**SPECIAL LEGISLATIVE procedure – Consultation**

**Follow-up to the European Parliament legislative resolution of 6 July 2017 on
the proposal for a Council Directive on Double Taxation Dispute Resolution Mechanisms in the European Union**

**2016/0338 (CNS)**

1. **Rapporteur:** Michael THEURER (ALDE/DE)
2. **EP reference number:** A8-0225/2017 / P8\_TA-PROV(2017)0314
3. **Date of adoption of the resolution:** 6 July 2017
4. **Subject:** Tackling Double taxation
5. **Interinstitutional reference number:** 2016/0338 (CNS)
6. **Legal basis:** Article 115 of the Treaty on the Functioning of the European Union
7. **Competent Parliamentary Committee:** Committee on Economic and Monetary Affairs (ECON)
8. **Commission's position:**

The tenor of many amendments is broadly in line with the Commission's position, whilst some of the requested amendments go beyond the Commission's proposal.

The Commission will monitor the functioning and effectiveness of the Directive and propose changes, if necessary, in due time.

**a) Amendments 20, 25, 26, 27, 28, 29, 31, 33, 34, 36, 37, 38, 40, 41, 52, 53, 54, 56, 58, 59, 61 and 62 on reducing procedural timelines and shortening time limits**

These amendments aim at reducing the overall duration of the process by shortening timelines and time limits at different stages of the procedure.

The efficiency and effectiveness of the procedure, including the timelines and time limits for its completion, are in the overall spirit of the Directive. When defining the timelines, the Commission did take into account variables such as investment cycles or existing current practices in bilateral tax treaties. The timelines in the Commission proposal are as far as possible aligned to the most recent developments at the Organisation for Economic Cooperation and Development (OECD) known at the time the proposal was drafted. These timelines also reflect the time needed by tax administrations for building up capacities and an expected further increase of the number of new cases. Therefore, the Commission cannot accept the amendments.

**b) Amendments 20 and 25 on providing acknowledgement of receipt and notification of other Competent Authorities in writing**

Amendments 20 and 25 require that receipt of the complaint should be acknowledged in writing and the competent authorities of other States informed in writing.

The Commission proposal provides that all important procedural steps result in administrative acts and are notified in writing in accordance with the national rules on notification of acts. As the substance of the proposed amendments is reflected in the proposal, the Commission does not see the need to accept these amendments.

**c) Amendment 30 on providing to taxpayers the reasons for rejection**

This amendment states that the competent authorities shall inform the taxpayer on the reasons for rejection.

The amendment is in the spirit of the Commission proposal as it aims at ensuring transparency of Member States towards taxpayers. The current compromise text includes an explicit requirement to provide general information about the reason for rejection. The Commission can partially accept the amendment.

**d) Amendments 19, 22 and 55 on facilitating the provision of information by the taxpayers**

These amendments call upon the taxpayer to submit the complaint to both authorities at the same time and on the Commission to host a central contact point containing all relevant and updated underlying legislation and treaties. They also call for an obligation for the taxpayer to submit information at the dispute resolution stage.

The Commission proposal requires the taxpayer to provide his position, the reasoning and the relevant information with sufficient details at the stage of the complaint. The taxpayer is obliged to submit all information on request of the Competent Authorities or the Advisory Commission. The Commission proposal requires that the taxpayer submits it to both authorities. This is further clarified in the current compromise text. The Commission already hosts a website with contact information of competent authorities. This is considered to strike a good balance and therefore the Commission cannot accept the amendment beyond what was stated in the Commission proposal.

**e) Amendments 29, 32 and 39 on providing for facilitation measures for the taxpayers**

These amendments call for ensuring access to information about possible recourses for taxpayer such as information on options for appeal, coordination of the appeal between authorities or a central information point made available by the Commission.

The Commission assessed that all Member States have already in place procedures for an internal review of administrative acts which have proven to be efficient. They also provide information regarding appeal bodies and the corresponding contact information at national level. Thus the Commission cannot accept the amendments.

**f) Amendments 21, 23 and 24 aiming at limiting taxpayers’ administrative burden**

These amendments introduce some considerations as regards the information to be requested from the taxpayer such as constraints with respect to accessibility, externally caused delays and other limitations of the requested information.

