European Union / OECD

The Changing Contours of Dispute Resolution in the International Tax World: Comparing the OECD Multilateral Instrument and the Proposed EU Arbitration Directive

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Issue: Bulletin for International Taxation, 2017 (Volume 71), No. 3/4

Published online: 22 February 2017

This article considers the most significant changes proposed in the Multilateral Instrument and the EU Arbitration Directive and compares their scope and effectiveness along with their interaction so as to point out issues and to propose recommendations for more uniformly acceptable solutions.

1. Introduction

The growth of global value chains, the increase in the international activities of businesses and the greater use of tax optimization schemes have all placed significant pressure on existing international tax rules. In response, the OECD/G20 have launched the Base Erosion and Profit Shifting (BEPS) initiative, the final reports in respect of which were released in late 2015, thereby setting out key changes to domestic law and tax treaties. The European Commission, in seeking a coordinated implementation of measures to counter BEPS in the European Union, published the EU Anti-Tax Avoidance Directive (2016/1164),[1] which has to be implemented by Member States no later than 1 January 2019. Both measures are now in their decisive phase of implementation.

In this context, effective dispute resolution measures are of increased importance because they balance protection of the revenue base with the need for an attractive framework for foreign investment. This has been recognized by both the OECD and the European Union, which complemented their proposed measures with proposals to improve cross-border dispute resolution mechanisms. In this context, Action 14[2] of the OECD/G20 BEPS initiative and Parts V and VI of the Multilateral Instrument[3] are dedicated to realizing this objective. Similarly, within the European Union, the Commission proposes to replace the Arbitration Convention (90/436)[4] with a proposed EU Arbitration Directive.[5]

The objective of this article is to discuss the most significant changes proposed by the Multilateral Instrument and the EU Arbitration Directive to existing dispute resolution mechanisms and to compare their scope and effectiveness with the aim of proposing recommendations for more uniformly acceptable solutions. The article commences with an analysis of the new procedures proposed under the Multilateral Instrument (*see* section 2.), which is followed by a consideration of the proposed EU Arbitration Directive (*see* section 3.). A comparison of their key features is undertaken in section 4. Section 5. then considers how these two instruments would interact with each other and other treaties or elements of supranational law. The article concludes with a short review of the procedures and possible steps for improvement in section 6.

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* **The authors are research and teaching associates at the Institute of Austrian and International Tax Law (WU), Vienna.** **The authors would like to especially thank Prof. Pasquale Pistone and Prof. Jeffrey Owens for their inspiration, guidance and motivation for completing and publishing this article and for their valuable inputs. The authors would also like to thank all the participants of the Doctoral Program in International Business Taxation (DIBT) Workshop conducted by Prof. Pasquale Pistone on 6 December 2016 at the WU, Vienna. This study is funded by the Austrian Science Fund (FWF).** **The authors can be contacted at sriram.govind@wu.ac.at and laura.turcan@wu.ac.at, respectively.**

1. Council Directive (EU) 2016/1164 of 12 July 2016 Laying Down Rules against Tax Avoidance Practices that Directly Affect the Functioning of the Internal Market, EU Law IBFD.
2. OECD, *Action 14 Final Report 2015 – Making Dispute Resolution Mechanisms More Effective* (OECD 2015), International Organizations' Documentation IBFD.
3. *Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting* (24 Nov. 2016), Treaties IBFD.
4. Arbitration Convention 90/436/EEC of 23 July 1990 on the Elimination of Double Taxation in Connection with the Adjustment of Profits of Associated Enterprises, EU Law IBFD.
5. Proposal for a Council Directive on Double Taxation Dispute Resolution Mechanisms in the European Union, COM (2016) 686 final (2016), EU Law IBFD [hereinafter "the proposed EU Arbitration Directive"].

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2. The Multilateral Instrument and Dispute Resolution: A Compromised Solution

2.1. Framework of the Multilateral Instrument

The Multilateral Instrument, which was adopted on 24 and 25 November 2016, is a multilateral treaty, which will be entered into by both OECD member countries and non-OECD countries. In general, the Multilateral Instrument only acts to modify tax treaties between two contracting states if the notification provisions provided in it are complied with, i.e. if both the tax treaty itself and the relevant provision in the tax treaty are notified to the depositary, the OECD. The Multilateral Instrument also permits reservations to be made, thereby allowing states to not apply the provisions in certain cases. With regard to the mandatory or minimum standard provisions, a state may make a reservation by applying the provisions only if that state has already complied or has agreed to comply with the minimum standard requirement in its tax treaties. In all other cases, a state is not limited in the reservations it may make.

2.2. Changes to the mutual agreement procedure in the Multilateral Instrument

Article 16 of the Multilateral Instrument encompasses the changes to be made to the mutual agreement procedure (MAP). These changes constitute minimum standard provisions. The provisions in article 25 of the OECD Model[6] are largely retained, except to the extent that taxpayers are permitted to make a request for a MAP to either competent authority.[7] This is a very important change because access to the opinion of the other competent authority would ensure that a taxpayer is not prevented from making use of a MAP due to purely domestic policy reasons. This should improve access to MAPs in general.

However, as this is the only proposed modification to the MAP in the Multilateral Instrument,[8] it can be considered a missed opportunity to address issues that have been brought up often regarding the MAP. These issues include:

- the guarantee that double taxation is resolved by the competent authorities at the conclusion of a MAP;[9]
- the timeframe within which a MAP should be completed, even if the states have not opted for arbitration;
- taxpayer participation in a MAP, thereby permitting hearings, submissions, the appreciation of evidence and even giving recourse to domestic law remedies in cases of inaction on the part of the competent authorities;[10] and
- the suspension of domestic recovery procedures until the MAP is settled.[11]

Allowing the taxpayer the option to participate in the MAP process by way of submissions or hearings together with the ability to produce evidence or witnesses and to challenge appointments before domestic courts would have gone a long way to ensuring non-adversarial procedures and mutually accepted solutions.[12] Constitutional law in several countries also does not permit a mechanism involving no protection of taxpayer rights.[13] In addition, in the European Union, the Charter of Fundamental Rights of the European Union provides numerous rights that apply even in direct tax situations; therefore, a lack of taxpayer participation in a final determination could be questioned.[14]

2.3. The arbitration option in the Multilateral Instrument

Part VI of the Multilateral Instrument contains the arbitration option.[15] Each state has the option to apply this part of the Multilateral Instrument in respect of their tax treaties, but it would apply to a tax treaty only if both parties so opt. To date, only 20 OECD member

