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Per email to TAXUD-D2-CONSULTATION@ec.europa.eu

10 May 2024

Subject: EY Comments on the EU Public Consultation: Review of the implementation of Council Directive (EU) 2017/1852 of 10 October 2017 on tax dispute resolution mechanisms in the European Union

We appreciate the opportunity to provide comments on behalf of EY on the European Commission's (the Commission) public consultation of 12 March 2024 on the Review of the implementation of Council Directive (EU) 2017/1852 of 10 October 2017 on tax dispute resolution.

The OECD MEMAP's fundamental Mutual Agreement Procedure (MAP) advice and best practices, the minimum standard of Base Erosion and Profit Shifting (BEPS) Action 14 on dispute resolution and the extensive work by the European Union (EU) on the functioning of MAP and the Arbitration Convention have led to major improvements in bi- and multi-lateral dispute resolution procedures. However, we believe that further enhancements are warranted given the current complexities of international tax disputes. Our comments below address elements of the functioning of the Dispute Resolution Directive. In addition, equally important for preventing and resolving double taxation will be the effective deployment by both mature and relatively new competent authority programs in the EU of the principles underlying agreements for the avoidance of double taxation and best practices that have been identified, both in administering treaty relief and resolving disputes. Therefore, our comments also address this second aspect.

With a view to contributing to more certainty and efficiency in the tax environment for businesses in the EU, we have answered the questionnaire to the extent possible. We would like to note that the answers in the questionnaire refer to experience with multiple cases. We welcome the opportunity to attach to the questionnaire a document with free form observations and suggestions, as we believe these are necessary for full explanation of our responses.

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We have divided our observations and suggestions into three categories:

1. The scope of the Dispute Resolution Directive
2. Access to the Dispute Resolution Directive and similar processes
3. Other observations

1. The scope of the Dispute Resolution Directive

The Dispute Resolution Directive effectively entered into effect as of 2018. We have seen little appetite from Member States to accept applications for years that are not explicitly covered by the Directive. This means that the experience with the Directive is quite limited, as the tax returns for 2018 have been made as of 2019, audits will have started following the submission of the tax returns and it takes tax administrations a while to finalize the reviews, including by deciding on and notifying the taxpayer of the adjustments.

The lack of experience with the mechanism also means that taxpayers have not been in a position to thoroughly test the important strengths of the mechanism, such as the possibility to appeal when access is denied, the fact that the mechanism applies to all cases arising under double tax agreements and not only to transfer pricing cases and the clear processes aimed at securing a mandatory conclusion on the case. Given the relatively limited experience with the Directive to date, we would recommend another review of the Directive in the future. Because wider use of the Directive would be helpful in resolving older cases, we would also like to encourage Member States to be generous in accepting cases relating to years before 2018 under the Dispute Resolution Directive and accepting the application of complaints submitted before 1 July 2019, as this will ensure more speedy resolution of old cases, provide tax certainty at an earlier stage and avoid unnecessary administrative costs.

Moreover, double taxation in the EU and differences in interpretations of EU legislation leading to unintended cumulation of taxation have a wider reach than is covered by the EU Dispute Resolution Directive. We would like to draw the Commission's attention to two specific areas, recognizing that more areas can be identified as well.

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The first relates to Pillar Two, as translated to the Council Directive on ensuring a global minimum level of taxation for multinational enterprise groups and large-scale domestic groups in the Union (the Minimum Tax Directive). The GloBE Model Rules and associated Commentary, which are the basis of the Directive, contain rules describing the allocation of taxing rights between countries when it comes to top-up taxes. Differences in transposition to Member State legislation, interpretation of the Minimum Tax Directive and the interaction between Pillar Two and regular tax treaty obligations can lead to double taxation or an unintended cumulation of taxation. Therefore, we call on the EU Member States to specify that taxes introduced by EU Member States to transpose the Minimum Tax Directive are in scope of the Dispute Resolution Directive.

As the second area, we believe the functioning of the internal market would be significantly improved if a dispute resolution mechanism were to be introduced in the area of Value Added Tax (VAT). This would make VAT in the Single Market more efficient and reduce the unintended cumulation of costs.

2. Access to the Dispute Resolution Directive and similar processes

Prevention and resolution of double taxation starts with targeted and clear legislation and ends with dispute resolution mechanisms such as are included in the Dispute Resolution Directive. The process only works seamlessly if the aim at all stages is to apply double tax agreements in a principled fashion. The tone at the top of tax administrations, as well as global awareness of auditors in the tax administration and officials in the internal appeal processes, are as important for the prevention of double taxation, if not more important, than the design and functioning of a mechanism that resolves disputes.