The Commission recognises the importance of limiting taxpayers’ burden to ensure efficiency and effectiveness of the Dispute Resolution Mechanisms. The Commission proposal provides that in cases where a taxpayer brings forward constraints as regards the information to be provided, the national court will finally decide on the validity of the constraints. Furthermore, it contains a list of information which can be expected. The proposed amendments are therefore in the spirit of the Directive. A general objective of proportionality when applying the Directive has been considered in the text of the latest compromise. Referring to specific situations of constraints or burden may, however, limit the intended general application. The Commission therefore cannot accept the proposed amendments.

**g) Amendments 42, 44, 45, 46, 47 and 51 related to the independence and impartiality of the members of the Advisory Commission**

These amendments aim at ensuring independence, impartiality and integrity of the members, publicity of the information and a lack of conflict of interests. The Commission is called to play a role in this regard.

The Commission recognises the high importance of these aspects. The proposed Directive therefore aims at setting up best international standards in terms of independence, impartiality and integrity of the independent persons of standing. Furthermore, it is ensured that the relevant corresponding information is made public and updated online, and, finally, that conflicts of interest are disclosed. Recourses before Court are offered by the proposal which ensures that the criteria independence, impartiality and integrity are respected. Such elements have been integrated in the text of the latest compromise which is considered by the Commission as striking the right balance between the criteria of independence and integrity. Referring expressly to some specific situations and detailing the role of the Commission would go beyond of what is necessary. Thus, the Commission cannot accept the proposed amendments.

**h) Amendments 12, 48, 64, 65, 67, 68 and 69 regarding publicity of the Dispute Resolution decision**

These amendments aim at making the full decisions on the disputed cases public with a possible deletion of sensitive information. Such broad publication is considered as contributing to sharing knowledge between tax administrations and taxpayers.

Increased transparency is in the spirit of the proposed Directive. The Commission acknowledges that making the decisions on the disputed cases public and sharing knowledge between tax administrations and taxpayers in this respect are important aspects that can contribute to effectiveness and efficiency of the dispute resolution mechanisms. In this respect, the Commission proposal by requiring publishing an abstract reflects a big step forward compared to the existing mechanisms. It is important to strike a balance between the need for transparency on the one hand and the need to protect the rights of taxpayers on the other hand, in particular as regards information which, if published, would clearly and evidently reveal industrial and commercially sensitive information to competitors. Operational aspects have been considered in order to improve such transparency in an effective manner: the requirements provided for in the proposed Directive as regards the abstract which at least has to be published aim at allowing users to carry out simple searches and have a direct access to aggregated, massive and complex information. It would have been unlikely to achieve this operational aspect with the publication of a neutralised decision. The Commission cannot accept the proposed amendments.

**i) Amendments 11, 49 and 50 related to the Alternative Dispute Resolution Commission**

These amendments call for stating the exceptionality of the Alternative Dispute Resolution Commission and for better taking into account SME characteristics. As a general requirement, effectivity of the Alternative Dispute Resolution techniques should be ensured.

For the Commission it is important that Alternative Dispute Resolution Mechanisms apply equally to all taxpayers and can be designed in a way that takes into account the specific situation of small and medium-sized enterprises and ensure a level playing field. The Commission does not share the Parliament's evaluation concerning the exceptionality of Alternative Dispute Resolution. A general possibility for Alternative Dispute Resolution without condition of exceptionality offers flexibility that enables Member States to design the most efficient approach for dispute resolution fitting to the respective bi- and multilateral situation at hand. Thus, the proposed amendments cannot be accepted.

**j) Amendments 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 13, 15 and 18 on avoiding double non taxation**

These amendments aim at strengthening the objective of removing double taxation and avoiding situations of double-non taxation.

The Commission proposal creates a transparent and harmonized framework within the EU. It refers to situations creating distortions and obstacles for investments, takes into account taxpayers’ rights and obligations in this respect and takes into account the cost and administrative burden for all stakeholders. The Presidency's compromise proposal also expressly provides that situations not involving double taxation may lead to a denial of access to mandatory resolution of the dispute. The Commission considers that the Commission proposal strikes a good balance, and it therefore cannot accept the proposed amendments.

**k) Amendment 18 on adding a reference to tax avoidance**

This amendment calls for adding the term "tax avoidance" to the section stating that the Directive does not preclude the application of national law or international agreements to prevent tax evasion, tax fraud and abuse.

The effectiveness and efficiency of the procedure as well as its clarity require the use of terms which are easily transposable and have a limited risk of being misinterpreted. Referring to the notion of tax evasion appeared to be sufficient in this context. The Commission cannot accept this amendment.

