Tax Dispute Resolution Directive: An Important Step for the EU

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Piergiorgio Valente (Crowe Valente/Valente Associati GEB Partners; Link Campus University, Rome)

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A Directive on Tax Dispute Resolution was adopted by European Member States early in October 2017. It had been proposed by the European Commission 1 year ago as part of the Corporate Tax Reform Package, along with the Common Consolidated Corporate Tax Base (CCCTB) and the amendment of the Anti-Tax Avoidance Directive (ATAD) regarding hybrid mismatches with third countries. Underlying purpose of the new Directive is to enhance the attractiveness of the Single Market to investment and business and boost growth. Specifically, it seeks to ease taxpayers' burden resulting from inadequate coordination of Member States' interpretations of bilateral tax treaties and the EU Arbitration Convention. It establishes effective tax dispute resolution, building on the existing system – as per in the Arbitration Convention – but releasing it from certain flaws and updating it to comprise other forms of alternative dispute resolution. The new system, which must be adopted in Member States by 30 June 2019, is also considered key to promoting fair taxation in the EU.

The new framework improves the existing one on five important points, which deserve a detailed analysis.

I. Enforceable Member States' Obligation to Dispute Resolution

Central deficiency of the framework prescribed by the Arbitration Convention is that it is not efficient. It cannot warrant resolution of the disputes raised thereunder. Although it provides the rules – which are in general terms similar to the ones of the new framework – it lacks the necessary tools to enforce them in case of noncompliance. The new system remedies this deficiency by providing clear guidance on how the rules can be enforced through taxpayer's own action. Thus, taxpayers are guaranteed a solution to their problem or at least a real power to provoke it.

II. Taxpayers' Right of Recourse to Court

The enforcement tool granted to taxpayers is recourse to national Courts – or especially designated domestic authorities. They are entitled to request Courts to intervene with tax dispute resolution proceedings, where tax authorities abstain from proper action. In particular, taxpayers may refer to Courts where:

- The arbitration/alternative dispute resolution committee is not promptly constituted, i.e., within the defined time limits (120 days from taxpayer's request to arbitrate). In this scenario, the Court shall function as appointing authority.
- The Rules of Functioning, i.e., the rules to govern the arbitral proceedings, have not been promptly defined or notified to taxpayer, the competent Court shall issue an order for implementation of such rules.
- They appeal a decision of a national tax authority rejecting a taxpayer's complaint/application for initiation of dispute resolution.

The above right has two important implications. On the one hand, taxpayers' position in the context of dispute resolution is better balanced against that of the tax authorities. On the other, the mere provision of enforcement may be expected to incentivize tax authorities to properly fulfill their obligations.

III. Strict Procedural Timeframe

Another remarkable difference between the new and the existing frameworks relates to the procedural timeframe for dispute resolution. The Arbitration Convention included general reference to the basic procedural stages – complaint submission, MAP negotiation, issuance of arbitral decision – and the deadlines for their completion. Hence, it left undefined intermediary – but equally necessary – steps, e.g., the set-up of the arbitral body. In the new context, prescribed time limits shall apply, amongst others, to (i) notification of receipt of taxpayer's complaint, (ii) request and provision of additional information, (iii) tax authorities' decision to accept/reject the complaint, (iv) request to arbitrate, (v) set-up of arbitral/alternative dispute resolution body, (vi) notification of final decision. It ensues that if delay and inaction are the easy way in the existing rule-book, such practice shall have to change soon.

IV. Extension of Dispute Resolution's Scope

Furthermore, the Directive is praiseworthy for expanding significantly the scope of tax dispute resolution in the EU. To be specific, the Arbitration Convention is limited to disputes with respect to (i) transfer pricing and (ii) attribution of taxable income between permanent establishment and foreign head office. By definition, only businesses with significant international presence through subsidiary/permanent establishment could rely thereon. Such limitation does not exist in the Directive, which may be invoked in relation to all disputes from interpretation/application of treaties for avoidance of double taxation. As regards subjective scope, business and individuals, engaged in any type of cross-border activity, may benefit from the provisions of the Directive. Target is double taxation in general and not only certain aspects thereof.

In this respect, the Directive marks an important step towards more tax fairness in the EU. Even if the primary purpose of the European legislator is the optimization of the investment environment, the progress expected on elimination of double taxation at individual taxpayers' level might be even more significant.

V. Public Outcome of Proceedings

The decision reached on how to settle a tax dispute can be published if all parties involved – tax authorities and taxpayers – consent thereto. This is the case under both, the new and the existing legal framework. The innovation of the Directive in this matter lies with the introduction of obligation for publication of abstract, in the absence of consent for full publication of specific decision. The abstract should include information on (i) subject matter of the dispute, (ii) date, (iii) relevant tax years, (iv) legal basis, (v) industry sector, (vi) dispute resolution method and (vii) summary of the decision reached. By allowing public access – even partial – to tax dispute resolution decisions, transparency and legal certainty are enhanced. Equally, taxpayers' trust in the system is promoted.

The changes described above are fit for purpose, warranting significant improvement of the tax dispute resolution framework in the EU and enhancing the appeal of the Single Market to business. Nevertheless, there is still room for optimization.

Firstly, there are issues where the new framework falls short of the existing one. For example, the scope of the existing framework includes cases where double taxation is highly likely to arise, but has not arisen yet. This is not the case with the new framework, where the tax assessment leading to double taxation is a prerequisite to dispute resolution proceedings. Equally, in the new scenario, taxpayers' right to present their case before the arbitral/alternative dispute resolution body is subject to tax authorities' prior consent. No such limitation exists in the current framework.

Secondly, there are parts of the Directive that demand clarification or specification. Indicatively, although a detailed procedure is provided where a taxpayer's complaint is rejected by one of the tax authorities involved, such procedure does not apply if it is rejected by all such authorities. It follows that recourse to national remedies is the sole solution available in the latter case. Expansion of the former procedure to the latter case would favor consistency and efficiency in dispute resolution, though, without requiring further resources. In addition, with respect to the composition of the arbitral/alternative dispute resolution body, independence, competence, impartiality and integrity are set forth as requirements for appointed members. The content of such terms is not provided though.

To conclude, the new Directive unquestionably signifies great progress in tax dispute resolution in the EU. It targets important deficiencies of the existing framework, providing adequate remedies. It inaugurates a new era in tax dispute resolution, showing the way forward also for international tax dispute resolution. Nevertheless, there is need for further amendments in order to actually optimize dispute resolution. Most importantly, Member States should look beyond resolution; they should prioritize tax dispute prevention. There lies the principal flaw of the Single Market, in the fact that the risk of double taxation is always present; and this should be the principal target.