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**NOTE**

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From: General Secretariat of the 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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Delegations will find in the Annex the Presidency compromise on the abovementioned Commission proposal.

Proposal for a

**COUNCIL DIRECTIVE**

**on Tax Dispute Resolution Mechanisms in the European Union**

**THE COUNCIL OF THE EUROPEAN UNION,**

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 115 thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national parliaments,

Having regard to the opinion of the European Parliament<sup>1</sup>,

Having regard to the opinion of the European Economic and Social Committee<sup>2</sup>,

Acting in accordance with a special legislative procedure,

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<sup>1</sup> OJ C , , p. .

<sup>2</sup> OJ C , , p. .

Whereas:

- (1) Situations in which different Member States interpret or apply differently the provisions of bilateral tax agreements and conventions and the Convention on the elimination of double taxation in connection with the adjustments of profits of associated enterprises (90/436/EEC)<sup>3</sup> ('the Union Arbitration Convention') can create serious tax obstacles for businesses operating cross border. They create an excessive tax burden for businesses and are likely to cause economic distortions and inefficiencies, as well as to have a negative impact on cross border investment and growth.
- (2) For this reason, it is necessary that mechanisms available in the Union ensure the effective resolution of disputes concerning the interpretation and application of such bilateral tax treaties and the Union Arbitration Convention, in particular disputes leading to double taxation.
- (3) The currently existing mechanisms provided for in bilateral tax treaties and the Union Arbitration Convention might not achieve the effective resolution of such disputes in a timely manner in all cases. The monitoring exercise carried out as part of the implementation of the Union Arbitration Convention has revealed some important shortcomings, in particular as regards access to the procedure and the length and the effective conclusion of the procedure.
- (4) With a view to create a fairer tax environment, rules on transparency need to be enhanced and anti-avoidance measures need to be strengthened. At the same time in the spirit of a fair taxation system, it is necessary to ensure that mechanisms on dispute resolution are comprehensive, effective and sustainable. Improvements to dispute resolution mechanisms are also necessary to respond to a risk of increased number of double or multiple taxation disputes with potentially high amounts being at stake due to more regular and focused audit practices established by tax administrations.

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<sup>3</sup> OJ L 225, 20.8.1990, p. 10.

- (5) The introduction of an effective and efficient framework for resolution of tax disputes which ensures legal certainty and a business friendly environment for investments is therefore a crucial action in order to achieve fair and efficient tax systems in the Union. The dispute resolution mechanisms should also create a harmonised and transparent framework for solving disputes and as such provide benefits to all taxpayers.
- (6) The resolution of disputes should apply to different interpretations and application of bilateral tax treaties and the Union Arbitration Convention - in particular to different interpretations and application leading to double taxation - and this should be achieved through a procedure under which, as a first step, the case is submitted to the tax authorities of the Member States concerned with a view to settling the dispute by Mutual Agreement Procedure. Member States should be encouraged to use non-binding alternative dispute resolution forms, such as mediation or conciliation, during the final stages of the mutual agreement procedure period. In the absence of such agreement within a certain time frame, the case should be submitted to a dispute resolution procedure. There should be flexibility in the choice of method for dispute resolution, either through ad hoc structures or more permanent structures. Dispute resolution procedures could take the form of an Advisory Commission consisting both of representatives of the tax authorities concerned and of independent persons of standing or Alternative Dispute Resolution Commission (the latter providing for the said flexibility). Also, where appropriate, any other dispute resolution processes such as the "final offer" arbitration process (otherwise known as "last best offer" arbitration), could be chosen as an alternative by bilateral agreement of the Member States to solve the dispute in a binding manner. The tax authorities should take a final binding decision by reference to the opinion of an Advisory Commission or Alternative Dispute Resolution Commission.

- (7) The improved dispute resolution mechanism should build on existing systems in the Union including the Union Arbitration Convention. However, the scope of this Directive should be wider than that of the Union Arbitration Convention, which is limited to disputes on transfer pricing and attribution of profits to permanent establishments only. This Directive should apply to all taxpayers that are subject to taxes on income and capital covered by bilateral tax treaties and the Union Arbitration Convention. At the same time, individuals, micro and small and medium enterprises should have a lesser administrative burden when accessing the dispute resolution procedure. In addition, the dispute resolution phase should be strengthened. In particular, it is necessary to provide for a time limit for the duration of the procedures to resolve double taxation disputes and to establish the terms and conditions of the dispute resolution procedure for the taxpayers.
- (8) In order to ensure uniform conditions for the implementation of this Directive, implementing powers should be conferred on the Commission. Those powers should be exercised in accordance with Regulation (EU) No 182/2011 of the European Parliament and of the Council<sup>4</sup>.
- (9) This Directive respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union. In particular, this Directive seeks to ensure full respect for the right to a fair trial and the freedom to conduct a business.
- (10) Since the objective of this Directive, to establish an effective and efficient procedure to resolve disputes in the context of the proper functioning of the internal market, cannot be sufficiently achieved by the Member States but can rather, by reason of the scale and effects of the action, be better achieved at Union level, the Union may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty on European Union. In accordance with the principle of proportionality as set out in that Article, this Directive does not go beyond what is necessary in order to achieve that objective.

