effective remedy and to a fair trial are accessory rights that require the existence of an (initial) substantive right enshrined in EU law in order to apply. However, the substantive law that underlies these disputes does not fall within the scope of EU law as it refers to the tax agreement or convention that provides for the elimination of double taxation between the contracting Member States.

- Article 10 cannot alter the rules that apply to **the phase before the dispute resolution procedure** by an AC or ADRC. For example, cases that are submitted to the dispute resolution procedure can be either cases of double taxation or questions in dispute that do not involve double taxation. However, according to Article 16 para. 7, a Member State may deny access to the dispute resolution procedure under Article 6 on a case-by-case basis where the question in dispute does not involve double taxation.

- Under the Directive the **consequences of the opinion** are the same regardless of whether the dispute resolution procedure is conducted by the AC or an ADRC rules being applicable:
    - Article 15 para. 4 provides that the decision of Member States shall not constitute precedence;
    - Article 18 para. 3 provides for the publication of the Final Decision.

- In respect of **competency and flexibility**, the interpretation of the terms "the competent authorities of the Member States concerned may agree to set up an ADRC […]" and respectively "may agree to set up an ADRC in the form of a standing committee […]" in Article 10 para. 1 leads to the following conclusions:
    - As Article 10 para. 1 first sentence refers only to the opinion under Article 14, the ADRC is limited to the resolution of the substance of a case (Article 6 para. 1 letter b)); it does not extend to the admissibility of the complaint (Article 6 para. 1 letter a)).
    - Whether an ADRC is set up is a decision for the competent authorities of the Member States concerned (and not a decision for the AC or the taxpayers). To the extent agreed between Member States who participate in an ADRC initiative, the ADRC would replace the AC.

- Member States who participate in an ADRC initiative are free to agree amongst themselves in advance that – during the arbitration phase – all their questions in dispute shall be referred to an ADRC. Also, a partial replacement (e.g. only for transfer pricing cases) is possible in advance.
- Conversely, Member States who participate in an ADRC initiative may wish to leave it up to their competent authorities whether or not to use the ADRC for the arbitration phase of a specific dispute (opt in or opt out). From a legal point of view, there are no constraints to the scope of flexibility as long as the rule of law is respected.
- Not all Member States have to participate to initiate an ADRC; even as few as two Member States could agree to setting up an ADRC for disputes within their competencies.
- From a legal point of view, even different ADRCs can be set up in parallel.

- **Form** is one of the features where the ADRC may differ from the AC. In this respect the following aspects may be pointed out:
  - In respect of form, any rules for the dispute resolution procedure that are not explicitly mentioned are not applicable for Article 10 (Article 10 para. 2 sentence 1);
  - The ADRC may take a more permanent form (a standing committee) but does not necessarily need to do so.

- **Composition** is another feature where the ADRC may differ from the AC. In this respect the following aspects may be pointed out:
  - As stipulated in Article 10 para. 2, this freedom shall be exercised in a way that it does not compromise the rules of independence laid down in Article 8 para. 4 and 5, regardless of the fact whether the arbitration phase of the dispute resolution procedure is conducted by the AC or an ADRC. Thus, the following aspects have to be taken into account:
    - Member States may object on a case-by-case basis to the appointment of any potential member of an AC or ADRC on the reasons stipulated in Article 8 para. 4. In case of a standing committee, Article 8 para. 4 should still be interpreted in a way that such objection is (also) possible on a case-

by-case basis (in distinction to a right to object only at the moment when somebody should be appointed as member of such standing committee).

- Some members of the project group raised the issue that the reference in Article 10 para. 2 may further be interpreted as a general stipulation of independence requirements which are enumerated in Article 8 para. 4 and which have to be met irrespective of whether a competent authority of a Member State concerned has objected to an appointment.[1] Following this interpretation, Member States could only agree to appoint persons fulfilling the criteria of independence as members of an ADRC. Another interpretation would be to limit the rule laid down in Article 8 para 4 of the Directive to a right to object by the Member States concerned. Consequently, Member States would have the possibility to appoint members to an AC or ADRC irrespective of the independence requirements.
- As in the case of dispute resolution under Article 6, Article 8 para. 4, letter a) does not prevent tax officials from non-involved Member States from being appointed as members of an AC or ADRC.
- These criteria of independence refer to the independent persons of standing only. Article 8 para. 1 letter b) stipulates that next to the chair and the independent persons of standing also one representative of each Member State concerned shall be member of the AC. Thus, also in respect of an ADRC there is the possibility of having representatives of the respective competent authorities concerned next to the chair and the independent persons of standing as members of the ADRC. This is not overruled by Article 10 para. 2.

- Article 9 may also be relevant to the ADRC. However, Members of an ADRC do not have to be arbitrators from the list under Article 9 (provided that the relevant criteria of independence are fulfilled). It would even be possible to have arbitrators appointed who originate from countries outside the EU (N.B.: for different reasons, this applies to both AC and ADRC).

[1] This is an issue relevant to both the AC and the ADRC and will be left open for further discussion.

- Legal aspects in respect of the **dispute resolution process or technique** (including dispute resolution method) of the ADRC:
    - According to Article 10 para. 2 and 4, the ADRC has to agree on rules of functioning which are in accordance with Article 11. Articles 12 and 13 function as default. No further specific guidance is given in respect of the dispute resolution process. The time limits laid down in the Directive have to be respected, e.g. the 6-months-period as stipulated in Article 14 para. 1.
    - An ADRC may apply any dispute resolution method. From a legal point of view, the independent opinion approach is also applicable (see the wording of Article 11 para. 2 letter c: "if" and the wording of Article 10 para. 2 sentence 2: "may").
    - The explicit reference to an agreement of the competent authorities of the Member States concerned in Article 10 para. 2 sentence 3 suggests that these competent authorities themselves may agree to stipulate the dispute resolution method. However, Article 10 para. 2 sentence 2 leaves it open whether this is done in advance or case-by-case; in this respect, Article 10 allows for all options. Also, if a standing committee is set up, the determination of the method used can – from a legal point of view – be left to be decided on a case-by-case basis or can be stipulated upfront for all questions in dispute to be handled by that panel.
    - As Article 10 refers to the opinion in accordance with Article 14, para. 2 of this article (basis of the opinion) shall be respected, i.e. Article 10 does not allow for a deviation. Therefore, the ADRC – like the AC – shall base its opinion on the provisions of the applicable agreement (DTA) or convention as well as on any applicable national rules.

3 COMPETENCY OF THE ADRC

3.1 Description

This section aims to address both the advantages and disadvantages of referring all disputes to an ADRC or using it optionally on a case-by-case basis. Furthermore, in the latter case, it should be explored on which criteria the decision is made whether a question in dispute should be referred to an ADRC.

3.2 Evaluation

The following aspects have been raised by the working group:

- Case-by-case or all cases (automatically)?
  - On a case-by-case basis, the most appropriate form, method and composition may be chosen for each individual case; this may have a positive impact on quality.
  - For the competent authorities concerned, a case-by-case approach may also have a positive impact on the acceptability. Acceptability for taxpayers and the public may on the other hand rather benefit from a procedure that is not decided by the competent authorities on a case-by-case basis.
  - On the other hand, one may want to take into account that any flexibility and related decision-making process is time consuming (e.g. deciding which commission to use on a case-by-case basis introduces an additional step).
  - A case-by-case approach may make it harder to predict the caseload for an ADRC. Predictability is especially relevant for setting up a commission of a more permanent nature.
- All cases of a specific type, i.e. transfer pricing cases or ”other” cases (automatically)
  - If a panel would only deal with transfer pricing cases or “other” cases, experts may be chosen as arbitrators with a more specific background. Also, a method that may generally be seen as being suitable for the respective type of cases may be chosen. This may have a positive impact on quality and acceptability.
  - It might save the time to decide on form, method and composition and the caseload may be easier to be determined compared to a case-by-case option.
  - Thus such an approach may have the advantages of automatically referring all cases to an ADRC and may at the same time lessen the disadvantages of a one-fits-all approach.

3.3 Decision process in respect of the competence

Either the competent authorities refer all questions in dispute to the ADRC in advance or they refer specific types of questions in dispute to the ADRC in advance. Another option is that the competent authorities concerned have to agree on a case-by-case basis to refer a question in dispute to the ADRC. This may be achieved through either an opt-in or an opt-out process.

The process therefore depends on how flexible participating Member States wish the ADRC to work.

4 FORM OF THE ADRC

4.1 Description

This section summarizes the project group's considerations concerning the possible form of the ADRC. The project group first defined different options of how an ADRC can be set up. The options differ in terms of their degree of permanency (see below section 4.2). In a second step, the group discussed the potential structure of an ADRC. This includes, in particular, the question of whether recourse to already existing structures is possible (see below section 4.3).

4.2 Degree of permanency

The AC – which is foreseen by the Directive as a default scenario – is constructed as a so-called "ad-hoc committee". An ad-hoc committee means a committee that is convened on a case-by-case basis, i.e. formed for resolving a specific dispute and dissolved after its task is performed.

Article 10 para. 1 of the Directive allows the competent authorities of Member States to set up an ADRC instead of an AC. The competent authorities may further agree to set up the ADRC in the form of a commission that is of a permanent nature (standing committee) in accordance with Article 10 para 1 sentence 2 of the Directive. Thus, the Directive provides flexibility in setting up the ADRC as either an ad-hoc committee or standing committee.

