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**NOTE**

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From:	General Secretariat of the Council
To:	Permanent Representatives Committee/Council
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Subject:	Dispute Resolution Mechanisms – Proposal for a Council Directive on Double Taxation Dispute Resolution Mechanisms in the European Union = General approach

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**I. BACKGROUND**

1. On 26 October 2016, the Commission adopted a proposal for a Council Directive on double taxation dispute resolution mechanisms in the European Union. The objective of the Directive is to provide for rules on mechanisms to resolve disputes between Member States when these arise from the interpretation and application of agreements and conventions that provide for the elimination of double taxation.

2. The proposal builds on the necessity identified by the Council of enhancing tax certainty, thereby allowing for the promotion of investment and stimulation of growth. In doing so, the proposal also focuses on creating a more favourable tax environment for businesses, and reducing compliance costs and administrative burden. The proposal put forward sets up an effective dispute mechanism that is mandatory and binding, through a mutual agreement procedure combined with an arbitration phase, with a clear time limit and an obligation to achieve a result for all Member States.
3. When adopting conclusions at its meeting on 6 December 2016, the ECOFIN Council called for swift examination of the proposal. Finance ministers meeting in Valletta on 7-8 April 2017 expressed wide support for a swift agreement.
4. This proposal was discussed under the Maltese Presidency at the meetings of the Working Party on Tax Questions (WPTQ) on 18 January 2017, 1 February 2017, 3 March 2017, 14 March 2017, 27 March 2017, 12 April 2017 and 27 April 2017 and at the meetings of the Fiscal Attachés on 2 May 2017, 5 May 2017 and 10 May 2017.
5. During those discussions, a substantial number of technical issues were addressed and resolved, and the Presidency submitted several redrafts of the proposal in order to meet the concerns expressed by delegations.
6. At its meeting on 11 May 2017, the High Level Working Party (Taxation) discussed the three most important remaining questions, relating to: (i) the scope of the proposal; (ii) the independence requirements to be met by the appointed independent persons of standing; and (iii) the possibility of providing for a permanent structure to resolve disputes, instead of an ad hoc committee.
7. As a result of those constructive discussions, the Presidency is in a position to offer a compromise text which, in its view, could be submitted to the ECOFIN Council that will be invited to reach a general approach at its meeting on 23 May 2017.

## II. ISSUES

### 1. Scope

8. It emerged early in the negotiation process that the disputes that should fall under the scope of application of the Directive were disputes arising out of the interpretation and application of double taxation agreements between Member States and of the EU Arbitration Convention.
9. Some Member States, however, have expressed the view that such a scope could, in some circumstances, be too broad, and have asked to (i) limit the scope of the Directive to disputes between Member States on how to eliminate double taxation, (ii) explore the possibility of excluding smaller claims or claims brought by individuals, or (iii) exclude cases of abuse or settlement.
10. In line with the discussion held by the High Level Working Party, the Presidency proposes a compromise according to which:
  - a) (Article 1) the Directive will apply to 'disputes between Member States when these arise from the interpretation and application of agreements and conventions that provide for the elimination of double taxation'; and
  - b) (Article 15(7)) on a case by case basis, a Member State may deny access to the dispute resolution procedure under Article 6 where the question of dispute does not involve double taxation. In other words, cases not involving double taxation (but still relating to disputes where taxation has not been levied in accordance with an agreement or convention under Article 1) would only be guaranteed access up to the mutual agreement procedure (MAP) under Article 4.

### 2. Independent persons of standing

11. The Advisory Commission due to render a binding decision on how to resolve the dispute will be composed of representatives of the competent authorities, and of independent persons of standing.

12. From the start of the negotiations, it has been highlighted that it is essential that the Directive provide for the necessary mechanisms in order to ensure that the independent persons of standing offer real guarantees of independence. At the same time, some Member States have expressed the concern that, if the conditions are too strict, they might not be able to include enough persons on the list.
13. In order to address both concerns, the Presidency proposes the following compromise:
- Regarding the list of independent persons of standing (Article 8a): Member States are to nominate at least three individuals who are competent, independent, and who can act with impartiality and integrity. The aggregation of those nominations will comprise the list. Member States are to provide for procedures for the removal of persons from the list when those persons do not remain independent and a procedure has been put in place for a Member State to object to a person remaining on the list in case of lack of independence.
  - Regarding appointment to Advisory Commissions (Article 8): the appointment of the independent persons of standing to the Advisory Commission will be made in accordance with rules to be agreed between the competent authorities, and competent authorities may object to the appointment if several detailed conditions are met, including when the person is an employee with an enterprise that provides tax advice or otherwise gives tax advice on a professional basis or was in such a situation at any time during a period of at least three years prior to the date of his or her appointment.
  - Independent persons of standing need not be judges. However, unless agreed otherwise by the representatives of the competent authorities and the independent persons, the chair of the advisory commission must be a judge (Article 8(6)).
  - When a court of judicial body of a Member State decides, in accordance with its national rules and applying the criteria of Article 8, that there was a lack of independence, the final decision will not be implemented (Article 14(4)).

### 3. Standing Committee

14. The proposal provides for mechanisms to set up an Advisory Commission that will take a decision on the dispute at hand. The proposal also provides for flexibility in the choice of method for dispute resolution, either through ad hoc structures or more permanent structures.
15. Building on experience from previous arbitration cases, one delegation highlighted the importance of working with a permanent structure, which would solve problems linked to the setting up of ad hoc structures. If many delegations support this idea, then the framework for such a permanent structure should be carefully considered and assessed, and could be a solution for the future.
16. On that basis, and in order to pave the way for such a permanent structure in the future, the Presidency proposes the following compromise:
  - a) Article 9 opens up the possibility of setting up an Alternative Dispute Resolution Commission that may apply a different method of dispute resolution. If Member States so wish, they may agree to set up such an Alternative Dispute Resolution Commission in the form of a committee that is of a permanent nature.
  - b) Having expressed a wish to further explore the possibilities provided for in Article 273 TFEU, Member States can make a statement to this effect in the Council minutes. Pending the outcome of those explorations, the Directive would already provide for a self-standing instrument that will provide an efficient tool to resolve disputes, thereby enhancing tax certainty.
17. The above solutions have been reflected in an overall compromise text prepared by the Presidency with a view to its submission to ECOFIN via Coreper.

## II. WAY FORWARD

18. Against this background, the Permanent Representatives Committee is invited to suggest that the Council, at a forthcoming meeting, reach a general approach on the Directive, on the basis of the compromise text set out in ST 9010/17 FISC 98 ECOFIN 344, with a view to adopting the Directive once the opinion of the European Parliament has been received and the legal-linguistic revision carried out.
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