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<sup>4</sup> Regulation (EU) No 182/2011 of the European Parliament and of the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers (OJ L 55 of 28.02.2011, p. 13).

- (11) The Commission should review the application of this Directive after a period of five years and Member States should provide the Commission with appropriate input to support this review,

HAS ADOPTED THIS DIRECTIVE:

*Article 1*

*Subject matter and scope*

This Directive lays down rules on a mechanism 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 of income and, where applicable, capital. It also lays down the rights and obligations of the affected persons when such disputes arise. Hereinafter in this Directive, the matter giving rise to such disputes is referred to as a “question of dispute”.

*Article 2*

*Definitions*

1. For the purposes of this Directive, the following definitions shall apply:
  - (a) 'competent authority' means the authority of a Member State which has been designated as such by the Member State concerned;
  - (b) 'competent court' means the court, tribunal or other body of a Member State which has been designated by the Member State concerned;

- (c) 'double taxation' means the imposition of taxes covered by an agreement or convention referred to in Article 1 by two (or more) Member States in respect of the same taxable income or capital when it gives rise to either (i) additional tax charge, (ii) increase in tax liabilities or (iii) cancellation or reduction of losses, which could be used to offset taxable profits;
- (d) 'affected person' means any person, including an individual, that is resident for tax purposes in a Member State and whose taxation is directly affected by a question of dispute.

2. Any term not defined in this Directive shall, unless the context otherwise requires, have the meaning that it has at that time under the relevant agreement or convention referred to in Article 1 as applying at the date of receipt of the first notification of the action resulting in or that will result in a question of dispute. In the absence of a definition under such agreement or convention, such terms shall have the meaning that it has at that time under the law of the Member State concerned for the purposes of the taxes to which the said agreement or convention applies, any meaning under the applicable tax laws of that Member State prevailing over a meaning given to the term under other laws of that Member State.

### *Article 3*

#### *Complaint*

1. Any affected person shall be entitled to submit a complaint on a question of dispute requesting the resolution thereof to each of the competent authorities of each of the Member States concerned. Such a request shall be submitted within three years from the receipt of the first notification of the action resulting in, or that will result in a question of dispute, whether or not such person uses the remedies available in the national law of any of the Member States concerned. The affected person shall submit such complaint to each competent authority at the same time with the same information and shall indicate in the complaint which other Member States are concerned. The affected person shall ensure that each Member State concerned receives the complaint in at least one of the following languages

- (a) one of that Member State's official languages in accordance with national law; or
  - (b) any other language that such a Member State may accept for this purpose.
2. Each competent authority shall acknowledge receipt of the complaint within two months from the receipt of the complaint. They shall also inform the competent authorities of the other Member States concerned on the receipt of the complaint within two months of such receipt. The competent authorities shall at that time also inform each other on which language or languages they intend to use for their communications during the relevant procedures for a case.
3. The complaint shall only be accepted if, as a first step, the affected person making the complaint provides the competent authorities of each of the Member States concerned with the following information:
- (a) name, address, tax identification number and other information necessary for identification of the affected person(s) who presented the complaint to the competent authorities and of any other person concerned;
  - (b) tax periods concerned;
  - (c) details of the relevant facts and circumstances of the case (including details of structure of the transaction and of the relations between the affected person and the other parties to the relevant transactions and including facts determined in good faith in a mutual binding agreement between the affected person and the tax administration, where applicable) and more specifically, the nature and date of the actions giving rise to the question of dispute (including, where applicable, details of same income received in the other Member State and of inclusion of such income in the taxable income in the other Member State, and of tax charged or that will be charged in relation to such income in the other Member State) as well as the related amounts in the currencies of the Member States concerned, with a copy of any supporting documents;