As outlined above, an essential element of an ad-hoc commission is that it is set up in connection with resolving a single dispute. In contrast, the main feature of a standing committee is that it is established with the objective of having a more permanent nature.

In this context one has to distinguish between two different tasks that are carried out for the purposes of the ADRC: first, there is an "administrative function" making available infrastructure and dealing with the procedural aspects of dispute resolution (e.g. registration/assignment of reference numbers, monitoring of deadlines, etc.); and, second, the "arbitration function", being the commission itself, i.e. the arbitrators' decision-making.

The optional "permanent nature" of the ADRC – as provided for by Article 10 para. 1 sentence 2 of the Directive – relates to the members of a commission. In other words, the

permanent nature of a standing committee is not dependent on other features like a permanent secretariat. Likewise, it is not decisive whether there is an actual fixed place for the meetings of the commission. For example, the fact that a commission only meets virtually or from time to time in different places does not prevent it from having a permanent nature.

Based on the above deliberations, the project group discussed the following potential forms of an ADRC:[2]

- Option 1: ADRC with full-time arbitrators (see below section 4.2.1);
- Option 2: ADRC with part-time arbitrators (see below section 0);
- Option 3: ADRC with roster system (see below section 4.2.3);
- Option 4: ADRC without deviation from default (see below section 4.2.4).

4.2.1 ADRC with full-time arbitrators (***Option 1***)

Option 1 is characterised as a committee that – in contrast to an ad-hoc committee that is convened on a case-by-case basis – deals with all cases brought to arbitration that fall under the competency of the ADRC.

This option is further characterised by the presence of full-time arbitrators, i.e. a certain number of arbitrators working as full-time employees.

> ***Example****: Several Member States decide to jointly set up an ADRC under Article 10. Each Member State nominates one independent person and an alternate as arbitrator. They are meant to work full-time. Depending on the number of participating Member States or the number of questions in dispute, more than one arbitrator per Member State can be nominated and more than one panel may be set up. Also, separate panels dealing with different questions in dispute could be introduced, for example one panel dealing with transfer pricing questions and another with the other DTA questions.*

With option 1 there is a strong argument in favour of also having a permanent secretariat carrying out administrative functions.

[2] Please note that further details on the composition of the different options are discussed below in chapter 5.

4.2.2 ADRC with part-time arbitrators (***Option 2***)

Option 2 is characterised as a committee that – in contrast to an ad-hoc committee – deals in a consistent composition with all cases brought to arbitration that fall under the competency of the ADRC. In contrast to option 1, option 2 does, however, not engage full-time arbitrators. Rather, the committee consists of a certain number of arbitrators who – possibly besides other professional obligations – are committed to render a specific level of hours per month (i.e. part-time arbitrators).

In contrast to an ad-hoc commission, the arbitrators are not in the position to actually refuse cases. The fact that the arbitrators render their services only part-time does not imply that the work is rendered on a voluntary basis.

> ***Example****: Several Member States decide to jointly set up an ADRC under Article 10. Each Member State nominates one independent person and an alternate as arbitrator. The arbitrators meet on a regular basis every last two working days of a month (meeting days). They are paid for attendance on meeting days, usually two days per month. If – depending on the number of pending arbitration cases – certain meeting days are not needed, these will be cancelled with advance notice. Any preparatory work upfront to the meeting days, e.g. review of documents received, is already compensated for by the payment for the meeting days. Separate panels dealing with different questions in dispute can be introduced, for example one panel dealing with transfer pricing questions and another with the other DTA questions.*

Depending on the number of participating Member States and the number of cases brought to arbitration, a transition from option 2 to option 1 and vice-versa may be feasible.

With option 2 there are arguments in favour of having a permanent secretariat carrying out administrative functions.

4.2.3 ADRC with roster system (***Option 3***)

Option 3 is characterised by a committee that consists of arbitrators determined by a roster. The roster system is a method for the selection of a committee of arbitrators from a list of independent persons. Each committee in its specific composition will be responsible for questions in dispute falling under the competency and arising during a certain period of time. Therefore, the composition would regularly change according to the roster. Thus, in contrast to an AC, this option provides for an automatic and pre-determined assignment of arbitrators.

***Example**: Several Member States decide to jointly set up an ADRC under Article 10. Each Member State nominates five independent persons as potential arbitrators. A secretariat allocates the arbitrators – based on the roster criteria (e.g. respective availability, balanced composition, etc.) – to pre-defined periods. Pursuant to this, a list exists according to which three specific arbitrators plus potential alternates are responsible for cases coming in during the period from January up until March and are responsible to deliver an opinion on all of them. Considering the 6 month period for delivering an opinion they will hence altogether serve for a maximum of 9 months. Three different arbitrators (plus alternates) are responsible for cases coming in between the period April up until June and so forth. Arbitrators may be responsible for certain kinds of questions in dispute, e.g. transfer pricing questions. The secretariat is responsible for clarifying details of availability with the arbitrators, assigning cases to arbitrators etc. Remuneration of the arbitrators is based on the number of actual meeting days; to stipulate the necessary number of meeting days will be a task of the secretariat.*

In option 3 potential arbitrators can refuse certain cases. Therefore, a mechanism to ensure a minimum level of commitment may be necessary. For example by removing people from the list once they refused a certain number of cases within a year.

The necessary administrative support is crucial for the proper functioning of this option. This relates in particular to the administration of the roster, including management of alternates, in order to ensure a fair and even assignment of those who feature on the list and the number of meeting days which is also the basis for the arbitrator's remuneration. The secretariat should ensure a reasonable composition of every panel, i.e. either a mixture of expertise if there is only one panel or the respective expertise if there are separate panels for transfer pricing questions and other DTA questions in parallel.

4.2.4 ADRC without deviation from default in respect of the form (***Option 4***)

Option 4 reflects that it is possible to establish an ADRC under Article 10 with the default scenario as foreseen for the AC. Therefore, this option is relevant in case Article 10 is used to deviate from the Directive in other aspects, e.g. by differing from the composition of the commission as laid down in Article 8 of the Directive or by choosing a different dispute resolution method.

4.3 Potential structure of the ADRC

4.3.1 Review of existing structures

In principle, the creation of a new body is an interesting and challenging option. Still, as of today the degree of caseload is unpredictable, the project group discussed that such decision to implement a new stand-alone body should also be based on cost-benefit considerations. The following arguments in favour of using an already existing structure have been put forward:

- **Costs**: A new body would incur fixed costs regardless of the fact how many cases are brought forward by the taxpayers. The consequence of the use of already existing structures may be that only costs in relation to services actually rendered should be incurred. In other words, if fewer services are requested also less cost should incur.
- **Experience**: It might be beneficial to be able to rely on experiences from the past. Usually, a learning process is both time and cost consuming.
- **Acceptance**: The public acceptance of an already existing body may be more pronounced than that one of a newly established one.
- **Timing**: The use of an existing body is likely to be a less complex and time consuming process.

Therefore, the project group examined different structures that exist already today. In doing so, the project group discussed whether it would be possible to make direct use of such structures for an ADRC

- by stipulating an existing institution as ADRC, i.e. as the arbitration committee itself and/or
- by using the administrative support and infrastructure of an existing institution.

It should be noted that the possibility of outsourcing certain activities to an existing body is not limited by Article 10. Rather, even if the default scenario (i.e. AC) applies, it would also be possible to refer to an existing body in terms of administrative support. As such, e.g. the Rules of Functioning as outlined in Article 11 of the Directive might be prepared and processed by such external body.

The project group looked into the following existing structures:

- Arbitration institutions (see below a));
- ECJ (see below b));
- (Further) Governmental Institutions (see below c)).

a) Arbitration institutions

The project group assessed existing arbitration institutions, such as the Permanent Court of Arbitration in The Hague (PCA) and the Arbitration Institute of the Stockholm Chamber of Commerce (SCC) and concluded that existing arbitration courts are, strictly speaking, not courts but rather administrative bodies without any authority of decision-making in the respective subject matter (question in dispute). They give administrative support in setting up an arbitration body but do not have in-house arbitrators.

Therefore, the above mentioned existing arbitration institutions are relevant for possible administrative support and infrastructure. Although without a specific tax background, they have general practical expertise on arbitration and may provide a framework, institutional seat and secretariat for an ADRC. The PCA and SCC have indicated their willingness to further explore the specifics and costs.

b) ECJ

The project group also noted that the ECJ recently was asked to interpret a reference in the interest article of the Double Tax Agreement between Austria and Germany ("DTA Austria-Germany"). This was due to the fact that the DTA Austria-Germany expressly mentions the ECJ as arbitration court in its Article 25 para. 5. It was the first arbitration case that the ECJ in this capacity was given competency to rule on. Currently, the DTA Austria-Germany is the only tax treaty that includes such a provision.

As arbitration panel, the ECJ may provide a panel of independent lawyers. Also, procedural rules are already in place.

However, the project group noted that, so far, the ECJ has little experience when it comes to disputes arising from tax treaties. Also, judges appointed to the ECJ are unlikely to have a specific tax background. The project group also discussed that using the ECJ as arbitration panel might not be compatible with the Directive due to the procedural rules of the ECJ and the nature of the decisions of the ECJ. Especially, the Directive provides that the dispute resolution panel (AC or ADRC) shall issue an opinion not a judgment.