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6. *OECD Model Tax Convention on Income and on Capital* (26 July 2014), Models IBFD.
7. Reservations to this provision are only permitted if the conditions have already been met.
8. There are also, of course, several proposals with regard to MAPs at the soft law level, which are likely to have a significant effect due to the monitoring process implemented by the OECD, but these proposals are not considered in this article.
9. Such a guarantee is to be found, for example, in arts. 4(1) and 14(2) of the proposed EU Arbitration Directive.
10. P. Pistone & P. Baker, *General Report*, in *The Practical Protection of Taxpayers' Fundamental Rights* (IFA Cahiers Vol. 100B, 2015), Online Books IBFD, at sec. 9.6, pp. 65-66 stated that the lack of the protection of taxpayer rights in MAP proceedings is deplorable. In addition, P. Baker & P. Pistone, *BEPS Action 16: The Taxpayers' Right to an Effective Legal Remedy Under European Law in Cross-Border Situations*, 25 EC Tax Rev. 5/6, p. 341 (2016) have developed a proposal for greater taxpayer participation and an appeal remedy in the MAP. Unfortunately, such changes are not included in the *Multilateral Instrument* (2016).
11. This was initially intended to be a minimum standard under OECD, *supra* n. 2, but ended up being a "best practice" given the lack of consensus.
12. For instance, a taxpayer has a right to be heard by the advisory commission under art. 12(2) of the proposed EU Arbitration Directive. This is not to deny that the taxpayer may still be permitted the option to question the appointment of an arbitrator before a domestic court. *See* A. Rust, *How Final are Arbitration Decisions?*, in *International Arbitration in Tax Matters* ch. 16 (M. Lang & J. Owens eds., IBFD 2015), Online Books IBFD. However, the lack of clarity at the treaty level may result in different positions on this subject in different countries.
13. Baker & Pistone, *General Report*, *supra* n. 10, at sec. 10.2., which broadly refer to the issue. The principles of natural justice, and especially the principle of *audi alteram partem* in administrative law, particularly in the common law countries, may result challenges to such arbitration procedures before domestic courts.
14. Recently, the opinion of the Advocate General of the Court of Justice of the European Union (ECJ) in FR: Opinion of the Advocate General, 10 Jan. 2017, Case C-682/15, *Berlioz Investment Fund SA v. Directeur de l'administration des Contributions directes* has opened up the possibility of relying on the Charter with regard to enforcement of the rights of taxpayers. Although there is a view that the Charter can be applied only with respect to an application of EU law based on art. 52 of the Charter, there is another view that these rights constitute general principles of EU law that may be relied on in any case.
15. The authors have some issue with the use of the term "arbitration" for this process in tax treaties, as the decision of the Panel may be modified by mutual agreement without enforcement and is even subject to judicial scrutiny. This process is nothing more than a mandatory dispute resolution mechanism that facilitates and encourages the more efficient use of MAPs, thereby making it entirely different from the concept of "arbitration" in other treaties. *See* M. Züger, *Arbitration under Tax Treaties: Improving Legal Protection in International Tax Law*, IBFD Doctoral Series No. 5, sec. 6.1. (IBFD 2001), Online Books IBFD.

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countries have officially indicated their intention to apply this provision. The deviations from the current article 25(5) of the OECD Model and the implications of the deviations are now analysed.

Under the new provisions, the time limit of two years regarding the initiation of arbitration may be extended, prior to expiry, by the competent authorities, subject to notifying the taxpayer. States may also reserve the power to generally extend this time limit from two years to three years, which is in line with the UN Model.[16] If the MAP is suspended pending decision by a court or administrative tribunal regarding the same issue or by agreement between the taxpayer and the competent authority, or if both competent authorities agree that the information requested from the taxpayer was not provided in a timely manner, this period may be extended accordingly.

Although detailed time limits are prescribed with regard to MAPs and arbitration in this part of the Multilateral Instrument, the option to indefinitely extend the time limit for requesting arbitration undermines the deterring effect of arbitration and thus hinders the quicker resolution of MAP cases. This is because there would be no enforceable time limit for the conclusion of a MAP in such circumstances.

In addition, although there is more clarity on the information required from the taxpayer than before, the provisions are still vague in scope. The minimum information required is to be determined by the competent authorities by mutual agreement and the question of the sufficiency of information at their discretion.[17] Even the time limits for initiation of arbitration are linked to satisfaction on receipt of information by the competent authorities. This may make "fishing expeditions" possible on the part of the tax authorities without the information requested being objectively relevant. Further, from the Advocate General's Opinion in *Berlioz Investment Fund* (Case C-682/15),[18] where the proposition is that the Charter of Fundamental Rights of the European Union can be relied on to create a requirement of "relevancy" with regard to the automatic exchange of information, EU law (and constitutional provisions in several Member States) can be used to extend the provisions in the Multilateral Instrument to include this test.

As was the case in the procedural rules provided in the Annex to the UN Model, "baseball arbitration" or "last best offer" arbitration is the default option provided for in the Multilateral Instrument as opposed to the independent opinion approach currently preferred in the Commentary on Article 25 of the OECD Model.[19] In a "baseball arbitration" procedure, each competent authority, by an agreed date, submits a proposed resolution limited to a specific monetary amount of tax or a maximum tax rate applying to each issue.[20] If there is a substantial issue concerning the application of the tax treaty in question, alternative resolutions, supported by position papers, may be provided by each competent authority, contingent on the determination of this question. The Panel would then decide the issue based on either resolution without any reasoning and by simple majority. The opinion would not have any precedential value and would not be published.[21]

Unpublished opinions remove an opportunity to realize greater uniformity with regard to tax positions at a global level, even if each opinion does not have precedential value. It is rather unfortunate that the publication of opinions is not allowed, even as part of the independent opinion arbitration option. If opinions are not published, it would also be difficult to gather further support for arbitration, as realized results cannot be justified.

Although "baseball arbitration" has clear advantages, such as simple and faster procedures, encouraging the competent authorities to produce reasonable proposals and the absence of delays,[22] the default option of pure "baseball arbitration" may give rise to an issue with regard to the principle of legality and the principle of equality in constitutional law. As "baseball arbitration" permits decisions purely based on monetary values, identical cases in one state could result in diametrically opposing decisions, which would be against the principle of legality, certainty and equality provided for in constitutional law and, to an extent, under the Charter of Fundamental Rights of the European Union. This may result in judicial challenges to arbitral awards.[23] However, it has been argued that such deficiencies of "baseball arbitration" could be resolved if significant documentation is maintained from the MAP stage, which could be a solution to make "baseball arbitration" more effective.[24]

The arbitration decision is to be implemented by way of a MAP and is binding except where the taxpayer does not accept the agreement,[25] a court of one of the states declares the decision as invalid,[26] or the taxpayer pursues litigation in a court or tribunal regarding the issues

16. *UN Model Double Taxation Convention between Developed and Developing Countries* (1 Jan. 2011), Models IBFD.
17. Concerns have also been raised that information provided by taxpayers as part of MAP and the following arbitration may be used against the taxpayer in subsequent audits. A tax treaty may also provide that this should not be the case so as to increase taxpayer confidence in the proceedings. *See* Z. D. Altman, *Dispute Resolution under Tax Treaties*, IBFD Doctoral Series No. 11, sec. 5.3.2. (IBFD 2005), Online Books IBFD.
18. AG Opinion in *Berlioz Investment Fund* (C-682/15), *supra* n. 14.
19. *OECD Model Tax Convention on Income and on Capital: Commentary on Article 25* (26 July 2014), Models IBFD.
20. If one state wishes to apply "baseball arbitration" and the other wishes to apply independent opinion arbitration, the arbitration provisions would not apply as yet and they should endeavour to agree on one of the modes with regard to the tax treaty in question.
21. Nevertheless, states have the option to reserve to apply independent opinion arbitration where reasoned decisions are to be given. Even in this situation, decisions are not published and do not have precedential value.
22. J. Monhait, *Baseball Arbitration: An ADR Success*, 4 Harvard J. Sports & Ent. L. No. 1, Winter 2013, pp. 131-139 (2013), and B.A. Tulis, *Final Offer "Baseball" Arbitration: Contexts, Mechanics and Applications*, 20 Seton Hall J. Sports & Ent. L. No. 1, p. 91 (2010), as cited in R. Petruzzi, P. Koch & L. Turcan, *Baseball Arbitration in Comparison to Other Types of Arbitration* in Lang & Owens eds., *supra* n. 12, ch. 6, at sec. 6.2.2.1, p. 142.
23. Pure "baseball arbitration" has also been criticized in the literature in an empirical study that revealed that arbitrators rarely split the difference. *See* S.E. Keer & R.W. Naimark, *Arbitrators do not "Split the Baby" – Empirical Evidence from International Business Arbitrations*, 18 J. Intl. Arb. 5 p. 573 (2001), as cited in Petruzzi, Koch & Turcan, *supra* n. 22. This article also cites a study, by D.L. Dickinson, *A Comparison of Conventional Final-Offer and "Combined" Arbitration for Dispute Resolution*, 57 Indus. & Lab. Rels. Rev. No. 2, p. 288 (2004), where conventional arbitration was found to be more successful in minimizing disputes, which is also the motivation for arbitration in tax treaties.
24. Baker & Pistone, *BEPS Action 16*, *supra* n. 10, at p. 342.
25. The taxpayer is deemed to not accept the agreement where an action before a court or a tribunal is not withdrawn.