**l) Amendments 35 and 43 on the Advisory Commission**

These proposed amendments aim at clarifying that the Advisory Commission shall deliver an opinion if the competent authorities fail to reach an agreement during the mutual agreement procedure and at providing Member States with a possibility to appoint permanent representatives.

These proposed amendments are in the spirit of the proposed Directive as providing for the possibility to use Alternative Dispute Resolution which may include permanent representatives. Furthermore independent persons of standing have to be nominated with a certain permanence Thus, the Commission cannot accept these amendments.

**m) Amendment 57 on adding a reference to the UN Model Tax Convention**

This amendment calls for adding a reference to the UN Model Tax Convention as the proposed Directive did only refer to the OECD Model Tax Convention.

According to the text of the latest compromise, the Directive applies to questions of dispute arising from Double Taxation Conventions between Member States (usually modelled after the OECD or the UN) and the EU Arbitration Convention. A specific reference to either the OECD or the UN Model Tax Convention is therefore obsolete. Thus, the Commission cannot accept this amendment.

**n) Amendment 60 on the application of administrative or criminal penalties**

This amendment calls for a provision that prevents a Member State from initiating or continuing judicial proceedings or proceedings for administrative and criminal penalties in relation to the same matters until a binding decision is taken.

The Commission recognises that the application of administrative or criminal penalties can increase significantly the costs and burden of dispute resolution procedures. However, it is also fundamental to ensure that double taxation situations constituting tax evasion or tax avoidance are identified and can be pursued up to denying access to the Dispute Resolution Mechanisms, if necessary. Tax administrations' practice shows that suspension of the corresponding penalties achieves the intended effect of not imposing penalties on the taxpayer until the decision is binding without preventing investigations against tax fraud and tax evasion. This practice has been encouraged by the Code of Conduct on the Functioning of the EU Arbitration Convention and does not require stopping any initiation of procedure to establish and impose administrative or criminal penalties. Thus, the Commission cannot accept the proposed amendment.

**o) Amendment 63 on offences and tax fraud cases established by legally binding judgment**

This amendment calls for adding the condition that cases of tax fraud as well as wilful default or gross negligence will have to be established by a legally valid judgment in criminal or administrative proceedings before access to the dispute resolution procedure is denied.

This proposed amendment is in the spirit of the Directive proposal. The nature of the offence in cases of tax fraud as well as wilful default or gross negligence requires that taxpayers’ rights are protected and that the decision regarding such offence is final and binding before access to the dispute resolution procedure is denied. In this respect, the principle is general. Explicitly referring to the specific need for a legally valid judgment in criminal or administrative proceedings may, however, lead to restrictive interpretations. The Commission cannot therefore accept the proposed amendments.

**p) Amendments 16, 17 and 70, and amendments 71 and 72 aiming at extending the scope**

These amendments aim at also covering all cross-border double taxation situations involving individuals and businesses (amendments 16, 17 and 70); and to include "Gewerbesteuer" and "Imposta regionale sulle attività productive" (amendments 71 and 72).

The Commission notes that the extension of the scope is contemplated in the compromise proposal which provides that all questions of dispute resulting from the application or interpretation of agreements and conventions that provide for the elimination of double taxation of income and capital, where applicable, are covered. Thus, the Commission cannot accept the amendment.

**q) Amendments 13 and 14 on the primacy of the Directive's procedure and the creation of a global framework**

Amendment 13 calls for having the procedure laid down in the Directive prevailing over bilateral Double Taxation Conventions and EU Arbitration Convention. Amendment 14 calls for the establishment of a global framework within the context of the OECD.

The text of the latest compromise provides for rules giving priority to the EU Directive over mechanisms established by bilateral Double Tax Conventions and the EU Arbitration Convention.

Although the Directive is limited to EU cross-border situations, it contains elements of flexibility and general provisions which allow adaption to situations beyond the EU. Consequently, it should facilitate synergies good practices at global level so that it will favour a global framework significantly improving the resolution of double taxation cases involving third countries. The Directive proposal aims at establishing efficient mechanisms and to combine them effectively within the global framework. Thus, the Commission cannot accept these amendments.

**9. Outlook for amendment of the proposal:**

The Commission will not table a modified proposal in respect of the additional amendments proposed by Parliament.

**10. Outlook for the adoption of the proposal:**

It is expected that the Council will adopt the proposal in autumn of 2017.