In respect of the necessary administrative support and infrastructure, the project group considered that the procedural rules of the ECJ in their current form are not tailored for arbitration. For example any Member State can issue a statement in each case and decisions of the ECJ are published in the Official Journal.

The project group also discussed the possibility of using a specialized court as a permanent body under Article 10. Still, the same issues as for the ECJ apply to other courts. Further, in such a case the legal circumstances on national level should be checked as to whether these courts would be actually allowed to function as arbitrators.

c) (Further) Governmental Institutions

Governmental organisations like e.g. the OECD do not have in-house arbitrators. As such, it is not an existing body that may be used as ADRC.

However, the project group discussed the possibility of choosing an organisation like the OECD as framework, institutional seat and secretariat for an ADRC. Although without a specific background and experience in arbitration, the OECD could provide some infrastructure, a network of tax experts and a general expertise on DTA and MAP provisions. However, the group noted, that an arbitration structure would have to be established from scratch as the OECD or other comparable governmental institutions have neither the administrative framework nor any practical experience to act as an arbitration body.

To summarise, while it is in the project group's perception not possible to fully refer to an existing structure in terms of using this structure as arbitrator, it can, nevertheless, be recorded that at least with regard to infrastructure and administrative functions a recourse on existing bodies is possible. The project group concluded that the use of an existing body as framework, institutional seat and secretariat for an ADRC might be beneficial compared to a scenario where a completely new structure is set-up.

Based on the above deliberations, the project group discussed the respective structure of the potential forms of an ADRC (see below sections 0 to 4.3.5).

4.3.2 ADRC with full-time arbitrators (**Option 1**)

To stipulate an already existing body as ADRC would in theory be possible. However, as was analysed, such body does not exist.

The use of an existing body as framework, institutional seat and secretariat for an ADRC might be beneficial. This body would be responsible for

- file management, e.g. registering incoming arbitration applications;
- allocating cases to arbitrators/panels;
- managing and applying general rules of procedure;
- managing resources and infrastructure, e.g. employment/engagement contracts including potential pension plans, (potential) premises/finances;
- case management, e.g. circulating documents, monitoring deadlines, issuing invites, (potentially) preparing minutes and protocols;
- compiling possible annual reports.

4.3.3 ADRC with part-time arbitrators (**Option 2)**

To stipulate an already existing body as ADRC would in theory be possible. However, as was analysed, such body does not exist.

The use of an existing body as framework, institutional seat and secretariat for an ADRC might be beneficial. This body would be responsible for

- file management, e.g. registering incoming arbitration applications;
- allocating cases to arbitrators/panels;
- managing and applying general rules of procedure;
- managing resources and infrastructure, e.g. employment/engagement contracts including potential pension plans, (potential) premises/finances;
- case management, e.g. circulating documents, monitoring deadlines, issuing invites, (potentially) preparing minutes and protocols;
- compiling possible annual reports.

4.3.4 ADRC with roster system (**Option 3**)

To stipulate an already existing body as ADRC would in theory be possible. However, as was analysed, such body does not exist.

The use of an existing body as framework, institutional seat and secretariat for an ADRC might be beneficial. This body would be responsible for

- file management, e.g. registering incoming arbitration application;
- clarifying details of availability with the arbitrators;
- allocating cases to arbitrators/panels;
- managing and applying general rules of procedure;
- managing resources and infrastructure, e.g. contracts, (potential) premises/finances;
- case management, e.g. circulating documents, monitoring deadlines, issuing invites, (potentially) preparing minutes and protocols;
- compiling possible annual reports.

4.3.5 ADRC without deviation from default in respect of the form (**Option 4)**

The form of the commission remains untouched, i.e. the default as foreseen by the Directive (Advisory Commission) applies.

5 COMPOSITION OF THE ADRC

5.1 Description

This section summarizes the project group's considerations concerning the possible composition of the ADRC. The project group looked at the four different main forms of how an ADRC can be set up (see chapter 4) and examined the key questions regarding the possible composition for each of those options.

5.2 Composition of the commission in the different options

This section contains initial thoughts on how the ADRC might look like in the different options discussed above (see sections 4.2.1 to 4.2.4) with regard to their respective composition. As such, for each option the following aspects have been discussed:

- **Members:** Who is eligible to become an arbitrator? Are there any persons prevented from being an arbitrator under a certain option? [3]
- **Appointment:** What is the procedure? Who is responsible for appointing the members?
- **Composition:** What should the composition look like? Does the composition change and, if so, what circumstances trigger such a change of composition?

When addressing the term "arbitrator" in this section, it refers to the independent persons of standing only. Thus, the possibility of having representatives of the respective competent authorities concerned as further members of the ADRC remains untouched. Member States with the wish to participate in developing an ADRC should consider if and to what extent the competent authorities of the concerned Member States are going to be involved.

5.2.1 ADRC with full-time arbitrators (***Option 1***)

a) Members

Option 1 requires a very high level of commitment from the members of the ADRC as they will work as arbitrators on all cases that fall under the scope of the ADRC. It is possible to have several panels in this option, either to balance the workload and/or to specialise in different types of cases or in different methods of arbitration.

The participating Member States should nominate at least one person. The overall number of arbitrators would then depend on the number of participating Member States.

It is neither mandatory nor prohibited that arbitrators work on cases where the Member State of their origin is involved. In such cases e.g. the nationalities of the arbitrators might be helpful in terms of their knowledge of the national law. On the other hand the question of neutrality is an important issue. This said, situations where only one Member State

[3] In this respect, it should be noted that the rules regarding the independence of the members of the ADRC as set out in Article 8 para. 4 and 5 must be complied with in any case. However, the interpretation of these rules is to be discussed further, see chapter 2.3 under "**composition**".

involved is represented by one of its appointed arbitrators should be avoided. In option 1 the possibilities of not having arbitrators from the Member States involved strongly depends on the number of participating Member States, the size of the panel and the number of alternate arbitrators.

Although not explicitly excluded by the Directive, option 1 is not suitable for having active members of competent authorities of any Member State as arbitrators on the panel, mainly because of the full-time engagement.

In this option due to the standing character and to the limited number of arbitrators it seems rather challenging to have experts in the different possible types of cases. It is possible, though, to have an ADRC with a mixed composition of specialists or to have separate specialised panels. It is also possible to bring in external independent expert knowledge. This could be provided for in the rules of functioning.

The number of arbitrators in option 1 varies according to the number of Member States participating. In general, there should be an odd number of arbitrators including a chairperson on a panel to facilitate decision-making. There is no set maximum number of arbitrators in this option but it seems prudent to cap it. There will also have to be alternates to secure the functioning of the ADRC.

b) Appointment

In option 1 there is no need to appoint arbitrators for each case as the Member States participating in the ADRC nominate at least one candidate for a set period of time (e.g. several years). The ADRC will work as a permanent body with a fixed composition. In such cases a method on how to choose new or replacing arbitrators or how to rotate the seats needs to be provided. The same applies where several panels have been established.

The chairperson or president will be elected for a certain period (e.g. 2 years) with the possibility of a re-election. The election is performed by the members of the ADRC as this structure is meant to be permanent but not the membership.

c) Composition

The composition of the ADRC (and its panels if applicable) stays the same, except for an exchange of personnel (e.g. due to permanent reasons such as an end of an appointment or due to temporary reasons such as illness or independence issues).

5.2.2 ADRC with part-time arbitrators (***Option 2***)

a) Members

In respect of time resources, option 2 requires a lower level of commitment from the members of the ADRC compared to option 1 as they will work as arbitrators on all cases that fall under the scope of the ADRC but will – in contrast to option 1 – only have to attend committee meetings once or twice a month. This allows for the arbitrators to have other (professional) commitments as long as they do not infringe their independence. It is possible to have several panels in this option, either to balance the workload and/or to specialise in different types of cases or in different methods of arbitration.

The participating Member States should at least nominate one person. The overall number of arbitrators would then depend on the number of participating Member States.

It is neither mandatory nor prohibited that arbitrators work on cases where the Member State of their origin is involved. In such cases the nationalities of the arbitrators might be helpful in terms of their knowledge of the national law. On the other hand the question of neutrality is an important issue. Nevertheless, situations where only one Member State involved is represented by one of its arbitrators should be avoided. In option 2 the possibilities of not having arbitrators from the Member States involved strongly depends on the number of participating Member States, the size of the panel and the number of alternate arbitrators.

The Directive does not explicitly exclude having active members of competent authorities of Member States not concerned as arbitrators on the panel.

In this option due to the standing character and to the limited number of arbitrators it seems challenging to have experts in the different possible types of cases. It is possible, though, to have an ADRC with a mixed composition of specialists or to have separate specialised panels. It is also possible to bring in external independent expert knowledge. This could be provided for in the rules of functioning.

The number of arbitrators in option 2 varies according to the number of Member States participating. In general, there should be an odd number of arbitrators including a chairperson on a panel to facilitate decision-making. There is no set maximum number of arbitrators in this option but it seems prudent to cap it. There will also have to be alternates to secure the functioning of the ADRC.

b) Appointment

In option 2 there is no need to appoint arbitrators for each case as the Member States participating in the ADRC nominate at least one candidate for a set amount of time (e.g. several years). The ADRC will work as a permanent body with a fixed composition. In such cases a method on how to choose new or replacing arbitrators or how to rotate the seats needs to be provided. The same applies where several panels have been established.