- (d) reference to applicable national rules and agreement or convention referred to in Article 1. Where more than one agreement or convention is applicable, the affected person making the complaint shall specify which agreement or convention is being interpreted in relation to the relevant question of dispute. Such agreement or convention shall be the applicable agreement or convention for the purposes of this Directive;
- (e) the following information provided by the affected person who presented the complaint to the competent authorities with a copy of any supporting documents:
  - (i) an explanation of why the affected person considers that there is a question of dispute;
  - (ii) the details of any appeals and litigation initiated by the affected person regarding the relevant transactions and any court decisions concerning the question of dispute;
  - (iii) a commitment by the affected person to respond as completely and quickly as possible to all appropriate requests made by a competent authority and provide any documentation at the request of the competent authorities;
  - (iv) a copy of the final tax assessment decision in the form of a final tax assessment notice, tax audit report or other equivalent document leading to the question of dispute and of any other documents issued by the tax authorities with regard to the question of dispute where relevant;
  - (v) information on any complaint submitted by the affected person under another mutual agreement procedure or dispute resolution procedure as defined in Article 15(5) hereafter and an express commitment by the affected person that he will abide by the provisions of Article 15(5) hereafter, if applicable.
- (f) any specific additional information requested by the competent authorities that is considered necessary to undertake a substantive consideration of the particular case.

4. The competent authorities of each of the Member States concerned may request the information referred to in point (f) of paragraph 3 within a period of three months from the receipt of the complaint. Further requests for information may be made thereafter during the mutual agreement procedure under Article 4 where this is considered necessary by the competent authorities. Protection of information in national law and as regards trade, business, industrial or professional secret or trade processes shall apply.

An affected person that receives a request in accordance with the above mentioned point (f) shall reply within three months of receipt of such request. A copy of this reply shall also be sent at the same time to the competent authorities of the other Member States concerned.

5. The competent authorities of each of the Member States concerned shall take a decision on the acceptance or rejection of the complaint of an affected person within six months of the receipt thereof or of the receipt of the information referred to in point (f) of paragraph 3, whichever is the later. The competent authorities shall inform the affected person and the competent authorities of the other Member States of their decision without delay.

A competent authority may decide, within the period of six months of the receipt thereof or of the receipt of the information referred to in point (f) of paragraph 3, whichever is the later, to resolve the question of dispute on a unilateral basis without involving the other competent authorities of the Member States concerned. In such case, the relevant competent authority shall notify the affected person and the other competent authorities of the Member States concerned without delay, following which notification, procedures under this Directive shall be terminated.

6. Where an affected person wishes to withdraw a complaint, a notification of withdrawal shall be submitted to all competent authorities of the Member States concerned in writing at the same time. Such notification shall terminate all procedures under this Directive with immediate effect. Competent authorities of the Member States receiving such a notification of withdrawal shall inform the other competent authorities of the Member States concerned of such termination of procedures without delay.

Where for any reason a question of dispute ceases to exist, all procedures under this Directive shall terminate with immediate effect and the competent authorities of the Member States concerned shall inform the affected person of this state of affairs and of the general reasons in relation thereto without delay.

#### *Article 4*

##### *Mutual Agreement Procedure*

1. Where the competent authorities of the Member States concerned accept the complaint they shall endeavour to resolve the question of dispute by mutual agreement within two years starting from the last notification of one of the Member States' decision on the acceptance of the complaint.

The period of two years referred to in the first subparagraph may be extended by up to one year at the request of a competent authority of a Member State concerned to all the other competent authorities of the Member States concerned, if the requesting competent authority provides justification in writing.

2. Once the competent authorities of the Member States have reached an agreement as to how to resolve the question of dispute within the period provided for in paragraph 1, the competent authority of each of the Member States concerned shall, without delay, notify this agreement to the affected person as a decision which is binding on the authority and enforceable by the affected person, subject to the affected person accepting the decision and renouncing the right to any other remedy, where applicable. Where procedures regarding such other remedies had already commenced, the decision shall become so binding and enforceable once the affected person provides evidence to the competent authorities of the Member States concerned that action has been taken to terminate these procedures regarding such other remedies. Such evidence shall be provided not later than sixty days from the date when such agreement was notified to the affected person. The decision shall then be implemented without delay irrespective of any time limits prescribed by the national law of the Member States concerned.

3. Where the competent authorities of the Member States concerned have not reached an agreement on how to resolve the question of dispute within the period provided for in paragraph 1, the competent authority of each of the Member States concerned shall inform the affected person indicating the general reasons for the failure to reach agreement.

#### *Article 5*

##### *Competent Authority decision concerning the complaint*

1. The competent authority of a Member State concerned may decide to reject the complaint within the period provided for in Article 3(5) where
  - (a) the complaint lacks information required under Article 3(3) (including any information requested under Article 3(3)(f) that was not submitted within the deadline specified in Article 3(4));
  - (b) there is no question of dispute; or
  - (c) the three-year period set forth in Article 3(1) is not respected.

When informing the affected person in accordance with the provisions of Article 3(5), the competent authority shall provide the general reasons for such rejection.

