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WORKING PAPER

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MEETING DOCUMENT

From:	DK delegation
To:	Working Party on Tax Questions (Direct Taxation – Dispute resolution)
Subject:	Danish proposal to amend the proposal for a Council Directive on double taxation dispute resolution mechanisms in the European Union

Delegations will find attached a document by the DK delegation in view of the meeting of the Working Party on Tax Questions (Direct Taxation - Dispute resolution) on 1 February 2017.

To the Maltese Presidency

January 26, 2017
J.nr. 2017 - 210

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Danish Proposal to amend the proposal for a Council Directive on Double Taxation Dispute Resolution Mechanisms in the European Union

In our view, the purpose of the work in the EU for the resolution of double taxation disputes is to ensure a European implementation of the work undertaken in the OECD relating to obligatory binding arbitration.

It is our opinion that the directive should be confined to include only disputes concerning the interpretation of double taxation treaties between Member States.

We are aware that there are Member States that sees some difficulties with the solutions that are developed by the OECD, and that these Member States will be reluctant to agree to mandatory binding arbitration under the Multilateral Instrument developed by the OECD.

For us it is the requirements for the independence of the independent persons of standing, which we regard as not being sufficient. It is our view it should be a requirement that these persons are employed as full-time judges in a Member State. This ensures sufficient independence – not only from the competent authorities involved and any specific taxpayers in the case that is to be assessed – but also from business interests in general.

On this basis, we propose the following amendments to the draft directive, and we request that this document is presented as a room document at the next meeting of the Working Party on Tax Questions on 1 February 2017.

Our Proposal is as follows:

Article 1

Subject matter and scope

This Directive lays down rules on the mechanisms to resolve disputes between Member States on [the interpretation of a convention with respect to taxes on income and capital](#). ~~how to eliminate double taxation of income from business and the rights of the taxpayers in this context.~~

~~This Directive applies to all taxpayers that are subject to one of the taxes on income from business listed in Annex I, including permanent establishments situated in one or~~

~~more Member State whose head office is either in a Member State or in a jurisdiction outside the Union.~~

~~This Directive does not apply to any income or capital within the scope of a tax exemption or to which a zero tax rate applies under national rules.~~

This Directive shall not preclude the application of national legislation ~~or provisions of international agreements~~ where it is necessary to prevent tax evasion, tax fraud or abuse.

Article 2

Definitions

For the purposes of this Directive, the following definitions shall apply:

1. 'competent authority' means the authority of a Member State which has been designated as such by the Member State concerned;
2. 'competent court' means the court of a Member State which has been designated by the Member State concerned;
- ~~3. 'double taxation' means the imposition of taxes listed in Annex I to this Directive by two (or more) tax jurisdictions in respect of the same taxable income or capital by their national or judicial authorities when it gives rise to either (i) additional tax, (ii) increase in tax liabilities or (iii) cancellation or reduction of losses, which could be used to offset taxable profits;~~
- ~~4. 'taxpayer' means any person or permanent establishment subject to income taxes listed in Annex I to this Directive.~~

Article 8

The Advisory Commission

1. The Advisory Commission referred to in Article 6 shall have the following composition:
 - (a) one chair;
 - (b) two representatives of each competent authority concerned; .
 - (c) one or two independent persons of standing who shall be appointed by each competent authority from the list of persons referred to in paragraph 4. .

The number of representatives referred to in point (b) of the first subparagraph may be reduced to one by agreement between the competent authorities.

Persons referred to in point (c) of the first subparagraph shall be appointed by each competent authority from the list of persons referred to in paragraph 4.

2. Following the appointment of the independent persons of standing a substitute shall be appointed for each of them according to the rules for the appointment of the independent persons in case where the independent persons are prevented from carrying out their duties.
3. When lots are drawn, each of the competent authorities may object to the appointment of any particular independent person of standing in any circumstance agreed in advance between the competent authorities concerned or in one of the following situations:
 - (a) where that person belongs to or is working on behalf of one of the tax administrations concerned;
 - (b) where that person has, or has had, a large holding in or is or has been an employee of or adviser to one or each of the taxpayers; .
 - (c) where that person does not offer a sufficient guarantee of objectivity for the settlement of the dispute or disputes to be decided. .
4. The list of independent persons of standing shall consist of all the independent persons nominated by the Member States. For this purpose, each Member State shall nominate five persons. .

Independent persons of standing must be nationals of a Member State and resident within the Union. They must be competent and independent [and employed as full-time judges in a Member State](#).

Member States shall notify to the Commission the names of the independent persons of standing they have nominated. Member States may specify in the notification which of the five persons they have nominated can be appointed as a chair. They shall also provide the Commission with complete and up-to-date information regarding their professional and academic background, competence, expertise and conflicts of interest. Member States shall inform the Commission of any changes to the list of independent persons without delay.

5. The representatives of each competent authority and independent persons of standing appointed in accordance with paragraph 1 shall elect a chair from the list of persons referred to in paragraph 4.

Article 13

The Opinion of the Advisory Commission or Alternative Dispute Resolution Commission

1. The Advisory Commission or Alternative Dispute Resolution Commission shall deliver its opinion no later than six months after the date it was set up to the competent authorities of the Member States concerned. .

2. ~~The Advisory Commission or Alternative Dispute Resolution Commission when drawing up its opinion shall take into account the applicable national rules and double taxation treaties. In the absence of a double taxation treaty or agreement between the Member States concerned, the Advisory Commission or Alternative Dispute Resolution Commission, when drawing up its opinion, may refer to international practice in matters of taxation such as the latest OECD Model Tax Convention.~~
3. The Advisory Commission or Alternative Dispute Resolution Commission shall adopt its opinion by a simple majority of its members. Where majority cannot be reached, the vote of the chair shall determine the final opinion. The chair shall communicate the opinion of the Advisory Commission or Alternative Dispute Resolution Commission to the competent authorities.

As a consequence of the proposed amendments to Articles 1 and 2, Annex I will become redundant and can be deleted.

Best regards,