The chairperson or president will be elected for a certain period (e.g. 2 years) with the possibility of a re-election. The election is performed by the members of the ADRC as this body is meant to be permanent but not the members itself or the chairperson/president.

c) Composition

The composition of the ADRC (and its panels if applicable) stays the same, except for an exchange of personnel (e.g. due to permanent reasons as an end of an appointment or due to temporary reasons as illness or independence issues).

5.2.3 ADRC with roster system (***Option 3***)

a) Members

In contrast to options 1 and 2, in option 3 potential arbitrators on the list require a lower degree of commitment as they will not be on duty all the time and can refuse certain cases, even for other reasons than their independence. Therefore, a mechanism ensuring a minimum level of commitment may be necessary, for example by removing people from the list once they refused a certain number of cases within a year.

The timeframe during which the individual effort by the arbitrators on duty is required would also be very foreseeable as, firstly, the roster determines during which time new cases arising will fall in their duty and, secondly, the deadline for delivering the opinion is limited to 6 months by the Directive.

If on duty, the temporary panel of option 3 will work together until all cases that arose during their assigned period are finished. This allows the arbitrators to have other (professional) commitments before and after (and to a more limited degree also during) their time on panel duty as long as those commitments do not infringe the independence requirement. It is possible to have several panels in this option, either to balance the

workload and/or to specialise in different types of cases or in different methods of arbitration.

The participating Member States will have to at least nominate several persons to a list of potential arbitrators as the required overall number of persons on that list will need to be high enough to allow a rotation of the arbitrators. The overall number of possible arbitrators on the list would then depend on the number of participating Member States.

It is neither mandatory nor prohibited that arbitrators work on cases where the Member State of their origin is involved. In such cases the nationalities of the arbitrators might be helpful in terms of their knowledge of the national law. On the other hand the question of neutrality is an important issue. Nevertheless situations where only one Member State involved is represented by one of its arbitrators should be avoided.

The Directive does not explicitly exclude having active members of competent authorities of Member States not concerned as arbitrators on the panel or on the list of potential arbitrators. In this option it is possible to form the duty roster in such a way that experts in all possible types of cases are represented in the ADRC. It is also possible to bring in external independent expert knowledge. This could be provided for in the rules of functioning.

The number of arbitrators in the commission on duty in option 3 does not have to vary but will be determined in advance. In general, there should be an odd number of arbitrators including a chairperson on a panel to facilitate decision-making. There is no set maximum number of arbitrators in this option but it seems prudent to cap it. There will also have to be alternates to secure the functioning of the ADRC.

b) Appointment

In option 3 the participating Member States nominate potential arbitrators to a list of such persons. They will stay on that list for a set amount of time (e.g. 4 years). A fixed number of arbitrators and their alternates are appointed – for example by an external administrative service (secretariat) – from this list to be responsible for a certain amount of cases determined (most likely) by their arrival during a certain period of time (e.g. 3 months). This appointment will be performed ample time before the beginning of the said period as the availability of the potential arbitrators and their alternates has to be

confirmed and a suitable degree of rotation and mixture has to be ensured. This roster will be continued so that there is always a panel of arbitrators on duty functioning as ADRC.

In this option ADRC will work as a permanent body but in a constantly changing composition. Member States will have to replace persons quitting the list.

c) Composition

The composition of the ADRC (and its panels if applicable) under option 3 will be different every new period (e.g. 3 months, see above) while the number of members stays the same. Different parallel panels, even with a differing number of arbitrators, for example for different types of cases or different methods are possible. Within the set period of duty there can also be a change in the composition for temporary reasons as illness or independence issues. Rules on how the secretariat has to choose arbitrators for duty and how to rotate the seats are to be established in advance. The same applies where several panels have been established. These rules will also have to establish a way of determining the chairperson or president for the panel(s) on duty.

5.2.4 ADRC without deviation from default in respect of the form (***Option 4***)

a) Members

Option 4 reflects the possibility of establishing an ADRC under Article 10 which in respect of the form of the committee does not differ from the default scenario as foreseen for the AC. Therefore, this option is relevant in case Article 10 is used to deviate from the Directive in other aspects, e.g. by differing from the composition of the commission as laid down in Article 8 of the Directive or by choosing a different dispute resolution method. Thus, the number of arbitrators as well as the method of determining a chairperson in option 4 could but do not have to follow the same rules as under Article 8.

If the participating Member States decide that when using option 4 only the method to be applied by the ADRC shall differ from Article 8, all aspects relating to the composition of the commission will be the same as under Article 8 including the list of independent persons.

If the participating Member States, however, choose to use option 4 under Article 10 for (also) having a different composition, many variations in the composition are possible, for example:

- having a different number of arbitrators as under Article 8;
- having different rules for electing the chairperson;
- using a different list of eligible persons as under Article 9; if having a different list the participating Member States should nominate at least one person for that list – the overall number of possible arbitrators on the list would then depend on the number of participating Member States;
- having rules for removing people from the list once they refused a certain number of cases within a year to ensure a minimum level of commitment.

b) Appointment

If Article 10 is used only for purposes of deviating from the method of dispute resolution (please refer to the following chapter 6), the default rules in relation to the AC apply.

However, if option 4 is used to (also) differ in terms of the composition, either the list existing under Article 8 can be used or the participating Member States nominate persons eligible as arbitrators to a different or enlarged list of such persons. It might be considered to set a certain timeframe pursuant to which they will stay on that list (e.g. 4 years). The ADRC is nominated from the respective list (and, depending on the composition chosen, with additional representatives of the Member States involved) for each case by the Member States involved. Hence, in this option the ADRC will not work as a permanent body but a new body for each case. Member States will have to replace persons who are removed from the list.

c) Composition

The composition of the ADRC under option 4 will always be decided by the Member States involved in the matter.

6 DISPUTE RESOLUTION METHOD

6.1 Description

Pursuant to Article 10 of the Directive, it is possible to apply any dispute resolution process or technique to solve the question in dispute. This section summarizes the project group's considerations concerning typical aspects of the following two different dispute resolution methods:

(i) the independent opinion (see below section 6.2) and,

(ii) the final offer arbitration (see below section 6.3).

Although there are other techniques of dispute resolution, the project group, nevertheless, concentrated on these two types as these seemed to be the most practical and feasible approaches.

In a second step, the group compiled a (non-exhaustive) list of aspects which might influence the choice of the most appropriate dispute resolution method. Further, some initial conclusions were drawn on whether the above illustrated options might influence the choice of dispute resolution method to a certain extent (see below section 6.4).

Last but not least, the project group discussed on which basis the arbitrators should base their opinion as well as questions concerning the scope of any opinion rendered by the arbitrators (see below section 6.5). In this respect, it should, however, be noted that these are not particular questions of Article 10 but should rather apply for both an AC and an ADRC.

6.2 Independent opinion

The "independent opinion" approach has two main characteristics. The arbitration panel has full authority to arrive at an opinion to settle the open issues not being restricted by any positions presented by the competent authorities concerned. Therefore, there is a responsibility to support its conclusion taken with appropriate arguments.

This means that instead of deciding to adhere to either of the positions presented by the competent authorities, the arbitration panel can conclude independently on a solution to the case and is not obliged in any way to reach the same conclusions as either of the competent authorities.

The responsibility to support the opinion with appropriate arguments means that the arbitration opinion must be reasoned and presented in writing. The opinion must not only indicate the provisions of the applicable agreement or convention and the applicable national rules that it relies upon but also the reasoning which led to the result.

The contents of the opinion may vary in different situations. However, the basic structure typically comprises of the following:

- a description of the facts and circumstances of the dispute as seen by the commission,
- a clear statement of what the commission had to draw a conclusion on,
- a short summary of the proceedings,
- the arguments and methods on which the conclusion in the opinion is based, and
- the opinion itself (note: if the decision is made by vote, the opinion can also include a dissenting opinion from the party with the minority vote).

6.3 Final offer arbitration ("Baseball arbitration")

Final offer arbitration (sometimes referred to as last best offer arbitration or baseball arbitration) is a process where each party in a dispute presents a last, best offer to solve the question in dispute. The arbitrators are restricted to choosing one of those offers as the most appropriate resolution to the dispute. This differentiates final offer arbitration from other forms of arbitration, in particular independent opinion, where the arbitrators are authorised to reach a resolution based on their own opinion of the most appropriate outcome.

There are a number of common features in existing final offer arbitration arrangements[4] in tax disputes such as:

- limiting the length (i.e. number of pages) of submissions,
- the competent authorities are not active members of a commission,
- restricting access to certain types of dispute (e.g. monetary amounts),
- issuing opinions without the need to provide supporting rationales,
- opinions are usually not published.

[4] These features are most commonly seen in the context of final offer arbitration, however, they might also be aspects in connection with independent opinion arbitration.

However, it is important to note that none of these features are prerequisites for final offer arbitration and they could be retained, removed, amended or supplemented to suit the needs of Member States.