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in question. The binding nature of arbitration is significantly reduced by the fact that not only is it subject to unlimited review by courts and tribunals, without objective guidelines in respect of cases in which review is permitted,[27] but it is also suspended when litigation is pursued regarding the issue in question by the taxpayer and an option is given to prevent arbitration in respect of any court or tribunal decision with regard to the issue. This may result in the remedy losing its desired scope and effect. States may also choose to permit the competent authorities to arrive at a different resolution from that prescribed in the arbitration opinion, even after the Panel's decision. This could also reduce the binding nature of arbitration.

Detailed rules regarding the appointment of arbitrators from the Sample Mutual Agreement on Arbitration are set out and apply, except where the competent authorities agree otherwise. The Panel should consist of three members with experience and expertise in international taxation. Each competent authority should appoint one member within 60 days of the arbitration request and the appointed members should appoint the third member, who should be the "Chair", within 60 days of the later appointment. If no appointment is made in any of these cases, the arbitrator should be appointed by the highest ranking official of the Centre for Tax Policy and Administration of the OECD who is not a national of either of the states involved.

Each member of the Panel should be "impartial" and "independent" of the tax authorities, the competent authorities and the Ministry of Finance of each of the states involved, and of all of the persons affected by the issue at the time of appointment. They should maintain such a position throughout the process and for a reasonable time thereafter so as to not damage their independence. The fees and expenses of the members should be agreed by mutual agreement and, if there is no agreement, each party should bear the expenses for the member that it appoints. Other costs should be shared by both states.[28]

The independence and transparency rules provided are not adequate to ensure independence without inclusive, broad definitions of the terms and with no one to ensure that these criteria are met. An option would be to require a declaration or an affidavit from the arbitrators appointed with regard to their independence, which may be enforceable against them in domestic courts in case of misrepresentation.[29] Another issue is the power given to an official of the OECD to appoint an arbitrator in the case of inaction on appointment. Not only is no time limit prescribed for such appointment, but the fact that an OECD official is to exercise this power with discretion may discourage developing countries from participating in the process.[30] In order to bring more developing countries into the process, the creation of an institution that is funded by all states and that has a pool of arbitrators from each country, including from developing countries, and provides these arbitrators with training with regard to the procedure along with more flexible rules on the allocation of costs[31] would have been desirable.[32]

Other key issues must also be highlighted. As in the case of a MAP, the proposed rules have missed out on the opportunity to permit active taxpayer participation in the arbitration process (*see* section 2.2.). The Multilateral Instrument also does not attempt to give credence to other dispute resolution mechanisms, such as facilitative mediation or conciliation in respect of tax treaty dispute resolution. As a MAP is the primary framework that is relied on, the addition of a third-party, independent mediator who would require the competent authorities to meet to resolve their differences and arrive at an objectively satisfactory conclusion without much in the way of a time delay would have been a much desirable option.[33]

The Multilateral Instrument provides for much more detailed procedural rules compared to the provisions in the OECD Model and the UN Model, and creates a workable, multilateral framework for treaty dispute resolution. In this respect, the work of the OECD is laudable because certain features, such as the option regarding the type of arbitration, detailed arbitrator appointment rules and specific time limits, definitely improve the framework and provide taxpayers with much greater certainty than under the previous approach, where procedural rules were almost entirely lacking.[34] However, as noted previously in this section, there is room for refinement, so that the framework evolves to become a more effective and inclusive means of resolution of disputes in a treaty context.[35]

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26. The arbitration request is deemed to have not happened, except with regard to confidentiality and costs. A new request may be made thereafter, unless the competent authorities do not permit such an action.
27. Ideally, only higher courts should be granted this power and only in relation to the incorrect application of law or facts, erroneous interpretation, grave miscarriages of justice, etc.
28. This provision is virtually identical to that in the Sample Mutual Agreement.
29. A similar declaration is required under the *Multilateral Instrument* (2016) with regard to confidentiality.
30. The *OECD Model* has always followed this format, except that it was previously contained only in soft law, i.e. the Sample Mutual Agreement on Arbitration in the *OECD Model Tax Convention on Income and on Capital: Commentary on Article 25* Annex (17 July 2008), Models IBFD. The UN Tax Committee took issue with this approach and adopted its own approach in *UN Model Double Taxation Convention between Developed and Developing Countries: Commentary to Article 25*, Annex, paras. 14-15 (1 Jan. 2011), Models IBFD.
31. *See* para. 32 Annex *UN Model: Commentary on Article 25* (2011), which adds a condition that states may arrive at other means to share costs, especially in case of disparity in economic development between the two states concerned.
32. J. Owens, A.E. Gildemeister & L. Turcan, *Proposal for New Institutional Framework for Mandatory Dispute Resolution*, 82 Tax Notes Intl. 10, p. 1001 (2016) take into account these issues and provides a comprehensive proposal with solutions.
33. Similar provisions have been enacted in domestic tax disputes in certain countries and have been a great success. *See* the analysis of the UK provisions in S. Govind & S. Varanasi, *Dispute Resolution in Tax Matters: An India-UK Comparative Perspective*, 9 Taxmann Intl. Taxn (1 Sept. 2013).
34. Several procedural aspects of arbitration have been included in the Annex to the *OECD Model: Commentary on Article 25* and the *UN Model: Commentary on Article 25*. *See* H.J. Oortwijn, *Dispute Resolution in Cross-Border Tax Matters*, 56 Eur. Taxn. 4, sec. 2. (2016), Journals IBFD. Nevertheless, only four tax treaties have adopted these rules and a total of only 32 of the remaining tax treaties with arbitration clauses provide for any form of procedural rules. *See* H.M. Pit, *Arbitration under the OECD Model Convention: Follow-up under Double Tax Conventions: An Evaluation*, 42 Intertax 6/7, p. 464 (2014). This may contribute to the reluctant use of the provisions in practice.
35. This calls for the active engagement of the UN Tax Committee to try and realize more acceptable results.

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3. The Proposed EU Arbitration Directive: An Improvement on the Arbitration Convention (90/436)?