2. Where any of the competent authorities of the Member States concerned have not taken a decision on the complaint within the time provided for in Article 3(5), the complaint shall be deemed to be accepted by that competent authority.
3. The affected person shall be entitled to appeal against the decision of the competent authorities of the Member States concerned in accordance with national rules where all competent authorities of the Member States concerned have rejected the complaint. In such a case where the appeal right has been exercised, the affected person cannot make a request under Article 6(1)(a)

- (a) while the decision is still under appeal according to the laws of the Member State concerned;
- (b) where the decision of rejection can still be further appealed under the appeal procedure of the Member States concerned; or
- (c) when a decision of rejection has been confirmed under the appeal procedure in point (a) but it is not possible to derogate from the decision of the relevant court or other judicial bodies in any of the Member States concerned.

Where the appeal right has been exercised, the decision of the relevant court or other judicial body shall be considered for the purposes of Article 6(1)(a).

### *Article 6*

#### *Dispute resolution by the Advisory Commission*

1. Upon a request made by the affected person to the competent authorities of the Member States concerned, an Advisory Commission shall be set up by such competent authorities in accordance with Article 8 where
  - (a) the complaint submitted by such affected person is rejected under Article 5(1) by at least one but not all of the competent authorities of Member States concerned; or
  - (b) the competent authorities of the Member States concerned have accepted the complaint that was submitted by the affected person but failed to reach an agreement on how to resolve the question of dispute by mutual agreement within the time limit provided for in Article 4(1).

The affected person may make such a request provided no appeal can be made, is pending or the affected person has formally renounced their right of appeal, in accordance with any applicable national rules against a rejection referred to in Article 5(1). The request shall include a declaration to this effect.

The affected person shall make such a request in writing not later than fifty days from the date of receipt of the notification under Articles 3(5), 4(3) or the date of delivery of the decision by the relevant court or judicial body under Article 5(3), as the case may be. The Advisory Commission shall be set up not later than one hundred and twenty days from the receipt of such request, and once set up, its chair shall inform the affected person thereof without delay.

2. The Advisory Commission set up in the case of paragraph (1), point (a), shall adopt a decision on the acceptance of the complaint within six months from the date of its set up. It shall notify its decision to the competent authorities within thirty days of the adoption thereof.

Where the Advisory Commission confirms that all the requirements under Article 3 have been satisfied, the mutual agreement procedure provided for in Article 4 shall be initiated at the request of one of the competent authorities. The competent authority concerned shall notify the Advisory Commission, the other competent authorities concerned and the affected person of that request. The period provided for in Article 4(1) shall start from the date of the notification of the decision taken by the Advisory Commission on the acceptance of the complaint.

Where none of the competent authorities request initiation of the mutual agreement procedure within sixty days of the date of the notification of the decision of the Advisory Commission, the same Advisory Commission shall provide an opinion on how to resolve the question of dispute as provided for in Article 13(1). In such a case, for the purposes of Article 13(1), the Advisory Commission shall be deemed to have been set up on the lapse of the said sixty days.

3. In the case of paragraph (1), point (b), the Advisory Commission shall deliver an opinion on how to resolve the question of dispute in accordance with Article 13(1).

## *Article 7*

### *Appointments by competent courts or national appointing body*

1. If the Advisory Commission is not set up within the period provided for in Article 6(1), Member States shall provide that the relevant affected person may refer to a competent court or any other body or person designated in their national law for the carrying out of such function (national appointing body).

Where the competent authority of a Member State has failed to appoint at least one independent person of standing and its substitute, the affected person may request the competent court in that Member State or national appointing body to appoint an independent person and the substitute from the list referred to in Article 8a.

If the competent authorities of all Member States concerned have failed to do so, the affected person may request the competent courts or national appointing body of each Member State to appoint the two independent persons of standing from the list referred to in Article 8a. The thus appointed independent persons of standing shall appoint the chair by drawing lots from the list of the independent persons according to Article 8(3).

Affected persons shall submit their referral to appoint the independent persons of standing and their substitutes to each of their respective states of residence, if more than one affected person is involved or to the Member States whose competent authorities have failed to appoint at least one independent person of standing and its substitute, if only one affected person is involved.

2. Appointment of the independent persons and their substitutes according to paragraph 1 shall be referred to a competent court of a Member State or national appointing body only after the end of the one hundred and twenty day period referred to in Article 6(1) and within thirty days after the end of that period.

3. The competent court or national appointing body shall adopt a decision according to paragraph 1 and notify it to the applicant. The applicable procedure for the competent court to appoint the independent persons when the Member States fail to appoint them shall be the same as the one applicable under national rules in matters of civil and commercial arbitration when courts or national appointing bodies appoint arbitrators in cases where parties fail to agree in this respect. The competent court or national appointing body of a Member State shall inform the competent authority of that Member State, which shall in turn inform the competent authority of the other Member States concerned without delay. The competent authority of the Member State having initially failed to appoint the independent person of standing and the substitute shall be entitled to appeal a decision of the court, or national appointing body in that state, provided they have the right to do so under their national law. In case of rejection, the applicant shall be entitled to appeal against the decision of the court in accordance with the national procedural rules.