6.4 Which method to choose and how flexible to be?

6.4.1 Key arguments on finding the appropriate dispute resolution method

While the AC is bound to apply the independent opinion in order to resolve the question in dispute, Article 10 of the Directive provides for the possibility that the ADRC apply, where appropriate, any dispute resolution process or techniques to solve the question in dispute. Thus, when considering the flexibility available under Article 10, the predominant questions are whether there are reasons not only for having a different form and/or composition of the arbitration body but also for deviating whether there are reasons to deviate from the default method set out in Article 8 (i.e. independent opinion) and under which circumstances the final offer arbitration might be preferable. In this respect, the following practical aspects have been raised and discussed in the project group. They may be helpful for Member States in their decision-making:

- **(Implicit) precedence**: Given that – when applying the final offer arbitration – the commission always gets to choose only between two opinions presented by the competent authorities of the Member States involved, the risk of setting any precedent seems to be comparably lower.
- **Transparency and acceptability**: This aspect is in particular dependent on the scope of the opinion as issued by the commission. An essential feature of the independent opinion is the opinion itself. In contrast, with the final offer arbitration the commission could suffice with a short statement instead of a full and well-reasoned opinion (see however the discussion below in chapter 0). Transparency and acceptability for the involved parties (i.e. competent authorities and taxpayer concerned) is expected to be greater if the opinion also provides for a proper reasoning. With regards to the public, it is, however, questionable whether the one or the other method can be seen as providing for more transparency and/or acceptability given that a distinction has to be made between the opinion of the commission on the one hand and the final decision taken by the Member States on the other hand (only the latter, or a summary thereof, is published).

- **Involvement of taxpayer**: While it is in principle possible and sometimes also helpful to have the taxpayer(s) appear before the commission when applying the independent opinion method, final offer arbitration does generally not foresee any involvement of the taxpayer. Still, it would be possible to involve the taxpayer in form of a hearing in both methods.
- **Involvement of competent authorities**: With final offer arbitration the competent authorities are usually not part of the commission as their views are already expressed in their final offer. It can even be argued that the competent authorities must not be an active part of the commission when final offer is used as a method. On the other hand the presence of competent authorities during the deliberations of the commission without a say in the decision might help to draw conclusions and ascertain transparency.
- **Availability of expertise**: Considering that the competent authorities of the Member States involved are usually not part of the commission when applying the final offer arbitration, it is of utmost importance that the arbitrators are able to understand the offer on the table and the reasoning behind it. Thus, one could argue that the pool of potential arbitrators is more limited since experienced and qualified people are needed if the aim is to decide which one is the most appropriate offer.
- **Timing**: There are different views on whether the independent opinion approach might, under certain circumstances, – as compared with final offer arbitration – take longer. Finding the most appropriate of the two offers might require a time consuming thorough analysis of the case. Still, considering the tight timeframes foreseen by the Directive, this issue should not be decisive.
- **Costs**: There does not seem to be an advantage in terms of costs for either method as both will require most likely the same amount of physical meetings on which the remuneration is likely to be based.
- **"Philosophy" of arbitration**: There are two different ways of how arbitration can be seen: Pursuant to the pragmatic approach, arbitration aims at finding – any – solution in order to be able to overcome differences between the Member States concerned. In contrast, the rule-based approach aims at finding the "correct" answer to the question in dispute. With the final offer arbitration competent authorities are encouraged to adopt principled and pragmatic positions which provide an efficient and cost effective means of resolving disputes when a point of principle prevents competent authorities

from reaching agreement during the bilateral phase of MAP. However, this method seems to be less preferable if the commission is asked to identify the "correct" answer to the question raised (as this answer might also lie between the both offers provided). It will then only be possible to decide for the "best available" offer.

Pursuant to the wording of Article 10 para. 2 sentence 2, the ADRC can be shaped in a way that it is free to decide on a case-by-case basis which method to choose (i.e. to identify the method most appropriate for the question in dispute). Still, on the other hand, the wording does not prevent the ADRC to apply a certain method to all questions in dispute. A predefined method might be advantageous in terms of a saving of time (there would be no additional need for coordination).

The choice of method and the question whether it should be pre-determined by the participating Member States or by the commission might also be dependent on the form the ADRC should take.

6.4.2 ADRC with full-time arbitrators (***Option 1***)

Option 1 offers the form of a standing committee which saves time in terms of choosing the arbitrators. By pre-determining the method even more time for preparation can be saved in this option. This does not necessarily mean a limitation to one method as there might for example be different panels for different types of cases (e.g. transfer pricing or "other" cases), each applying different methods.

6.4.3 ADRC with part-time arbitrators (***Option 2***)

Option 2 also offers the form of a standing committee which saves time in terms of choosing the arbitrators. By pre-determining the method even more time for preparation can be saved in this option. This does not necessarily mean a limitation to one method as there might for example be different panels for different types of cases (e.g. transfer pricing or "other" cases), each applying different methods.

6.4.4 ADRC with roster system (***Option 3***)

Option 3 offers a panel of arbitrators that is put together in advance and that changes every few months according to a roster. This saves time in terms of choosing the arbitrators. By pre-determining the method even more time for preparation can be saved in this option as well. This does not mean a limitation to one method as there might for example be different panels

for different types of cases (e.g. transfer pricing or "other" cases), each applying different methods. The regular change of composition of the panel(s) itself does not favour a specific method. However, one may take into account that the system should not get too complex.

6.4.5 ADRC without deviation from default in respect of the form (***Option 4***)

Option 4 reflects that it is possible to establish an ADRC under Article 10 which in respect of the form of the committee does not differ in form from the default scenario as foreseen for the AC. Therefore, this option is relevant in case Article 10 is used to deviate from the Directive just in order to applying a different dispute resolution method. As such, option 4 would typically end up with an ADRC with an ad-hoc composition that applies the final offer arbitration.

Further, one could think of an ADRC – set up as an ad-hoc composition – that (compulsory) decides on a case-by-case basis which method to use. As such, final offer arbitration would be an option but not binding for the ADRC.

6.5 How to get to the opinion – Framework

6.5.1 Basis of the opinion

Article 14 para. 2 of the Directive requires an ADRC as well as an AC to base its opinion on the provisions of the applicable agreement or convention as well as on any applicable national rules. Both kinds of commissions serve the general purpose of the Directive which according to its Article 1 "[…] lays down rules on a mechanism to resolve disputes between Member States when those disputes arise from the interpretation and application of agreements and conventions […]".

When interpreting an applicable agreement or convention, the panel should resort to (further) means of interpretation provided the national rules (domestic law and the practice) of the Member States concerned allow for that (for example via Art. 31 VCLT[5]). In this case, the panel would base their opinion not only on the applicable agreements and conventions but also – for the purpose of their interpretation – on the OECD Transfer Pricing Guidelines (OECD TPG), the OECD Commentaries on the Articles of the Model Tax Convention (OECD MTC) and mutual agreements on the interpretation of a DTA between Competent

[5] Vienna Convention on the Law of Treaties.

Authorities (based on a provision following Article 25 para. 3 OECD MTC). In contrast, agreements between Competent Authorities in individual cases cannot be used as basis for an opinion by a commission as those agreements do not constitute any precedence.

Basing an opinion on OECD TPG, OECD MTC and mutual agreements on the interpretation of a DTA is seen as highly desirable. Still, as far as they do not form part of the national rules of the Member States concerned, making those materials a mandatory base would - even within the liberties given under Article 10 – seen as deviation from Article 14 para. 2. To that end, a recommendation could be given for a use of those texts without deviating from the provisions of the Directive.

In any case, rules of functioning have to be provided according to Article 11 para. 1 for each case referred to an AC or an ADRC. They shall provide in particular the description and the characteristics of the question in dispute as well as the terms of reference on which the competent authorities of the Member States agree as regards the legal and factual questions to be resolved (see Article 11 para. 2). The question in dispute might then as well be defined as the proper interpretation and application of the above named sources if possible under the national rules of the Member States concerned in the specific case in order to correctly apply the DTA.

6.5.2 Content of the opinion

The Directive is silent on the question whether an opinion by an ADRC (or an AC for that matter) might be given without any proper reasoning. It is, hence, possible to have such a "simple" opinion. It can be argued that for an opinion based on a final offer arbitration the content of no opinion or an opinion with a very limited content might generally be sufficient as each offer already consists of a set of circumstances, reasoning and conclusion. But in the majority of cases a full opinion with a proper reasoning given by the ADRC will have more advantages than a limited one.

If the participating Member States would like to have an increased degree of responsibility of the ADRC this can especially be created through asking for a broad scope of the opinion. This could incentivize the ADRC to make its reasoning more thorough and transparent.

Insight into the reasoning of the ADRC might help Member States to reflect on their own positions and promote knowledge of proper handling of tax disputes. This aspect could lead to

better and more transparent decision-making and enhanced efficiency. It might also help Member States to give better guidance to taxpayers.

A properly reasoned opinion will also allow for a possible evaluation process of the work of the ADRC.

The Directive distinguishes between the opinion given by the ADRC (or the AC) and the final decision taken by the Member States on the subject matter which will be eventually published in some form. A full opinion with a proper reasoning given to the Member States does therefore not imply that the decision will also be published including the reasons.

7 POSSIBLE WAYS OF IMPLEMENTATION

7.1 Formal implementation

The Directive provides for the possibility to deviate from the default (AC) by setting up an ADRC under the principles of Article 10. It does, however, not provide any further details of how such process might be initiated. The discussions have shown that a broad range of feasible scenarios are conceivable.