3.1. The legal implications of the change to a directive

The Arbitration Convention (90/436) has oft been criticized in academic literature on the grounds that it would have been more effective as a directive. Interestingly, the Commission had originally proposed an Arbitration Directive in 1976[36] which could not come into force due to the lack of consensus among Council Members.[37]

Indeed, a directive is more suitable here. As regulations directly apply under the Treaty on the Functioning of the European Union (TFEU) (2007),[38] their wording must be precise to realize their objectives.[39] On the other hand, directives are more flexible and offer the Member States some leeway regarding their implementation. In addition, while directives are not directly legally binding, they can have direct effect.[40]

The change in the legal status from a convention to a directive has several important consequences. First, a directive would transfer competences from a national to a supranational level.[41] Direct taxation is a shared competency, insofar as it affects the internal market.[42] As it is shared with a pre-emption, the Member States lose their competence wherever the European Union chooses to exercise this power.[43]

Second, the jurisdiction of the Court of Justice of the European Union (ECJ)[44] should encourage a common interpretation,[45] as opposed to the Arbitration Convention (90/436), which is interpreted by national courts or, in some situations, the advisory commission, and which has therefore resulted in multiple interpretations.[46] This problem is compounded by the fact that the Arbitration Convention (90/436) does not apply to double taxation resulting from different interpretations of its terms.[47] The Commission is also required to initiate an infringement procedure before the ECJ if it considers that a Member State has enacted or kept in force domestic provisions, which are incompatible with EU law, or that it has failed to implement a directive in a timely or accurate fashion.[48]

Third, the Arbitration Convention (90/436) is not a legal instrument under the TFEU,[49] and is thus not automatically adopted by Member States on accession to the European Union. This is the reason why separate accession is required for all new Member States after 1990.[50] In contrast, a directive, once adopted by the Council, enters into force on a predetermined date.[51] A directive also usually stipulates a deadline for its correct implementation into domestic law, after which Member States could become liable to damages.[52]

Fourth and finally, a Member State cannot unilaterally decide not to be bound by a directive. In contrast, the contracting states may unilaterally withdraw from the Arbitration Convention (90/436).

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36. OJ C301 (21 Dec. 1976) and Commission Doc. R/2955/76 (FIN 778). An addendum to this Arbitration Directive was issued in 1977 (Commission Doc. R/2955/76 (FIN 778) Add. 1(e)).
37. The proposed directive could not be agreed on owing to the presence of art. 220 of the Treaty of Rome (then Consolidated Versions of the Treaty on European Union and of the Treaty Establishing the European Community art. 293, OJ C 321 (2006) (as amended through 2005), EU Law IBFD, repealed by Consolidated Versions of the Treaty on European Union and the Treaty on the Functioning of the European Union (TFEU) OJ C 115 (2008), EU Law IBFD), which required the Member States to negotiate among themselves for the abolition of double taxation. In fact, the reluctance of the Members States to agree to an arbitration directive apparently stemmed from their fear of losing sovereignty in tax matters. *See* G. Kofler, *Article 9. Associated Enterprises*, in *Klaus Vogel on Double Taxation Conventions* m.no. 132 (E. Reimer & A. Rust eds., Kluwer Law International, 2015), with further references.
38. Art. 288 TFEU.
39. P. Craig & G. Búrca, *EU Law: Text, Cases, and Material* p. 106 (Oxford University Press 2015).
40. This was established by the ECJ in NL: ECJ, 5 Feb. 1963, Case C-26/62, *Van Gend en Loos v. Administratie der Belastingen*.
41. The effects on the implementation of the *Multilateral Instrument* (2016) are addressed in sec. 5.
42. Art. 4(2)(a) TFEU and art. 115 TFEU. *See also* S. Leible & M. Schröder, *Art 115 AEUV*, in *EUV/AEUV2* m.no. 4 (R. Streinz ed., C.H.Beck 2012).
43. *See* B.J.M. Terra & P.J. Wattel, *European Tax Law* 6th ed., p. 9 (Kluwer L. Intl. 2012) and the arguments of the Commission in BE: ECJ, 6 June 2013, Case C-383/10, *European Commission v. Kingdom of Belgium*, para. 10 ECJ Case Law IBFD.
44. Art. 267 TFEU.
45. However, national courts are not prevented from applying the interpretation of a directive to the facts of the case. Consequently, the implementation of a directive into national law may still give rise to issues.
46. *See* S.B. Huibregtse & R.H.M.J. Offermanns, *What Is the Future of the EU Arbitration Convention?*, 11 Intl. Transfer Pricing J. 2, sec. 2. (2004), Journals IBFD; L. de Hert, *A New Impetus for the Arbitration Convention?*, 12 Intl. Transfer Pricing J. 2, sec. 3. (2005), Journals IBFD; and M. Helminen, *EU Tax Law – Direct Taxation* sec. 5.4.1.1. (IBFD 2016), Online Books IBFD. In practice, the Code of Conduct of the EU Joint Transfer Pricing Forum (JTPF) ensures, at least, partial uniformity of interpretation, as the views of the JTPF are generally followed by tax administrations in the contracting states. The Code of Conduct has been implemented into domestic law in four Member States and implemented through administrative guidance in another 18 Member States. *See* the summary in JTPF/006/BACK/REV5/2006/EN (Feb. 2008) and Kofler, *supra* n. 37, at m.no. 129.
47. Kofler, *supra* n. 37, at m.no. 133; D. Schelpe, *The Arbitration Convention: Its Origin, Its Opportunities and Its Weaknesses*, 4 EC Tax Rev. 2, p. 75 (1995); L. Hinnekens, *The Tax Arbitration Convention. Its Significance for the EC Based Enterprise, the EC Itself, and for Belgian and International Tax Law*, 1 EC Tax Rev. 2, p. 90 (1992) and L. Hinnekens, *The European Tax Arbitration Convention and its Legal Framework II*, Brit. Tax Rev. 3, pp. 282 and 284-285 (1996).
48. *Art. 258 TFEU.* Under *art. 259 TFEU, a Member State can also initiate such a procedure.* See *L. Adamczyk & A. Majdańska,* The Sources of EU Law Relevant for Direct Taxation, *in* Introduction to European Tax Law on Direct Taxation *m.nos. 18 et seq. (M. Lang et al. eds. Linde 2016).*
49. Art. 288 TFEU. *See also* Terra & Wattel, *supra* n. 43, at p. 709.
50. This gave rise to numerous problems, such as a complicated and slow ratification process, which had to be repeated with each enlargement of the European Union and legal uncertainty, as the Arbitration Convention (90/436) was not in force between 1999 and 2004. *See* Terra & Wattel, *supra* n. 43, at p. 706 et seq.
51. That is, in the proposed EU Arbitration Directive, the 20th day following publication in the Official Journal under art. 22.
52. The European Commission has the authority to initiate infringement proceedings against Member States that fail to comply with a directive under art. 258 TFEU. In this context, it should be noted that art. 21(1) of the proposed EU Arbitration Directive states that the national legislation must be enacted by 31 Dec. 2017.

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3.2. The scope of the proposed EU Arbitration Directive

According to the Explanatory Memorandum, the proposed EU Arbitration Directive is intended to improve dispute resolution procedures within the European Union "regarding access for taxpayers to those mechanisms, coverage, timeliness and conclusiveness".[53] In the authors' opinion, the provisions reflect these objectives very well. This section discusses the material, personal and geographic scope of the proposed EU Arbitration Directive and explains why the proposed Directive is, in general, a very significant improvement over the Arbitration Convention (90/436).

As with the MAP in the OECD Model, one of the main issues with regard to the Arbitration Convention (90/436) is insufficient access on the part of taxpayers to its procedures. Just as Action 14 of the OECD/G20 BEPS initiative attempts to address this with regard to the MAP in the OECD Model, the proposed EU Arbitration Directive has a significantly broader scope than the Arbitration Convention (90/436), thereby increasing the areas that it covers.

Specifically, according to article 1, the material scope of the proposed EU Arbitration Directive would extend to any "income from business" that is subject to one of the taxes listed in Annex I.[54] As with the Arbitration Convention (90/436), indirect taxes and penalties are excluded from the scope of application of the proposed EU Arbitration Directive.[55] However, the proposed EU Arbitration Directive does not contain a provision based on article 2(4) of the OECD Model or article 2(3) of the Arbitration Convention (90/436), which would extend the scope of application of the proposed EU Arbitration Directive to any "identical or similar taxes" and would require the competent authorities to inform their counterparts of any subsequent changes in domestic laws. The addition of such a provision would prevent the list in Annex I from having to be constantly updated.