Tax controversy has become one of the key focus points of global tax directors worldwide. The EY 2024 Transfer Pricing and International Tax Survey ("Driving transfer pricing certainty in uncertain times") shows that 84% of the more than 1,000 transfer pricing professionals that responded to the survey indicate that their company faces moderate or significant risk of double taxation due to global tax reforms.

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In addition to double taxation as a result of differences in domestic rules introduced based on global initiatives as mentioned in the previous paragraph, EY controversy subject matter professionals also see growing risk that companies are confronted with audit adjustments or other diverging positions by tax administrations resulting in double taxation. Moreover, there is concern about an increased likelihood that government practices may implicitly or explicitly block access to bi- or multi-lateral dispute resolution processes, even if a company is confronted with double taxation. Audit settlements under the condition that no access to MAP or similar dispute resolution mechanisms will be requested, the opening of extensive audits in areas other than the issue at stake when a bi- or multi-lateral dispute resolution process is opened and similar practices have in our experience not changed significantly since the introduction of the minimum standard of BEPS Action 14 on dispute resolution. More than in the past, our controversy subject matter professionals are also seeing instances where access to MAP and similar dispute resolution mechanisms is denied because transfer pricing adjustments are presented as domestic tax adjustments, for example based on domestic anti-abuse provisions specifically targeting payments between associated enterprises or by straightforward limitations on deductions of specific payments between associated enterprises only. In the latter case, the same limitations do not apply to similar payments between third parties, leading to economic distortions. In our opinion, these interpretations are not in line with the directions given in article 1 of the OECD Model Tax Convention and lead to double taxation in genuinely commercial transactions with an arm's length remuneration. Such adjustments create significant uncertainty and detract from the business climate of the Member State making the adjustment and the EU as a whole.

In this context, the fact that the Dispute Resolution Directive gives the possibility to appeal when access is denied is extremely welcome. However, this will not resolve the practices under which pressure is put on businesses not to access bi- or multi-lateral dispute resolution processes, because in those situations a request for access is never made.

As a final issue, we would like to mention that in certain countries when filing a request with a competent authority, taxpayers need to choose between various mechanisms available to them, which sometimes requires them to give up a treaty right (e.g., choosing between the domestic

law implementing the Dispute Resolution Directive and the EU Arbitration Convention). It is not entirely clear to us why taxpayers are obliged to choose between the available bi- or multi-lateral dispute resolution mechanisms when they make a submission. As the procedures are more or less the same in the MAP phase, we recommend giving the taxpayer the right to apply for multiple processes, use the one with the most efficient process in the MAP phase and decide which follow-up process it wants to pursue if the MAP phase does not work.

3. Other observations

In our above comments, we have emphasized the importance of tax certainty and the prevention of double taxation, which are attainable only through a comprehensive approach that encompasses all stages of the tax lifecycle. This includes the initial design of targeted and clear legislation, the enactment and implementation of these rules, and the subsequent interpretation and application by authorities and courts. It is crucial that each phase is informed by the practical realities of the business environment, incorporating insights from businesses, investors, and other stakeholders to ensure that the tax system remains responsive and relevant.

Recognizing the importance of the EU's competitiveness as an investment destination, a recurring theme identified by many stakeholders for the Commission and other EU institutions to prioritize over the next five years, EY would encourage and support a constructive and structured dialogue between business representatives and relevant EU institutions. Such a forum would serve as a platform to examine real-life tax issues, fostering the identification of best practices and the development of guidance and, where necessary, prompting amendments to tax rules to address emerging issues. This proactive engagement would also enable the adaptation of legislative and administrative practices to new business models and structural economic changes.

By facilitating this dialogue, we aim to enhance tax certainty and reduce administrative burdens, thereby contributing positively to the investment climate. This is particularly pertinent as the EU seeks to achieve its ambitious goals in the green transition and to stimulate innovation, both of which necessitate substantial private investment in the years ahead.

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We therefore call on the Commission and the Member States to establish a process that promotes such a dialogue, with the objective of pinpointing key areas for improvement that could bolster the tax dimension of the EU's business environment. EY welcomes the opportunity to discuss these issues in greater detail and to continue to participate in the dialogue as EU and policymakers from Member States advance the work on this important subject.

If there are questions regarding this submission or for further information, please contact Ronald van den Brekel (ronald.van.den.brekel@nl.ey.com), Maikel Evers (maikel.evers@nl.ey.com) or myself (marlies.de.ruiter@nl.ey.com).

EY is registered in the EU Transparency Register under reference 04458109373-91.

Yours sincerely, on behalf of EY,

Marlies de Ruiter

EY Global International Tax & Transaction Services Policy Leader