#### *Article 8*

##### *The Advisory Commission*

1. The Advisory Commission referred to in Article 6 shall have the following composition:
  - (a) one chair;
  - (b) one representative of each competent authority concerned. Where the competent authorities agree, the number of such representatives may be increased to two for each competent authority;
  - (c) one independent person of standing that is appointed by each competent authority of the Member States concerned from the list referred to in Article 8a. Where the competent authorities agree, the number of such persons appointed may be increased to two for each competent authority.



2. The rules for the appointment of the independent persons of standing shall be agreed between the competent authorities of the Member States concerned. 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. Where the rules for the appointment of independent persons of standing have not been agreed in accordance with paragraph 2, the appointment of such persons shall be carried out by drawing lots.
4. Except where the independent persons of standing have been appointed by the competent court or national appointing body as provided in Article 7(1), the competent authority of any of the Member States concerned 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 any one of the following situations:
  - (a) where that person belongs to or is working on behalf of one of the tax administrations concerned or was in such a situation at any time during the previous three years;
  - (b) where that person has, or has had, a material holding in or voting right in or is or has been an employee of or adviser, at any time during the last 5 years prior to the date of his appointment, to any affected person concerned;
  - (c) where that person does not offer a sufficient guarantee of objectivity for the settlement of the dispute or disputes to be decided;
  - (d) where that 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 appointment.

5. A competent authority of any of the Member States concerned may request that a person of standing that has been appointed in accordance with paragraph 2 or 3, or his substitute discloses any interest, relationship or any other matter that is likely to affect that person's independence or impartiality or that might reasonably create an appearance of bias in the proceedings.

For a period of twelve months after the decision of the Advisory Commission was delivered, an independent person of standing forming part of the said Advisory Commission shall not be in a situation that would have given cause to a competent authority to object to its appointment as provided for in this paragraph had it been in that situation at the time of appointment to that same Advisory Commission.

6. 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 Article 8a. Unless otherwise agreed by the said representatives of each competent authority and independent persons of standing, the chair shall be a judge.

#### *Article 8a*

##### *The List of Independent Persons of Standing*

1. 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 at least three individuals who are competent and independent, and who can act with impartiality and integrity.
2. Member States shall notify the Commission with the names of the independent persons of standing they have nominated. 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 may specify in the notification which of the persons they have nominated can be appointed as a chair.

3. Member States shall inform the Commission of any changes to the list of independent persons without delay.

Each Member State shall put in place procedures for the removal from the list of independent persons of standing of any person appointed by it if that person does not remain independent.

Where, taking into consideration the relevant provisions of this Article, a Member State has reasonable cause to object to an independent person of standing remaining in the above-mentioned list for reasons of lack of independence, it shall inform the Commission providing appropriate evidence for its concern. The Commission shall in turn inform the Member State that nominated such person of the said objection and evidence. On the basis thereof, the latter Member State shall within six months take those necessary steps to investigate the complaint and decide whether to retain or remove that person from the list. It shall then without delay notify the Commission accordingly.

#### *Article 9*

##### *The Alternative Dispute Resolution Commission*

1. The competent authorities of the Member States concerned may agree to set up an Alternative Dispute Resolution Commission instead of the Advisory Commission to deliver an opinion on how to resolve the question of dispute in accordance with Article 13. The competent authorities of the Member States may also agree to set up an Alternative Dispute Resolution Commission in the form of a committee that is of a permanent nature (Standing Committee).

2. Except for the rules regarding the independence of its members set out in Article 8(4) and 8(5), the Alternative Dispute Resolution Commission may differ regarding its composition and form from the Advisory Commission and may apply, where appropriate, any other dispute resolution processes or techniques to solve the dispute in a binding manner. As an alternative to the type of dispute resolution process applied by the Advisory Commission under Article 8, i.e. the independent opinion process, any other type of dispute resolution process, including the "final offer" arbitration process (otherwise known as "last best offer" arbitration), can be agreed by the competent authorities of the Member States concerned under this Article and applied by the Alternative Dispute Resolution Commission.
3. The competent authorities of the Member States concerned shall agree on the Rules of Functioning according to Article 10.
4. Articles 11 and 12 shall apply to the Alternative Dispute Resolution Commission except if otherwise agreed to in the Rules of Functioning.