In particular the following scenarios of how an ADRC under Article 10 might be implemented can be considered. The different scenarios may be more or less feasible depending on certain factors like for example the number of the participating Member States and their decision which option(s) shall be used.

- **Agreement between the competent authorities of two or more Member States**: This scenario is characterized by the fact that such arrangement can be agreed at the level of the competent authorities. The legal basis would be Article 10 of the Directive.
- **Bilateral agreement:** Member States can agree bilaterally on how they would like to use Article 10, either as part of an existing DTA or as a separate instrument. This scenario encompasses that different ADRCs are set up in parallel.
- **Multilateral agreement:** It would be possible to agree on an ADRC not only bilaterally but with more than one other Member State. This scenario would be open for further Member States to join at a later stage. Even though it is possible to have autonomous bilateral or multilateral agreements with Non-Member States stipulating the same kind of arbitration process as the ADRC, such agreements could not be

legally based on the Directive itself as it is not binding for Non-Member States. But they could well emulate or fully refer to the provisions of the Directive and implement the options possible under Article 10 to the same extent.

- **Directive:** Although not necessary from a legal point of view, one of the options discussed was implementing an ADRC via a Directive. This would include either (i) supplementing Directive (EU) 2017/1852 accordingly in order to provide a specific legal framework for the ADRC or (ii) adopting a new directive dealing only with questions arising in the context of the ADRC. However, it should be noted, that there needs to be a legislative proposal from the Commission and a consensus among the Member States.

7.2 Considerations from a practical point of view

As of today the degree of caseload is not yet predictable. Thus, several options under Article 10 bear the risk of costs which may be disproportionate to the case activity. There have been developed some initial ideas of how this situation could be dealt with:

- **Growing over time:** The expected amount of costs vary from one option to the other. Due to its permanent character and full-time arbitrators, option 1 is likely to be the most cost-intensive model. Thus, it might be considered to start with another option with the potential of a later transition to option 1, if the caseload increases in the future or when the caseload is easier assessable based on the first experiences made. Option 2 would especially be suitable as a starting point as the basic structure is similar to option 1. Such a change might also be considered for the necessary infrastructure, e.g. the secretariat, which could at the beginning be provided by an existing body or service provider and later perhaps be rendered through in-house personnel.
- **Increased caseload by bringing "old cases" to the ADRC:** It might be further analysed whether and how it is possible to even bring pending MAP cases not originally submitted under the Directive – to arbitration via an ADRC in order to ensure a high case activity even at an initial stage or to initiate a pilot with such cases. Such pending MAP cases are covered by Article 23 sentences 2 and 3 of the Directive because they are filed on the basis of either an existing DTA or the EU Arbitration Convention before 1 July 2019. Consequently, this would require an agreement

between the competent authorities of two or more Member States to apply the rules and procedures of the Directive in order to include pending MAP cases. [6]

- **Review/Evaluation:** Independent from the Commission´s obligation to evaluate the implementation of the Directive under Article 21 of the Directive, the Member States could review/evaluate the implementation of the ADRC under Article 10 after a time span of 3 to 5 years. If there are several different implementations all of those should be reviewed/evaluated. The results should be made accessible to all Member States, even if they do not (yet) participate in a form of ADRC under Article 10. Such a review/evaluation could include comparing costs, sharing the experiences of the participating Member States and perhaps the arbitrators as well. Issues that could be regarded might include the timeliness of the process, the experiences with the decision making process and the Member States' handling of the ADRC's opinions.

8 LIST OF ISSUES THAT PARTICIPATING MEMBER STATES WILL HAVE TO ADDRESS DOMESTICALLY

- *Arbitrators under Article 10 might be subject to limits for additional income under the respective national (tax) laws. This might have influence on the attractiveness of the above portrayed options.*
- *Labour law and social security issues arising from potential employment of the arbitrators.*
- *Possible constitutional issues in context with a possibly standing character of an ADRC.*

[6] Of course it is also possible that a taxpayer files a new complaint under the Directive (time limits permitting) or, in order to include even older tax years, Article 23 could be (and needs to be) transposed fully into the national law and an agreement of the competent authorities would be required on a case-by-case basis.

9 LIST OF ISSUES THAT MAY REQUIRE AMENDMENT OF THE DIRECTIVE

Amending the Directive would only be feasible in case the Commission would make a proposal and all Member States would agree in the Council to fundamentally change the Directive and provide that the ADRC differs in more points than already allowed under the Directive. Examples could be the following:

- *Responsibility of the ADRC also for access cases (see above section 3.2)?*
- *Amending the procedure after delivery of the opinion in a way that the competent authorities cannot deviate from the opinion (Article 15 para. 2)?*
- *Further developing the criteria for independence (Article 8 para. 4)?*

APPENDIX 1 – MAIN FEATURES OF OPTIONS

Option 1: ADRC with full-time arbitrators

- Committee with permanent composition dealing with all cases brought to arbitration.
- Full-time employed arbitrators.
- Possible to have separate specialised panels or an ADRC with a mixed expertise. A rule for distributing cases to the different panels is required (not to be confused with duty roster in option 3).
- Permanent secretariat.
- Members:
    - It is neither mandatory nor prohibited that arbitrators work on cases where the Member State of their origin is involved.
    - Allowed but impractical for competent authorities to participate.
- Participating Member States nominate the arbitrators and alternates.
- Considering the total case load, each arbitrator will be involved in the majority of cases.

Example:

Several Member States decide to jointly set up an ADRC under Article 10. Each Member State nominates one independent person and an alternate as arbitrator. They are meant to work full-time.

An existing arbitration institution (e.g. PCA) is used as a secretariat.

Depending on the number of participating Member States or the number of questions in dispute, more than one arbitrator per Member State can be nominated and more than one panel may be set up. Also, separate panels dealing with different questions in dispute could be introduced, for example one panel dealing with transfer pricing questions and another with the other DTA questions.

Option 2: ADRC with part-time arbitrators

- Committee with consistent composition dealing with all cases brought to arbitration.
- Part-time arbitrators, i.e. commitment to render a specific level of hours per month (possibly next to other professional obligations).
- Possible to have separate specialised panels or an ADRC with a mixed expertise. A rule for distributing cases to the different panels is required (not to be confused with duty roster in option 3).
- Permanent secretariat.
- Members:
    - It is neither mandatory nor prohibited that arbitrators work on cases where the Member State of their origin is involved.
    - Possible for competent authorities to be members.
- Participating Member States nominate the arbitrators and alternates.
- Considering the total case load, each arbitrator will be involved in the majority of cases.

Example:

Several Member States decide to jointly set up an ADRC under Article 10. Each Member State nominates one independent person and an alternate as arbitrator.

The arbitrators meet on a regular basis every last two working days of a month (meeting days). They are paid for the amount of actual meeting days, usually two days per month. If – depending on the number of pending arbitration cases – certain meeting days are not needed, these will be cancelled with advance notice. This and other administrative support is rendered by a permanent secretariat. Any preparatory work upfront to the meeting days, e.g. review of documents received, is already compensated by the payment for the meeting days.

Separate panels dealing with different questions in dispute have been introduced: one panel dealing with transfer pricing questions and another with the other DTA questions.

An existing arbitration institution (e.g. PCA) is used as a secretariat.

Option 3: ADRC with roster system

- Committee with a pre-determined but regularly changing composition according to a roster.
- Each committee in its specific composition will be pre-selected from a list of potential arbitrators taking into account the roster criteria (e.g. availability, balanced composition, etc.) and will be responsible for questions in dispute arising during a certain period of time.
- Potential arbitrators on this list most likely have other professional obligations.
- Possible to have separate specialised panels or an ADRC with a mixed expertise. A rule for distributing cases to the different panels is required (not to be confused with duty roster).
- Permanent secretariat, especially for setting up the roster.
- Members:
    - It is neither mandatory nor prohibited that arbitrators work on cases where the Member State of their origin is involved.
    - Possible for competent authorities to be members.
- Participating Member States only nominate potential arbitrators for the list. The duty roster itself will be administrated by the secretariat.
- Considering the total case load, potential arbitrators on the list will not be involved in the majority of the cases.

Example:

Several Member States decide to jointly set up an ADRC under Article 10. Each Member State nominates five independent persons as potential arbitrators.

A secretariat allocates the arbitrators – based on the roster criteria (e.g. respective availability, balanced composition, etc.) – to pre-defined periods. Pursuant to this, a list exists according to which three specific arbitrators plus potential alternates are responsible for cases coming in during the period from January up until March and are to deliver an opinion on all of them. Considering the 6 month period for delivering an opinion they will hence altogether serve for maximum of 9 months. Three different arbitrators (plus alternates) are responsible for cases

coming in between the period April up until June and so forth. Arbitrators may be responsible for certain kinds of questions in dispute, e.g. transfer pricing questions.

The secretariat is responsible for clarifying details of availability with the arbitrators, assigning cases to arbitrators etc. An existing arbitration institution (e.g. PCA) is used as a secretariat.

Remuneration of the arbitrators is based on the number of actual meeting days; to stipulate the necessary number of meeting days will be a task of the secretariat.