It should be noted that the term "business" is not defined in the proposed EU Arbitration Directive, nor is it defined in the proposed Common Consolidated Corporate Tax Base (CCCTB) Directive, which it is intended to complement,[56] thereby giving rise to uncertainty. The domestic law of the Member States cannot be relied on and, as the proposed EU Arbitration Directive lacks an interpretation rule as in article 3(2) of the Arbitration Convention (90/436), tax treaties which the Member States have concluded also cannot be used in the interpretation process.[57]

While the ECJ has jurisdiction to decide on the interpretation of a directive, this requires a referral process, which may not arise in the near future. In addition, given the importance of the term in the application of the proposed EU Arbitration Directive, one may wonder whether a single decision could provide sufficient clarity. Further, the exclusion of non-business income could potentially constitute discrimination under the freedoms of the internal market, as unrelieved double taxation is a hindrance to the exercise of the freedoms and, in this respect, the type of income taxed is unlikely to make a difference.

On the other hand, the term "double taxation", is very broadly defined in article 2(3) of the proposed EU Arbitration Directive to be:

> the imposition of taxes listed in Annex I ... by two (or more) tax jurisdictions in respect of the same taxable income or capital ... 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.

This definition is very similar to that in article 1(1) of the Arbitration Convention (90/436)[58] and would cover both economic and juridical double taxation, as well as double taxation that would only have a financial effect in the future, in cases where both enterprises have carried-forward losses. However, the phrasing of article 3 of the proposed EU Arbitration Directive, which requires a taxpayer to be "subject to double taxation", may indicate that only double taxation suffered by the same person, i.e. juridical double taxation, would be covered. This restricted interpretation would still be in line with the definition of double taxation and the method of elimination of double taxation in the proposed EU Arbitration Directive.[59] This could also exclude a large number of economic double taxation disputes, such

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53. Proposed EU Arbitration Directive, *supra* n. 5, at p. 2.
54. These taxes are individual income tax and corporate income tax of the relevant Member States, for example income tax and corporation tax in the United Kingdom. *See* Annexes to proposed EU Arbitration Directive, *supra* n. 5, at p. 4.
55. Penalties do not constitute income taxes, *see* Hinnekens (1996), *supra* n. 47, at p. 276. However, the proposed EU Arbitration Directive could have an indirect effect, even on taxes not covered by it. This is because the ECJ could refer to a common understanding of facts in the arbitration proceedings, in parallel proceedings on the same facts with regard to other taxes (for example, VAT).
56. As per the Explanatory Memorandum, the current version of the CCCTB Directive does not include the consolidation of profits, thereby making double taxation likely and effective dispute resolution mechanisms necessary. In addition, not all companies would fall within the scope of the CCCTB Directive.
57. Art.e 3(2) of the Arbitration Convention (90/436) reads as follows: "Any term not defined in this Convention shall, unless the context otherwise requires, have the meaning which it has under the double taxation convention between the States concerned".
58. Hinnekens (1996), *supra* n. 47, at 281 and Terra & Wattel, *supra* n. 43, at p. 719.
59. Art. 4(2) of the proposed EU Arbitration Directive is identical to art. 14 of the Arbitration Convention (90/436) and stipulates that either the income previously subject to double taxation must be included only by one Member States or the tax chargeable on it must be reduced by the amount chargeable in the other Member State(s).

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as those involving transfer pricing. However, taking into account the fact that the proposed CCCTB Directive does not yet provide for the consolidation of the tax base of group companies, this might not have been the intention of the drafters.[60]

As the method of elimination of double taxation is identical in the Arbitration Convention (90/436) and the proposed EU Arbitration Directive, the issue relating to carried-forward losses would be inherited by the proposed Directive, i.e. the tax credit approach would be unfavourable for taxpayers in that it would affect their ability to carry forward losses. Consequently, this method would require a credit carry-forward to fully eliminate inter-temporal double taxation.[61]

The substantive rules on profit allocation between associated enterprises, as well as with a permanent establishment (PE), are provided in article 57 of the proposed CCCTB Directive. Articles 56 and 57(1) of the CCCTB Directive contain the definition of associated enterprises and the arm's length principle, which is essentially identical in wording to that in the OECD Model, the UN Model and the Arbitration Convention (90/436). The only major difference in application is that the foreign PEs of local taxpayers and vice versa are considered to be associated enterprises with regard to their head offices in the proposed EU Arbitration Directive.[62] Article 57(2) of the CCCTB Directive is identical to article 7(2) of the OECD Model (2014), thereby specifically referring to functions, assets and risks. The Arbitration Convention (90/436) is in line with the old wording of the OECD Model (2008)[63] and UN Model (2011).[64] While some authors accepted the use of the new method,[65] others considered that the Convention could lead to different decisions other than those brought about by tax treaties.[66] The proposed EU Arbitration Directive apparently raises the opposite issue, as most tax treaties still follow the old version of article 7 of the OECD Model (2008).[67]

Nevertheless, the removal of the direct link between the arm's length principle and double taxation in the proposed EU Arbitration Directive prevents many of the interpretation issues encountered in the Arbitration Convention (90/436). As such, profit adjustments resulting from thin capitalization rules are covered, whereas this is far from clear under the Arbitration Convention (90/436).[68] More importantly, corresponding adjustments, which are considered by many of the Member States to fall outside the scope of the Arbitration Convention (90/436), are also covered.[69] Differing interpretations on issues, such as the existence of PEs,[70] conflicts of qualification and the reclassification of income or costs, and differences in accounting rules would, therefore, be covered, as opposed to the non-coverage in the Arbitration Convention (90/436).[71] Although it is clear that harmonization with tax treaties was the objective,[72] it should also be noted that it cannot be guaranteed that the ECJ would follow the OECD approach, which could give rise to dissonance.[73]

The personal scope of the proposed EU Arbitration Directive under article 2(4) extends to individuals, partnerships and companies irrespective of their legal form, as long as they are subject to an income tax and engaged in business. These are considered to be "the main stakeholders affected by double taxation situations".[74]

The scope of the proposed EU Arbitration Directive is limited by two provisions, both of which are to be found in article 1. First, the EU Arbitration Directive would not apply to income or capital that is exempt or zero-rated under national rules. Second, provisions that are intended to prevent tax evasion, tax fraud or abuse would not be affected by the proposed EU Arbitration Directive.[75] The first limitation could have interesting implications. If the scope of the term "exempt" was not restricted to pure exemptions granted under law, the proposed EU Arbitration Directive could impose a "subject to tax" requirement. The second limitation most likely has its origin in the exception for serious penalties in article 8(1) of the Arbitration Convention (90/436), compared to which it is a significant improvement.