#### *Article 10*

##### *Rules of Functioning*

1. Member States shall provide that within the period of one hundred and twenty days as provided for in Article 6(1), the competent authority of each of the Member States concerned notifies the affected person on the following:
  - (a) Rules of Functioning for the Advisory Commission or Alternative Dispute Resolution Commission;
  - (b) a date by which the opinion on the resolution of the question of dispute shall be adopted;
  - (c) reference to any applicable legal provisions in national law of the Member States and any applicable agreement or convention.

2. The Rules of Functioning shall be signed between the competent authorities of the Member States involved in the dispute.

The Rules of Functioning shall provide in particular:

- (a) the description and the characteristics of the question of dispute;
- (b) the terms of reference on which the competent authorities of the Member States agree as regards the legal and factual questions to be resolved;
- (c) the form, either an Advisory Commission or an Alternative Dispute Resolution Commission as well as the type of process for the Alternative Dispute Resolution, if differing from the independent opinion process applied by the Advisory Commission;
- (d) the timeframe for the dispute resolution procedure;
- (e) the composition of the Advisory Commission or Alternative Dispute Resolution Commission (including number, names, details of competence and qualifications as well as disclosure of conflict of interests of the members);
- (f) the terms and conditions of participation of the affected person and third parties, exchanges of memoranda, information and evidence, the costs, the type of resolution process and any other relevant procedural or organisational aspects;
- (g) the logistical arrangements for the Advisory Commission's proceedings and delivery of its opinion.

If the Advisory Commission is set up to deliver an opinion under Article 6(1)(a), only the information referred to points (a), (d), (e) and (f) of the second subparagraph shall be set out in the Rules of Functioning.

3. The Commission shall establish standard Rules of Functioning on the basis of the provisions of paragraph 2 by means of implementing acts. Such Rules of Functioning shall apply in the absence or incompleteness of notification of the Rules of Functioning to the affected person. Those implementing acts shall be adopted in accordance with the procedure referred to in Article 18(2).
4. In the absence of notification of the Rules of Functioning by the competent authorities in accordance with para 1 and 2, the independent persons and the chair shall complete the Rules of Functioning on the basis of the standard form under paragraph 3 and send them to the affected person within two weeks from the date of setting up the Advisory Commission or Alternative Dispute Resolution Commission. When the independent persons and the Chair do not agree on the Rules of Functioning or do not notify them to the affected person, the affected person or affected persons can refer to the competent court in one of the Member States involved in order to obtain an order for the implementation of the Rules of Functioning.

#### *Article 11*

##### *Cost of the procedure*

1. Except as provided in paragraph 2, and unless the competent authorities of the Member States concerned have agreed otherwise, the following costs shall be shared equally between the Member States:
  - (a) the expenses of the independent persons of standing that is an amount equivalent to the average of the usual amount reimbursed to high ranking civil servants of the Member States concerned; and
  - (b) the fees of the independent persons, where applicable, that shall be limited to EUR 1000 per person for every meeting day of the Advisory Commission or Alternative Dispute Resolution Commission.

Costs that are incurred by the affected person shall not be borne by Member States.

2. Where the affected person makes
  - (a) a notification of withdrawal of complaint as per Article 3(6); or
  - (b) a request under the provisions of Article 6(1) following a rejection made under Article 5(1) and the Advisory Commission decides that the relevant competent authorities were correct in rejecting the complaint,and where the competent authorities of the Member States concerned agree, all the costs referred to in paragraphs 1(a) and (b) shall be borne by the affected person.

## *Article 12*

### *Information, Evidence and Hearing*

1. For the purposes of the procedure referred to in Article 6, where the competent authorities of the Member States agree, the affected person(s) concerned may provide the Advisory Commission or Alternative Dispute Resolution Commission with any information, evidence or documents that may be relevant for the decision. The affected person(s) and the competent authorities of the Member States concerned shall provide any information, evidence or documents upon request by the Advisory Commission or Alternative Dispute Resolution Commission. However, the competent authorities of any such Member State may refuse to provide information to the Advisory Commission in any of the following cases:
  - (a) obtaining of the information requires carrying out administrative measures that are against national law;
  - (b) information cannot be obtained under its national law;
  - (c) information concerns trade, business, industrial or professional secret or trade process;
  - (d) the disclosure of information is contrary to public policy.

2. Affected persons may, at their request and with the consent of the competent authorities of the Member States concerned, appear or be represented before the Advisory Commission or Alternative Dispute Resolution Commission. Affected persons shall appear or be represented before it upon request by the Advisory Commission or Alternative Dispute Resolution Commission.
3. In their capacity as members of the Advisory Commission or Alternative Dispute Resolution Commission, the independent persons of standing or any other member shall be subject to the obligation of professional secrecy under the conditions laid down by the national legislation of each of the Member States concerned in relation to information they come across during the proceedings of the Advisory Commission or the Alternative Dispute Resolution Commission. Affected persons, and where applicable, their representatives, shall undertake to treat any information (including knowledge of documents) that they come across during such proceedings as secret. A declaration to this effect shall be made by the affected person and their representatives to the competent authorities of the Member States concerned when so requested during the same proceedings. The Member States shall adopt appropriate provisions to sanction any breach of secrecy obligations.

