



**Euro Tax Flash**

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## **from KPMG's EU Tax Centre**



### **KPMG response to the EU Commission's public consultation on Double Taxation Dispute Resolution Mechanisms**

#### **European Commission – Double Taxation – Dispute Resolution – Action Plan on Corporate Taxation – Business tax environment**

On February 16, 2016 the EU Commission launched a public consultation on double taxation dispute resolution mechanisms, which closed on May 10, 2016. The aim of this consultation was to gather the views of all interested parties on how the current dispute resolution mechanisms operate and how they can be improved.

KPMG member firms and professionals from KPMG's Global Transfer Pricing and Dispute Resolution Practices ("KPMG") supported by KPMG's EU Tax Centre took the opportunity to [reply to the questionnaire](#) and submit a further [explanatory memorandum](#) summarizing their position on this issue.

#### **Background**

The consultation is part of the implementation of the EU Commission's Action Plan for Fair and Efficient Corporate Taxation, launched in June 2015 (see [ETF 253](#)). In the Action Plan, the Commission acknowledged that double taxation - by leading to economic distortions and

inefficiencies - can be a serious obstacle to businesses operating in more than one Member State, and can thus have a negative impact on cross-border investment. While reiterating that the implementation of a Common Consolidated Corporate Tax Base (CCCTB) would eliminate the risk of double taxation in the EU, the EU Commission also acknowledged that other solutions are needed until this is agreed.

The current mechanisms (Mutual Agreement Procedure, Arbitration) provided by bilateral tax treaties entered into by Member States and, specifically, by the EU multilateral Arbitration Convention offer relief for double taxation when it occurs, but still result in lengthy procedures if agreement is not reached. The [2010 survey](#) launched by the EU Commission on Double Tax Conventions confirmed these inefficiencies.

### Scope of consultation

The consultation focuses on improving the double taxation dispute resolution mechanisms. The general objective of the initiative is to create a more attractive investment and business environment and to achieve greater legal certainty at a time when recent significant changes to increase tax transparency and combat tax fraud and tax evasion may contribute to an increase in disputes. It is particularly aimed at gathering stakeholders' views on:

- the relevance of removing double taxation for enterprises engaged in cross-border operations;
- the impact and effectiveness of the abovementioned double taxation dispute resolution mechanisms for businesses established in the European Union;
- how these mechanisms can be improved; and
- the solutions presented.

According to the EU Commission, a wide range of views was sought from businesses, the public and other stakeholders.

### KPMG response

Although the issues addressed are complex and the debate ongoing, it is nevertheless widely acknowledged that the legal framework for resolution mechanisms needs to be enhanced. The experience of KPMG member firms and professionals shows that these mechanisms are not sufficient and that several obstacles remain.

The EU consultation frames its questions in terms of the scope, enforceability and efficiency of the current remedies available to EU taxpayers, and the options proposed. Considering the current status of the anti-BEPS initiatives developed both at OECD and EU level, and the legal uncertainties resulting therefrom, KPMG emphasized the need to find effective solutions and address the existing issues in respect of all three criteria:

- KPMG would welcome a firm commitment to improve the working of the EU Arbitration Convention, including accessibility and timescales. While the work of the EU Joint Transfer Pricing Forum should continue, existing recommendations should be implemented as a minimum.
- The Commission should decide on and recommend a preferred arbitration clause that EU Member States should consider including in new tax treaties, both with other Member States and with third countries. The current variations in different treaties cause confusion and inconsistencies.

- KPMG believes the EU should support the OECD's recommendations on minimum standards for tax administrations in applying MAP, and should consider whether these minimum standards could be higher and more effectively monitored in an EU context. Any changes which contradict the work of the OECD would be unhelpful for multinational enterprises.
- KPMG argued that binding arbitration is the only way to effectively eliminate double taxation, and that the EU Arbitration Convention, whilst not perfect, is a good model for what could be achieved at OECD level and that a practical arbitration process should be favored. Whilst a legalistic approach (e.g. the CJEU acting as arbiter) has some advantages, the additional costs and timeframes involved may make the process prohibitive, particularly for smaller cases.

As regards the current EU Arbitration Convention, KPMG identified several ways to improve it:

- Broaden its scope (e.g. address the existence of PEs and thin capitalization, as well as EU BEPS-related disputes).
- Make it more enforceable, e.g. by re-launching the initial plans for an EU Directive.
- Make it more timely, e.g. by making the two year limit mandatory .
- Make it more efficient, including the dedication of more resources by governments. In that respect, KPMG underlined the advantages of a “baseball arbitration clause” approach, under which the two parties are required to state their final position and the arbitrator has to choose one of these positions rather than reaching a compromise. This approach could encourage competent authorities to take more reasonable opening positions in negotiation and therefore reach an agreement more efficiently.
- Make it more accessible. In this respect, KPMG stressed that the limitations to Arbitration Convention access should be exceptional and well founded.
- Some form of sanction for tax authorities delaying the process should be considered (e.g. an automatic start of the arbitration process if a tax authority delays its response).

Finally, KPMG emphasized that the current OECD BEPS work and the EU work on creating a fair and efficient corporate tax system are both likely to lead to more disputes. This is obviously not the intention of the work, but will undoubtedly be the outcome, as is the case with any major change in approach, especially one being implemented globally. It is therefore critical for taxpayers to have access to an efficient, wide-ranging and enforceable process for eliminating double taxation.

## Next steps

Further details of the consultation together with a copy of the responses made publicly available should be posted on the [EU Commission Website](#) in the next few weeks.

The EU Commission is expected to propose improvements to the current mechanisms by the summer of 2016, in order to create a coordinated approach to dispute resolution, with clearer rules and more stringent timelines, building on the systems already in place. The EU Commission will also review whether the scope of the Arbitration Convention should be extended within the EU and whether turning it into an EU instrument would be more effective in improving the functioning of the Single Market.

Should you require further assistance in this matter, please contact the EU Tax Centre or, as appropriate, your local KPMG tax advisor.



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If you have any questions, please send an e-mail to insert [kpmgeutaxcentre@kpmg.com](mailto:kpmgeutaxcentre@kpmg.com)

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