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60. The wording "any taxpayer receiving income subject to double taxation" could resolve this issue.
61. Kofler, *supra* n. 37, at m.no. 137, with further references.
62. The geographical scope of the proposed EU Arbitration Directive is, therefore, much wider than that in the Arbitration Convention (90/436), which only applies to enterprises of two different Member States or between an enterprise of a Member State and its PE in another Member State.
63. *OECD Model* (2014).
64. *UN Model* (2011).
65. Kofler, *supra* n. 37, at p. 136, with further references.
66. Hinnekens (1996), *supra* n. 47, at p. 150.
67. A search of all of the tax treaties currently in force and available in English in the IBFD *Treaties* collection reveals that only 39 tax treaties include the wording of *OECD Model Convention on Income and on Capital* art. 7 (2010). Nevertheless, as the *Multilateral Instrument* (2016) gives the signatory states the option of updating their tax treaties to the latest version, this number will most likely increase substantially in the near future.
68. A strict interpretation of art. 1 of the Arbitration Convention (90/436) leads to the conclusion that these are not covered. It could be argued that the adjustments would be covered if they are due to the fact that the amount of debt finance and the interest paid is, therefore, not at arm's length. *See* A.P. Adonnino, *Some Thoughts on the EC Arbitration Convention*, 43 Eur. Taxn. 11, sec. 2. (2003), Journals IBFD and Helminen, *supra* n. 46, at sec. 5.4.1.3. The issue was only clarified in the Code of Conduct (2009), which extended the scope of art. 1 of the Arbitration Convention (90/436) and caused several Member States to make reservations regarding this interpretation. *See* Terra & Wattel, *supra* n. 43, at p. 716.
69. The Arbitration Convention (90/436) does not expressly require a corresponding adjustment. *See* Kofler, *supra* n. 37, at m.no. 135 and JTPF/017/FINAU2012/EN (Jan. 2013), at p. 7 on secondary adjustments. While art. 57 of the proposed CCCTB Directive also lacks any reference corresponding adjustments, the scope of the proposed EU Arbitration Directive is not directly linked to that article, thereby permitting a more business-friendly approach. Naturally, this interpretation of the Arbitration Convention (90/436 is not in line with its objective of removing double taxation, as it would require that the taxpayer file a request for a MAP under the relevant tax treaty in addition to the request under the Convention. *See* Hinnekens (1996), *supra* n. 47, at p. 296 and Kofler, *supra* n. 37, at m.no. 135.
70. PEs are defined in art. 5 of the proposed CCCTB Directive and, therefore, the ECJ would have competence to determine the correct interpretation. Consequently, differences in the application of art. 5 of the proposed CCCTB Directive between different Member States could be resolved by a preliminary ruling or through the procedures in the proposed EU Arbitration Directive.
71. Terra and Wattel, *supra* n. 43, at p. 719. However, some of these issues will be resolved by the application of the CCCTB Directive.
72. Art. 13(2) of the proposed EU Arbitration Directive would specifically permit the use of the *OECD Model*.
73. If the proposed CCCTB Directive is implemented, the profit allocation rules in the European Union would be substantially different compared to those under tax treaties.
74. This does not constitute a change compared to the Arbitration Convention (90/436), which also covers all possible legal forms for companies and any more or less permanent independent commercial activity carried on for a profit under art. 1. Compare art. 3(1) of the *OECD Model* (2014) and the *UN Model* (2011). *See also* Terra & Wattel, *supra* n. 43, at p. 719.
75. This applies both to domestic provisions and to provisions in international agreements. The exception is reinforced in art. 15(6) of the proposed EU Arbitration Directive.

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In this context, it should be noted that the proposed EU Arbitration Directive states that it does not preclude the use of domestic anti-abuse provisions, which points towards a concurrent application. As opposed to the Arbitration Convention (90/436), the proposed EU Arbitration Directive, therefore, applies to a dispute involving an anti-abuse provision.[76]

3.3. Procedural differences between the Arbitration Convention (90/436) and the proposed EU Arbitration Directive

3.3.1. Overview

The three stages of the procedure under the proposed EU Arbitration Directive are: (1) the complaint stage (*see* section 3.3.2.); (2) the MAP stage (*see* section 3.3.3.); and (3) the dispute resolution stage (*see* section 3.3.4.). The most significant changes compared to the Arbitration Convention (90/436) would be made to the complaint stage and primarily relate to the access of taxpayers to the mechanisms and, to some extent, the conclusiveness of the procedures. Lesser changes ensuring timeliness and conclusiveness would also be made to the dispute resolution stage.

3.3.2. Changes to the complaint stage

The complaint stage would remove the notification procedure under the Arbitration Convention (90/436), which requires a Member State that intends to make adjustments to notify the enterprise.[77] The new procedures would commence with the complaint, which, following the example of Action 14 of the OECD/G20 BEPS initiative, could be submitted to each of the competent authorities. Another change would be that the taxpayer making the complaint would have to be already subject to double taxation, whereas under the Arbitration Convention (90/436), it is sufficient that the adjustment(s) would most likely result in double taxation. The proposed EU Arbitration Directive would also set out the steps of the complaint procedure and the information to be provided by the taxpayer in great detail.[78] The decision time with regard to the competent authorities would be limited to six months to prevent the unnecessary prolongation of the process.

A complaint could only be rejected on the basis of inadmissibility, tardiness and the lack of double taxation. The terminology could be improved, i.e. unspecified "inadmissibility" most likely refers to the limitations of scope provided for in article 1 of the proposed EU Arbitration Directive, which should be clarified.

However, the most important difference relates to the steps that a taxpayer may take if the complaint is rejected. Taxpayers could escalate procedures to the next stage after the deadline of six months by construing the inactivity of the competent authorities to be a rejection. Most significantly, the taxpayer could also appeal against the rejection "in accordance with national rules". If the complaint is rejected by only one competent authority, an advisory commission would have to be established that would decide on the admissibility of the complaint within six months. Inactivity on the part of the advisory commission would, again, be construed as a rejection.[79] If the complaint was adjudged to be admissible, the competent authorities would have to proceed with the MAP procedure.[80]

These legal remedies would close the gap in the protection currently offered by the Arbitration Convention (90/436).[81] Such remedies would also constitute an important aspect in the design of international dispute resolution procedures.

However, these changes also has some adverse implications. First, it is to be assumed that the phrase "in accordance with national rules" refers to a challenge of the rejection before the national courts.[82] Such a possibility would first have to be introduced into the domestic laws. More importantly, the vague wording of the provision leaves it unclear whether taxpayer(s) would have to challenge the rejection before the courts of each of the Member States involved, thereby increasing the risk of diverging decisions and, therefore, uncertainty. In addition, even assuming that both courts issue a decision confirming that the rejection was not justified, the legal effect would be questionable, as the courts could not enforce the initiation of the MAP, unless the competent authorities were bound by the decisions.[83] In the authors' view, a more suitable solution would have been to extend the procedure for unilateral rejection involving the advisory commission to bilateral rejections, thereby resulting in certainty, and speedier and/or more uniform results. In addition, as the provision of domestic remedies would be required by the proposed EU Arbitration Directive, these would have to fulfil the requirements of equivalence

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76. This raises the question of the effect of the decisions on pending cases on the same issues at the domestic level, i.e. whether reference to the ECJ would be possible on the basis of EU law being applicable.
77. Although it should be noted that the failure to notify carries no legal significance, but is only to avoid unnecessary procedures and to reduce costs, *See* Hinnekens (1996), *supra* n. 47, at p. 253.
78. The comprehensive list of information to be provided gives the taxpayer the certainty that the complaint would not be rejected out of hand due to a failure to provide the necessary information. The competent authorities would also be prevented from drawing out the procedures by repeatedly asking for the relevant information: Art. 3(4) of the proposed EU Arbitration Directive would limit the number of information requests to one and the time period to two months after a complaint was submitted.
79. It is difficult to see why the taxpayer should lose rights just because the advisory commission reacts too slowly. On the contrary, the advisory commission would primarily involve competent authorities and should, therefore, bear the risk of indecision by being required to initiate a MAP.
80. If the MAP was not commenced within 30 days of the decision of the advisory commission, the advisory commission would have to issue an opinion on the substance of the complaint.
81. Under the Arbitration Convention (90/436), the requested competent authority can determine whether the complaint is "well-founded", as is the case for the *OECD Model* (2014). This makes the initiation of the MAP subject to the discretion of the requested competent authority, which can effectively deny access to a taxpayer.
82. The other possibility is that it refers to a challenge of the tax assessment itself, but under the provision would have no added legal value, as the domestic rules of a Member State already envisages these procedures. Consequently, the general rules of legal analysis would prevent such an interpretation.
83. Such is the case in Austria and Germany, where the competent authorities cannot deviate from the decisions of their Supreme Courts during the dispute resolution.