### *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. Where the Advisory Commission or Alternative Dispute Resolution Commission considers that the question of dispute is such that it would need more than six months to deliver an opinion, this period may be extended by three months. The Advisory Commission or Alternative Dispute Resolution Commission shall inform the competent authorities of the Member States concerned and the affected persons.
2. The Advisory Commission or Alternative Dispute Resolution Commission shall base its opinion on the provisions of the applicable agreement or convention referred to in Article 1 as well as any applicable national rules.



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.

#### *Article 14*

#### *Final Decision*

1. The competent authorities shall agree within six months of the notification of the opinion of the Advisory Commission or Alternative Dispute Resolution Commission on how to resolve the question of dispute.
2. The competent authorities may take a decision which deviates from the opinion of the Advisory Commission or Alternative Dispute Resolution Commission. If they fail to reach an agreement as to how to resolve the question of dispute, they shall be bound by that opinion.
3. Member States shall provide that the final decision on the resolution of the question of dispute is notified by each competent authority to the affected person without delay. In the absence of notification thereof within a thirty day period, the affected person may appeal in its Member State of residence in accordance with the applicable national rules in order to obtain the final decision.
4. The final decision shall be binding on the Member States concerned and shall not constitute a precedent. The final decision shall be implemented subject to the affected person(s) accepting the final decision and renouncing the right to any domestic remedy within sixty days from the date when the final decision was notified, where applicable.

Except where the relevant court or other judicial body of a Member State concerned decides according to its applicable national rules on remedies and applying the criteria under Article 8 that there was lack of independence, the final decision shall be implemented under the national law of the Member States concerned which as a result of the final decision shall amend their taxation, irrespective of any time limits prescribed by the national law. Where the final decision has not been implemented, the affected person may refer to the competent court of the Member State, which has failed to implement in order to enforce implementation thereof.

### *Article 15*

#### *Interaction with national proceedings and derogations*

1. The fact that an action causing a question of dispute taken by a Member State becomes final according to national law shall not prevent the affected persons from having recourse to the procedures provided for in this Directive.
2. The submission of the dispute to the mutual agreement procedure or to the dispute resolution procedure under Articles 4 and 6 respectively shall not prevent a Member State from initiating or continuing judicial proceedings or proceedings for administrative and criminal penalties in relation to the same matters.
3. Affected persons may have recourse to the remedies available to them under the national law of the Member States concerned. However, when the affected person has commenced proceedings to seek such a remedy, the terms of periods referred to in Articles 3(5) and 4(1) respectively shall commence from the date on which a judgement delivered in those proceedings has become final or on which those proceedings are otherwise definitively concluded or where the proceedings have been suspended.
4. Where in accordance with its national law, a Member State cannot derogate from the decisions of its relevant court or other judicial body, such Member State may provide that where a decision on a question of dispute has been rendered by the relevant court or other judicial body of that Member State

- (a) before agreement has been reached by the competent authorities of the Member States concerned under the mutual agreement procedure under Article 4 on that same question of dispute, the competent authority of such Member State shall notify the other competent authorities of the Member States concerned of the decision of the relevant court or other judicial body and the said procedure shall be terminated as from the date of such notification;
  - (b) before the affected person made a request under Article 6(1), the provisions of Article 6(1) shall not apply if the question of dispute had remained unresolved during the whole of the mutual agreement procedure under Article 4. The competent authority of that Member State shall inform the other competent authorities of the Member States concerned of the effect of such a decision of the relevant court or other judicial body;
  - (c) the dispute resolution process under Article 6 shall be terminated if such a decision was rendered at any time after a request was made by an affected person under Article 6(1) and before the Advisory Commission or the Alternative Dispute Resolution Commission has delivered its opinion to the competent authorities of the Member States concerned in accordance with Article 13. The competent authority of that Member State shall inform the other competent authorities of the Member States concerned and the Advisory Commission or the Alternative Dispute Resolution Commission of the effect of such a decision of the relevant court or other judicial body.
5. The submission of a complaint as provided under Article 3 shall put an end to any other ongoing mutual agreement procedure or dispute resolution procedure under an agreement or convention that is being interpreted or applied in relation to the relevant question of dispute. Such other ongoing mutual agreement procedure or dispute resolution procedure concerning the relevant question of dispute shall come to an end with effect from the date of first receipt of the complaint by any of the competent authorities of the Member States concerned.