Option 4: ADRC without deviation from default in respect of the form

- Option 4 reflects that it is possible to establish an ADRC under Article 10 which in respect of the form of the committee does not differ from the default foreseen for the AC. As such, it would be possible to only differ from the AC under Article 6 in one single aspect (e.g. composition or dispute resolution method used).
- Notwithstanding these possible variations, option 4 has the following general features:
    - For each case there will be a specifically compiled commission.
    - Due to the ad hoc composition in option 4 there will always be a sort of list of persons eligible to be chosen by the Member States involved to be arbitrators on a specific case.
    - When asked to participate in that case at issue, persons from that list will always be able to determine on a case by case basis whether they are available or not. This allows these persons to have other (professional) commitments before, during and after their time on the ADRC as they do not infringe their independence.
    - No permanent secretariat needed.
    - Participating Member States nominate the arbitrators.
    - Considering the total case load, potential arbitrators on the list will not be involved in the majority of the cases.

Example:

Several Member States decide to jointly set up an ADRC under Article 10. It is agreed to use the same AC as under Article 6, i.e. to make use of the list of independent persons (Article 9) and to follow the same rules regarding secretariat, remuneration etc.

Regarding the method of dispute resolution, however, final offer arbitration shall be applied instead of independent opinion.

APPENDIX 2 – EVALUATION OF OPTIONS

Options / Objectives	Option 1 ADRC with full-time arbitrators	Option 2 ADRC with part-time arbitrators	Option 3 ADRC with roster system	Option 4 ADRC without deviation from default in respect of the form
Quality				
Expertise of arbitrators	• In this option the limited number of arbitrators makes it more difficult to have experts in all possible types of cases. It is, however, possible to bring in external independent expert knowledge. • However, there should be a gain of expertise as arbitrators are involved in multiple cases. • It is possible to have several panels in this option to e.g. specialise in different types of cases. • Nationality may have an impact on expertise. They might be helpful in terms of their knowledge of the national law. On the other hand the question of neutrality seems worthy of discussion. In this option, it has to be decided in advance how the	• In this option the limited number of arbitrators makes it more difficult to have experts in all possible types of cases. It is, however, possible to bring in external independent expert knowledge. • However, there should be a gain of expertise as arbitrators are involved in multiple cases. • It is possible to have several panels in this option to e.g. specialise in different types of cases. • Nationality may have an impact on expertise. They might be helpful in terms of their knowledge of the national law. On the other hand the question of neutrality seems worthy of discussion. In this option, it has to be decided in advance how the nationality of	• In this option the number of arbitrators is higher and it may be possible to nominate arbitrators who are experts for different types of cases. As such, when forming the roster it would be possible to bring in different types of expertise into a commission. Still, due to the fact that the roster is formed in advance, the commission cannot be tailored to a specific question in dispute. • It is possible to bring in external independent expert knowledge. • It is possible to have several panels in this option to e.g. specialise in different types of cases. • Nationality may have an impact on expertise. They	• In this option it is possible to form the commission in such a way that the arbitrators have the expertise in the type of case at issue as the arbitrators are chosen on a case-by-case basis. It is also possible to bring in external independent expert knowledge. • Nationality may have an impact on expertise. They might be helpful in terms of their knowledge of the national law. On the other hand the question of neutrality seems worthy of discussion. Whether and how the nationality of arbitrators should influence the composition of the commission has to be decided on a case-by-case basis.

	nationality of arbitrators should influence the composition of the commission.	arbitrators should influence the composition of the commission.	might be helpful in terms of their knowledge of the national law. On the other hand the question of neutrality seems worthy of discussion. In contrast to options 1 and 2, it would be rather challenging to decide in advance how the nationality of arbitrators should influence the roster.	
Availability of arbitrators	• Standing committee, i.e. availability of arbitrators is guaranteed. • In option 1 the members of the ADRC will work as arbitrators on all cases that fall under the competency of the ADRC, i.e. they do not have the discretion to refuse cases. • Relatively strong incentive for potential arbitrators as it offers full time employment with responsibility for all cases. Due to the full time employment it is fully foreseeable for arbitrators when they have to render their services. But this also means that the required level of commitment allows no or limited time for other (professional) engagements.	• Standing committee, i.e. availability of arbitrators is guaranteed. • In option 2 the members of the ADRC will work as arbitrators on all cases that fall under the competency of the ADRC, i.e. they do not have the discretion to refuse cases. • Strong incentive for potential arbitrators as it offers responsibility for all cases. It is very foreseeable for arbitrators when they have to render their services. Also, the moderate necessary time resources leave time for other (professional) engagements.	• Roster system guarantees the availability of arbitrators (compared to an ad hoc commission as e.g. in option 4) but one should note that a lot of potential arbitrators would be needed. • Compared to options 1 and 2, in option 3 potential arbitrators on the list require a lower degree of commitment as they can refuse certain cases, even for other reasons than their independence. Therefore, a mechanism to ensure a minimum level of commitment may be necessary, for example by removing people from the list once they refused a certain number of cases within a year. • Strong incentive for potential arbitrators as it offers responsibility for all cases during a certain period. Due to the roster and the clarification of availability ahead of its creation it is well	• Experiences from the past in relation to arbitration under the EU Arbitration Convention respectively DTA have shown that in some cases identifying an available person has been challenging. • Potential arbitrators within option 4 require the lowest degree of commitment as they can refuse cases, even for other reasons than their independence. • Relatively strong incentive for potential arbitrators as it demands the lowest degree of necessary minimum level of commitment. It leaves ample time for other (professional) engagements. On the other hand it is not foreseeable for arbitrators whether and when they will be asked to render their services.

			foreseeable for arbitrators when they have to render their services. Also, the moderate necessary time resources leave time for other (professional) engagements.	

Efficiency

Setting up the commission	• The ADRC is permanently set up and needs the least preparation time. Only temporary alternates (e.g. illness or independence issues) require management. • Besides administrative support relating to the cases themselves such support is needed in regard to temporary alternates and probably management of the premises required for the commission(s).	• The ADRC is permanently set up and needs the least preparation time. Only temporary alternates (e.g. illness or independence issues) require management. • Besides administrative support relating to the cases themselves such support is needed in regard to temporary alternates and probably management of the meeting rooms required for the commission(s).	• Option 3 offers a panel of arbitrators that is put together in advance and that changes every few month according to a roster. This saves time in terms of choosing the arbitrators. • Compared to option 1 and 2, option 3 requires a comparatively higher amount of necessary administrative support for the proper functioning of this option. This relates in particular to the administration of the roster, including management of alternates, in order to ensure a minimum availability of those who feature on the list.	• Option 4 takes up the most time to set up the commission as the Member States involved in the issue at hand need to agree on the members for each question in dispute individually (no automatism foreseen). • Option 4 requires administrative support on an ad-hoc basis only.
Process of formation of opinion by arbitrators	• As in option 1 the same arbitrators are involved in multiple cases, a gain of expertise regarding process and content is to be expected. This might lead to a more efficient process of opinion formation.	• As in option 2 the same arbitrators are involved in multiple cases, a gain of expertise regarding process and content is to be expected. This might lead to a more efficient process of opinion formation.	• The roster foresees that a certain commission is in charge for all questions in dispute that are brought to arbitration within a certain time period. Thus, within this period, the same arbitrators are involved in multiple cases for which reason a certain gain of expertise is to be	• The ADRC under option 4 is set up on a case-by-case basis. Hence, there are usually different arbitrators engaged in the process of opinion formation for which reason the process might be less efficient than in option 1 and 2.

			expected. This might lead to a more efficient process of opinion formation might get more efficient. In contrast to option 1 and 2, the period of time during which the same arbitrators are responsible for incoming cases is rather limited.	
Independence of arbitrators	• Personal independence criteria should generally be fulfilled (mandatory precondition to become an arbitrator of the ADRC in option 1). As option 1 foresees a full-time employment, a loss of independence due to other professional engagements should not constitute an issue. If personal independence might nevertheless constitute an issue in a certain question in dispute brought to arbitration, this issue can be handled with alternates.	• Personal independence criteria should generally be fulfilled (mandatory precondition to become an arbitrator of the ADRC in option 2). If personal independence might nevertheless constitute an issue in a certain question in dispute brought to arbitration, this issue can be handled with alternates.	• Personal independence criteria should generally be fulfilled (mandatory precondition to become an arbitrator of the ADRC in option 3). If personal independence might nevertheless constitute an issue in a certain question in dispute brought to arbitration, this issue can be handled with alternates.	• Personal independence criteria are monitored on a case-by-case basis.

Flexibility

Regarding type of commission	• Although it would in principle be possible within option 1 to decide on a case-by-case basis whether the AC or the ADRC shall be used, it is, however, expected that the ADRC would be used in all or most cases due to the fact that fixed costs of the ADRC would arise in any case.	• Although it would in principle be possible within option 2 to decide on a case-by-case basis whether the AC or the ADRC shall be used, it is, however, expected that the ADRC would be used in all or most cases due to the fact that fixed costs of the ADRC would arise in any case.	• Given that option 3 requires a comparatively high level of administrative support which also contributes to the costs, it is expected that the ADRC would be used in most cases although it would in principle be possible to decide on a case-by-case basis whether the AC or ADRC shall be	• Within option 4 it is feasible to decide more freely on a case-by-case basis whether the AC or the ADRC shall be used.

			used.	
Regarding method – best suitable method	• Independent opinion and final offer arbitration are both possible.	• Independent opinion and final offer arbitration are both possible.	• Independent opinion and final offer arbitration are both possible.	• Independent opinion and final offer arbitration are both possible.