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and effectiveness, i.e. the national rules would have to be not less favourable than those relating to similar domestic claims and they would not have to make it virtually impossible or excessively difficult to obtain reparation.[84]

3.3.3. Changes to the MAP stage

The MAP under the proposed EU Arbitration Directive would be essentially the same as under the Arbitration Convention (90/436), except for the option to extend the two-year deadline, after which the advisory commission would have to be established within six months. This extension would have to be justified in writing and accepted by both the taxpayers and the other competent authorities. The authors consider this extension to be a very sensible addition to the procedure, as a resolution by mutual agreement is the most preferable outcome and the period added is not too long.[85]

3.3.4. Changes to the dispute resolution stage

The main changes to the dispute resolution stage of the proceedings concerns the extension in the powers of the advisory commission (*see* section 3.3.3.), the addition of an alternative dispute resolution (ADR) commission and the new appointment procedures. The ADR commission is intended to provide the contracting states with greater procedural flexibility, as they would be free to determine its composition and function. The ADR commission could also employ mediation, conciliation and other similar non-binding techniques, although its opinion would be issued under the same rules as that of the advisory commission and would have the same legal consequences. The proposed EU Arbitration Directive, therefore, pioneers the use of ADR mechanisms in international tax disputes. In the authors' opinion, this is an important step forward towards providing competent authorities and taxpayers with a dispute resolution framework that ensures both legal certainty in respect of the relief from double taxation and the adaptability of the process to the needs of the individual case.

The lack of an enforceable deadline for the appointment of the representatives and independent commission members has previously been criticized in literature, as it permits the competent authorities to prolong the resolution of a case indefinitely.[86] The proposed EU Arbitration Directive would set a deadline of 50 calendar days for the appointment and would enforce the deadline by permitting a taxpayer to request the appointment of the independent commission members by a national court. This provision would remove an important blockage in the advisory commission procedure and would ensure the timeliness of the delivery of the opinion.

The proposed EU Arbitration Directive would attempt to improve the ease of enforcement of the final decision by stating that it should be enforced, notwithstanding any domestic time limits and that taxpayers could challenge lack of implementation before the domestic courts. While the effective enforcement of the outcome is an important step, the authors believe that a more comprehensive result could have been realized by stipulating the legal nature of the decision of the tax authority within the domestic legal orders.

Another important change concerns the publication of the final decision. Even in the absence of taxpayer consent, an abstract of the decision containing the most important information could be published. Several authors have criticized the lack of transparency of dispute resolution procedures in the international tax area in general[87] and similar proposals for the publication of partial information have been suggested to permit a more accurate assessment of the functioning of the procedures.[88]

3.4. Overall assessment of the changes

The proposed EU Arbitration Directive offers many improvements compared to the Arbitration Convention (90/436) (*see* section 3.3.). However, a number of opportunities for, further, improvement have been missed.

First, the advisory commission has many more members, at least five and up to nine members, compared to an arbitral panel under the OECD Model and the UN Model, which would consist of three members. This would make the appointment of the advisory commission more cumbersome and the procedures costlier. At the very least, the number of representatives of competent authorities should be reduced to a maximum of one from each Member State.[89]

Second, the independence rules for the commission members are lacking in scope. "Independence" is not defined. An enforcement mechanism for dependent and biased arbitrators and a disclosure obligation to ensure that the commission members self-police their independence are also missing. The enforcement mechanism would be particularly easy to adopt since the proposed EU Arbitration Directive, as it currently stands, would already permit the rejection of members of the advisory commission if they were drawn by lot, as set out in article 8(3). There is no reason not to extend this to all cases. In addition, a taxpayer should be permitted to challenge the decision of the competent authority domestically if the taxpayer feels that the lack of independence had a material effect on the outcome. This right would be effectively renounced under the proposed EU Arbitration Directive.

84. *Adamczyk & Majdańska,* supra *n. 48, at m.no. 26.*
85. A similar rule had already been proposed in the context of the UN Model. *See* Owens, Gildemeister & Turcan, *supra* n. 32, at p. 1004.
86. H.M. Pit, *Improving the Arbitration Procedure under the EU Arbitration Convention (1)*, 24 EC Tax Rev. 1, p. 18 et seq. (2015).
87. J. Kollmann & L. Turcan, *Overview of the Existing Mechanisms to Resolve Disputes and Their Challenges*, in Lang & Owens eds., *supra* n. 12, at sec. 2.3.2.5. p. 46.
88. Owens, Gildemeister & Turcan, *supra* n. 32, at p. 1010.
89. Pit, *supra* n. 86, at p. 21 et seq. A more radical solution would have been to permit the taxpayer to participate in the nomination of the members of the advisory commission, thereby following the example of bilateral investment treaties (BITs), which grant comprehensive procedural rights to the investor. *See* P. Pistone, *General Report*, in *The Relationship between Taxation and Bilateral Investment Agreements* (M. Lang et al. eds., IBFD forthcoming).

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The new rules in the proposed EU Arbitration Directive also raise some issues, especially with regard to the interaction between its procedures and those of the domestic courts. In particular, article 15(2) of the proposed EU Arbitration Directive states that the Member States could continue judicial proceedings against taxpayers after the initiation of a MAP. The objective of this provision is not clear, as it stands to reason that such procedures would also affect the existence and extent of double taxation and, therefore, the very matter under consideration in the MAP. Article 15(4) of the proposed EU Arbitration Directive is even more troubling, as it would require taxpayers to withdraw from domestic remedies if the competent authorities could not derogate from the decisions of their judicial bodies. This would mean that taxpayers would have to choose between either the domestic appeals procedure or the procedures under the proposed EU Arbitration Directive before a MAP had been initiated. The rule would place taxpayers at a disadvantage and would appear to be unnecessarily strict, as domestic procedures generally permit a stay of proceedings.[90] Consequently, a MAP or a final decision could be concluded, while the domestic procedures are paused.

4. Comparison between the Multilateral Instrument and the Proposed EU Arbitration Directive

The international tax world is presently dealing with concerns regarding base erosion and profit shifting and the impending possibility of an increase in tax disputes. However, solutions have been found at the multilateral level with regard to tax treaties and at an EU level.[91] While the basic framework of both proposals involves a MAP and, at a later stage, arbitration, there are key differences.

The proposed EU Arbitration Directive contains more detail than the Multilateral Instrument in many areas and this has led to some favourable results. First, the MAP provided for in the proposed EU Arbitration Directive has time limits that could not be extended indefinitely. The detailed procedural rules in the proposed EU Arbitration Directive with regard to the form of complaints in MAP, the rules in respect of functioning of the advisory commission and the time limits for both the MAP and the process of the advisory commission would also provide for much greater legal certainty. In addition, the proposed EU Arbitration Directive would add arbitration and access to judicial remedies, even at the admissibility stage, which would be very relevant in terms of procedures and would provide taxpayers with more definitive access to the process.