6. By way of derogation from Article 6, a Member State concerned may deny access to the dispute resolution procedure under that same Article in cases where penalties were imposed in that Member State in relation to the adjusted income or capital as a result of tax fraud, wilful default and gross negligence. Where judicial or administrative proceedings were commenced that could potentially lead to such penalties and these proceedings are being conducted simultaneously with any of the proceedings referred to in this Directive, a competent authority may stay the proceedings under this Directive as from the date of acceptance of the complaint until the date of the final outcome of those proceedings.
7. A Member State may deny access to the dispute resolution procedure under Article 6 on a case by case basis where a question of dispute does not involve double taxation. In such a case, the competent authority of the said Member State shall inform the affected person and the competent authorities of the other Member States concerned without delay.

*Article 15a*

*Special Provisions for Individuals and Smaller Undertakings*

Where the affected person is either

- (a) an individual; or
- (b) not a large undertaking and does not form part of a large group (both as defined in Directive 2013/34/EU of the European Parliament and of the Council of 26 June 2013 on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings),

the complaint, reply to a request for additional information, withdrawal or request as per Article 3(1), Article 3(4), Article 3(6) and Article 6(1) respectively (hereinafter referred to as “communication”) may, by way of derogation from those same provisions, be submitted only to the competent authority of the Member State in which the affected person is resident. The competent authority of that Member State shall notify the competent authorities of all the other Member States concerned at the same time and within two months of receipt of the communication. Once this notification has been made, it shall be deemed that the affected person has made a communication to all the Member States concerned as at the date of such notification. The competent authority of the Member State receiving the additional information under article 3(4) shall submit a copy to the competent authorities of all the other Member States concerned at the same time. Once this submission has been made, it shall be deemed that additional information has been received by all the Member States concerned as at the date of such receipt of information.

#### *Article 16*

##### *Publicity*

1. The Advisory Commission and Alternative Dispute Resolution Commission shall issue its opinion in writing.
2. The competent authorities may agree to publish the final decision referred to in Article 14 in its entirety, subject to consent of each of the affected person concerned.
3. Where the competent authorities or affected person concerned do not consent to publishing the final decision in its entirety, the competent authorities shall publish an abstract of the final decision with description of the issue and subject matter, date, tax periods involved, legal basis, industry sector, short description of the final outcome. It shall also include a description of the method of arbitration used.

The competent authorities shall send the information to be published in accordance with the first subparagraph to the affected person before its publication. No later than sixty days from the receipt of such information, the affected person may request the competent authorities not to publish information that concerns any trade, business, industrial or professional secret or trade process, or that is contrary to public policy.

4. The Commission shall establish standard forms for the communication of the information referred to in paragraphs 2 and 3 by means of implementing acts. Those implementing acts shall be adopted in accordance with the procedure referred to in Article 18(2).
5. The competent authorities shall notify the information to be published in accordance with paragraph 3 to the Commission without delay.

#### *Article 17*

##### *Role of the Commission and Administrative support*

1. The Commission shall make available online and keep up to date the list of the competent authorities and of the independent persons of standing referred to in Article 8(4). That list shall contain only the names of those persons.
2. Member States shall inform the Commission of the measures taken in order to sanction any breach of secrecy obligation provided for in Article 12. The Commission shall inform the other Member States thereof.
3. The Commission shall maintain a central repository in which the information that is published in accordance with Articles 16(2) and (3) is archived and made available online.

## *Article 18*

### *Committee procedure*

1. The Commission shall be assisted by the Committee on dispute resolution. That Committee shall be a committee within the meaning of Regulation (EU) No 182/2011.
2. Where reference is made to this paragraph, Article 5 of Regulation (EU) 182/2011 shall apply.

## *Article 20*

### *Review*

Five years after 30 June 2019, the Commission shall evaluate the implementation of this Directive and present a report to the the Council. The report of the Commission shall, if appropriate, be accompanied by a legislative proposal.

## *Article 21*

### *Transposition*

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 30 June 2019 at the latest. They shall forthwith communicate to the Commission the text of those provisions.

When Member States adopt those provisions, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. Member States shall determine how such reference is to be made.

2. Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this Directive.

*Article 22*

*Entry into force*

This Directive shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.

This Directive shall apply to any complaint submitted from the 1 July 2019 onwards on questions of dispute relating to income or capital earned in a tax year commencing on or after 1 January 2018. Competent authorities of Member States concerned may however agree to apply this Directive with regard to any complaint that was submitted prior to that day or to earlier tax years.

*Article 23*

*Addressees*

This Directive is addressed to the Member States.

Done at Brussels,

*For the Council*

*The President*

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