Options / **Challenges**	**Option 1** **ADRC with full-time arbitrators**	**Option 2** **ADRC with part-time arbitrators**	**Option 3** **ADRC with roster system**	**Option 4** **ADRC without deviation from default in respect of the form**
Implicit precedence / consistency				
„Internal“ implicit precedence	• Internal implicit precedence can establish as the same persons are responsible for all cases. • Trade-off between “learning” (see above “expertise of arbitrators” and “process of formation of opinion by arbitrators”) and “precedence”.	• Internal implicit precedence can establish as the same persons are responsible for all cases. • Trade-off between “learning” (see above “expertise of arbitrators” and “process of formation of opinion by arbitrators”) and “precedence”.	• Less possibility of establishing an internal implicit precedence as the roster can provide an even higher rate of rotation compared to option 4 as the time of duty shall be distributed as evenly as possible between the persons on the list of eligible arbitrators.	• Less possibility of establishing an internal implicit precedence compared to options 1 and 2. Nevertheless, some persons on the list might be chosen more often than others as their home Member States might have more cases and those may be the first choice (also dependent from the length of the list).
„External“ implicit precedence	• The opinion rendered by the ADRC will not be published. As such, in terms of publication there might only be a risk of intermediate implicit precedence based on the wording of the final decision of the CAs. • Risk of establishing an external implicit precedence as the standing nature of the	• The opinion rendered by the ADRC will not be published. As such, in terms of publication there might only be a risk of intermediate implicit precedence based on the wording of the final decision of the CAs. • Risk of establishing an external implicit precedence as the standing nature of the	• The opinion rendered by the ADRC will not be published. As such, in terms of publication there might only be a risk of intermediate implicit precedence based on the wording of the final decision of the CAs. • Lower risk of establishing an external implicit precedence as the rotating nature of the	• The opinion rendered by the ADRC will not be published. As such, in terms of publication there might only be a risk of intermediate implicit precedence based on the wording of the final decision of the CAs. • Low risk of establishing an external implicit precedence as the ad hoc nature of the

	committee might lead externals to regard it as a tax court.	committee might lead externals to regard it as a tax court.	committee might prevent externals from regarding it as a tax court.	committee should not prompt externals to regard it as a tax court at all.

Acceptability

Competent Authorities "CAs" (confidence | effect on role of CAs)	• Although not explicitly excluded by the Directive, option 1 is not suitable for having active members of CAs of Member States not concerned as arbitrators on the panel, mainly because of the full-time engagement. • Depending on the method of dispute resolution chosen, CAs might be confronted with a situation in which they receive an opinion from the ADRC without proper reasoning (e.g. with final offer arbitration). This risk might, however, be reduced by making it a binding condition for the ADRC to render a full opinion with a proper reasoning.	• The Directive does not explicitly exclude having active members of CAs of Member States not concerned as arbitrators on the panel. • Depending on the method of dispute resolution chosen, CAs might be confronted with a situation in which they receive an opinion from the ADRC without proper reasoning (e.g. with final offer arbitration). This risk might, however, be reduced by making it a binding condition for the ADRC to render a full opinion with a proper reasoning.	• The Directive does not explicitly exclude having active members of CAs of Member States not concerned as arbitrators on the panel or on the list of potential arbitrators. • Depending on the method of dispute resolution chosen, CAs might be confronted with a situation in which they receive an opinion from the ADRC without proper reasoning (e.g. with final offer arbitration). This risk might, however, be reduced by making it a binding condition for the ADRC to render a full opinion with a proper reasoning.	• The Directive does not explicitly exclude having active members of CAs of Member States not concerned as arbitrators on the panel or on the list of potential arbitrators. • Depending on the method of dispute resolution chosen, CAs might be confronted with a situation in which they receive an opinion from ADRC without proper reasoning (e.g. with final offer arbitration). This risk might, however, be reduced by making it a binding condition for the ADRC to render a full opinion with a proper reasoning.
Taxpayer concerned (certainty | transparency)	• The certainty for taxpayers is not affected in the first line by the form of the ADRC but mostly by timely decisions and the outcome of the case. • Hence, consistent decisions might contribute to taxpayer certainty. As such, in terms of certainty there might be a slight preference for an ADRC with a permanent nature.	• The certainty for taxpayers is not affected in the first line by the form of the ADRC but mostly by timely decisions and the outcome of the case. • Hence, consistent decisions might contribute to taxpayer certainty. As such, in terms of certainty there might be a slight preference for an ADRC with a permanent nature.	• The certainty for taxpayers is not affected in the first line by the form of the ADRC but mostly by timely decisions and the outcome of the case. • Rotating panels might lead to different forms of reasoning a case, hence, might contribute slightly less to taxpayer certainty. • It is important to be as	• The certainty for taxpayers is not affected in the first line by the form of the ADRC but mostly by timely decisions and the outcome of the case. • As the commission in option 4 is set up on a case-by-case basis, this might lead to different forms of reasoning and, hence, might contribute slightly less to taxpayer

	• It is important to be as transparent as possible in respect of the procedural aspects to give confidence to the taxpayers.	• It is important to be as transparent as possible in respect of the procedural aspects to give confidence to the taxpayers.	transparent as possible in respect of the procedural aspects to give confidence to the taxpayers.	certainty. • It is important to be as transparent as possible in respect of the procedural aspects to give confidence to the taxpayers.
Public (confidence | transparency)	• This option might due to its permanency perhaps contribute to public confidence. But this mainly also depends on other factors like perceived or actual internal or external implicit precedence or transparency and participation of CAs in the commission (with or without right to participate in formation of the opinion). • The choice of body that might act as secretariat might influence public confidence. Such a body might be more in the focus of public scrutiny.	• This option might due to its permanency perhaps contribute to public confidence. But this mainly also depends on other factors like perceived or actual internal or external implicit precedence or transparency and participation of CAs in the commission (with or without right to participate in formation of the opinion). • The choice of body that might act as secretariat might influence public confidence. Such a body might be more in the focus of public scrutiny.	• Compared to option 1 and 2 perhaps a slightly lower probability of contributing to public confidence. But this mainly also depends on other factors like perceived or actual internal or external implicit precedence or transparency and participation of CAs in the commission (with or without right to participate in formation of the opinion). • The choice of body that might act as secretariat might influence public confidence. Such a body might be more in the focus of public scrutiny.	• Compared to the other options perhaps the lowest probability of contributing to public confidence. But this mainly also depends on other factors like perceived or actual internal or external implicit precedence or transparency and participation of CAs in the commission (with or without right to participate in formation of the opinion).

Costs

Reasonable costs for all stakeholders	• Potential costs include: payment of arbitrators including health insurance, social security etc., building (rental/acquisition costs and maintenance), IT, equipment and a secretariat • Option 1 is most likely more costly than other options as the arbitrators are employed full	• Potential costs include: payment of arbitrators possibly including health insurance, social security etc., building (rental/acquisition costs and maintenance), IT, equipment, travel costs and a secretariat • Option 2 is less costly than option 1 as the arbitrators are not employed full time and	• Potential costs include: payment of arbitrators, facilities (rental costs), possibly: IT, equipment, travel costs and a secretariat • Option 3 is likely to be less costly than option 1 as the arbitrators will be remunerated based on the number of meeting days.	• Potential costs include: payment of arbitrators, travel costs • Option 4 is likely to be less costly than option 1 as the arbitrators will be remunerated based on the number of meeting days. This option does not demand a permanent secretariat which may make it less costly.

	time with no immediate relation to the actual caseload. It also demands a permanent secretariat as well as possibly permanently available premises which also might contribute to higher costs.	remuneration can be based on the number of meeting days. In this option there are arguments in favour of having a permanent secretariat as well as available meeting rooms which also might contribute to the costs. • Due to the fact that option 2 can be better adapted to the caseload than option 1, this option might in particular be used in an initial phase with the potential of a later transition to option 1.	This option also demands a certain permanency of the secretariat and available meeting rooms which also contributes to the costs.	
Fair distribution (especially between Member States concerned)	• A distribution of all or most costs based on involvement of the Member States in the cases brought to the ADRC or decided throughout a certain period is possible. • A system of forehand payments needs to be established. • Due to the permanent nature of the ADRC and the required level of administrative support in option 1 a certain amount of fixed costs may be shared within all participating Member States without regard to their "usage" of the ADRC if one would consider that the existence of the ADRC in itself is already a benefit to all participating Member States.	• A distribution of all or most costs based on involvement of the Member States in the cases brought to the ADRC or decided throughout a certain period is possible. • A system of forehand payments needs to be established. • Due to the permanent nature of the ADRC and the required level of administrative support in option 2 a certain amount of fixed costs may be shared within all participating Member States without regard to their "usage" of the ADRC if one would consider that the existence of the ADRC in itself is already a benefit to all participating Member States.	• A distribution of all or most costs based on involvement of the Member States in the cases brought to the ADRC or decided throughout a certain period is possible. • A system of forehand payments needs to be established. • Like in option 1 and 2, in option 3 a certain amount of fixed costs is to be expected that may be shared within all participating Member States without regard to their "usage" of the ADRC if one would consider that the existence of the ADRC in itself is already a benefit to all participating Member States.	• A distribution of all or most costs based on involvement of the Member States in the cases brought to the ADRC or decided throughout a certain period is possible. • In option 4 there are likely no fixed costs to be distributed between participating Member States.