The proposed EU Arbitration Directive would also give the Member States the option to access other alternative dispute resolution methods, such as mediation, conciliation or expert opinion, instead of arbitration. This would go a long way to permitting remedies for taxpayers, even where mandatory arbitration was not an acceptable option for the Member States.[92] In addition, in terms of arbitration procedure, the proposed EU Arbitration Directive would be more favourable than the Multilateral Instrument with regard to the rights of the taxpayer, as it would give the taxpayer the option to participate in the proceedings[93] and to access courts at both the admissibility and the substantive stages to challenge either inaction or an unfavourable decision. Further, the proposed EU Arbitration Directive would require the publication of decisions, even if on an anonymous basis and in the form of abstracts summarizing the key aspects.

In light of the foregoing, the proposed EU Arbitration Directive should be considered an improvement over the procedures in the Multilateral Instrument and could be regarded as a first step towards reform of the arbitration process in the Multilateral Instrument in the future to attract greater participation.[94] In this context, such changes should be considered for adoption in the forthcoming UN Model (2017), especially as a separate subcommittee of the United Nations on MAPs and dispute resolution has been working on similar issues. The flexibility to move towards other forms of alternative dispute resolution could be critical for gathering developing country participation. However, more favourable appointment[95] and cost allocation rules would be required to encourage developing countries to adopt this proposal.[96]

5. The Multilateral Instrument and the Proposed EU Arbitration Directive

The Multilateral Instrument is an international treaty with the same status as tax treaties and the TFEU (2007), according to the Vienna Convention on Law of Treaties (the "Vienna Convention").[97] However, following *Flaminio Costa v. E.N.E.L.* (Case 6/64),[98] EU law has supremacy over domestic law, including international agreements such as tax treaties and, by extension, the Multilateral Instrument. Similarly, article 351 of the TFEU (2007) requires the Member States to eliminate any incompatibilities of international agreements with EU law. As noted in section 3.1., if the European Union chooses to exercise its competence in the area of dispute resolution by way of the

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90. The wording of the rule is also problematic, as it would appear to imply that the competent authorities are not required to withdraw their challenge of the appeal.
91. This may be evidence of the influence that the United States and other countries, especially Brazil, Russia, China and India (the BRICs), have on tax policy.
92. It should be noted that not all of the Member States have agreed to implement the dispute resolution mechanism under the *Multilateral Instrument* (2016). Such flexibility in the *Multilateral Instrument* (2016) could, perhaps, have resulted in greater support.
93. This does not constitute a change compared to the provisions of the Arbitration Convention (90/436) and is, therefore, not discussed further in sec. 3.
94. However, there are some issues that are common to both options, such as the lack of detailed transparency and/or independence rules and the excessive credence given to domestic courts and/or tribunals, which could hamper both procedures in the future.
95. A mechanism that would permit the perspectives of developing countries and emerging economies with regard to international taxation to be grouped together and to be adequately represented in any arbitration involving such countries could be the ultimate objective, although the implementation of such provisions would require extended cooperation between developing and developed countries.
96. *See* Owens, Gildemeister & Turcan, *supra* n. 32 for a detailed solution in this regard.
97. *Vienna Convention on the Law of Treaties* (23 May 1969), Treaties IBFD.
98. IT: ECJ, 15 July 1964, Case 6/64, *Flaminio Costa v. E.N.E.L.*, ECJ Case Law IBFD.

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proposed EU Arbitration Directive, the Member States would lose their competence in this regard within the scope of its application.[99] Accordingly, the procedures in the proposed EU Arbitration Directive would supersede those of tax treaties and, by extension, the Multilateral Instrument, with regard to all disputes arising as a result of the double taxation of business income between Member States and even between Member States and third states where the latter involves a head office or a PE in the European Union.[100]

However, this would not prevent Member States from concluding a MAP, including arbitration, under tax treaties. The choice of instrument, i.e. the proposed EU Arbitration Directive or tax treaties or both, would be left to the taxpayer. In the first stage, both legal remedies would result in a MAP between the competent authorities and, therefore, to the same result if an agreement was reached. However, within the scope of the application of a MAP, such an agreement would have to follow the substantive rules set out in the proposed EU Arbitration Directive.[101] As noted in section 3.2., the proposed EU Arbitration Directive would enforce the arm's length principle in article 57 of the proposed CCCTB Directive. In addition, as opposed to tax treaties and the Multilateral Instrument, the proposed EU Arbitration Directive stipulates how double taxation should be eliminated, which, depending on the interpretation of the ECJ, could also lead to different results other than those under tax treaties. These and other substantive rules would supersede similar provisions in tax treaties and the Multilateral Instrument. This would have practical importance if the ECJ were to interpret the concepts of arm's length transactions, associated enterprises, PEs, etc. in the proposed CCCTB Directive, as well as the removal of double taxation under the proposed EU Arbitration Directive, in a way which differs from the way in which these concepts are commonly understood in the context of tax treaties.[102]

In addition, due to different procedural rules, arbitration under the rules of the Multilateral Instrument and the procedure of the advisory commission under the proposed EU Arbitration Directive may give different results. In order to mitigate this, article 15(5) of the proposed EU Arbitration Directive states that dispute resolution procedures under tax treaties would be automatically terminated once an advisory commission is appointed. Consequently, the arbitration procedures under the Multilateral Instrument and tax treaties could not apply to cases that fall within the scope of the proposed EU Arbitration Directive.

6. Conclusions

The international community is at a crucial stage in the debate on how to resolve cross-border disputes, with the European Union, the OECD and United Nations all advancing new approaches that could go some way towards aligning tax dispute resolution with best practices in other areas, such as trade and investment. The G20 has recognized the importance of devising solutions that work for both government and business with the need to avoid tax uncertainty in a global environment.[103] Realizing this will require a constructive dialogue between tax administrations and business and genuine engagement on the part of all relevant countries.

The stakes are high. Governments require tax revenues, but at the same time, unresolved disputes make it hard to realize sustainable growth. The proposals of the European Union and the OECD are commendable, but the reality is that in a global environment, global solutions are required. This is why the newly constituted UN Tax Committee must intensify its work and not avoid ambitious solutions, including establishing a comprehensive institutional framework that addresses many of the concerns expressed by developing countries and emerging economies. As this work progresses, a two-speed system could be considered, which would permit some countries to adopt softer measures, such as supporting MAPs with mediation or conciliation or optional arbitration, before committing to harder solutions.

In any case, 2017 will be an interesting year for tax dispute resolution. With the initial signing ceremony of the Multilateral Instrument and finalization of the proposed EU Arbitration Directive, which is expected in 2017, there is much to look forward to. The steady improvement of dispute resolution mechanisms in international tax over the past few decades is a positive sign and it can only be hoped that this trend continues.

99. *See*, inter alia, DE: ECJ, 21 Sept. 1999, Case C-307/97, *Compagnie de Saint-Gobain, Zweigniederlassung Deutschland v. Finanzamt Aachen-Innenstadt*, para. 56, ECJ Case Law IBFD.
100. From the perspective of EU law, tax treaties and domestic law are both expressions of national law and are, therefore, subject to the supremacy of primary and secondary law in both monist and dualist Member States. Naturally, third countries would not be bound by the proposed EU Arbitration Directive.
101. The procedural rules provided under tax treaties would also have to meet the requirements of equivalence and effectiveness (*see* sec. 3.3.).
102. The application of the proposed EU Arbitration Directive could override tax treaties where two Member States are involved or where one Member State and a third country are involved, where permitted, which could be a matter of concern.
103. At the Hangzhou summit in Sept. 2016, the G20 leaders emphasized the importance of tax certainty and the OECD plans to release initiatives to promote this.

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Exported / Printed on 17 Apr. 2019 by petteri.rapo@aldersound.fi.