

To: European Commission, DG TAXUD - submitted online

**EBIT's Comments on the Review of the implementation of Council Directive (EU) 2017/1852 of 10 October 2017 on tax dispute resolution mechanisms in the EU – Feedback period: 12 March 2024 – 10 May 2024**

Brussels, 7 May 2024

Dear Marc,

EBIT's Members<sup>1</sup> thank the European Commission for the opportunity to provide feedback on the Review of the implementation of Council Directive (EU) 2017/1852 of 10 October 2017 on tax dispute resolution mechanisms in the European Union (the 'DRM'). As indicated in Article 21 of the DRM, by 30 June 2024, the European Commission will evaluate its implementation.

At the moment, experience among EBIT's Members with the arbitration phase or other alternative dispute resolution mechanisms provided for under the DRM is non-existent or very limited. This is also due to the relatively limited period (5 years) during which the DRM has been in force.

EBIT's Members are in general supportive of the initiatives to enhance dispute resolution mechanisms and view the DRM as an important framework that aims to address the complexities of cross-border taxation within the EU. EBIT's Members would also like to stress that in most cases the Competent Authorities of the EU's Member States manage to resolve the disputes in a mutual agreement procedure (MAP) without having to resolve to arbitration. In that regard, we acknowledge the ongoing efforts of EU Member States to strengthen MAP, including by improving the timeliness of MAP resolution. However, there is room for improvement.

EBIT's Members consider that the fact that the Competent Authorities have the right to deny access to the dispute resolution stage when: (i) the dispute does not involve double taxation, or (ii) penalties were imposed involving the adjusted income or capital for "tax fraud, wilful default and gross negligence", may unduly restrict the practical application of the DRM. Given the ease with which some Member States impose penalties, it is conceivable that some of them may seek to interpret this exclusion liberally.

One important and recurring aspect of dispute resolution processes, at least under the MAP (the 'first phase'), is the absence of real involvement of the taxpayer(s) concerned. EBIT's Members recommend granting taxpayers the right at their request to provide input on their cases before the joint Competent Authorities. Currently, taxpayers may request to be heard but it is considered a discretionary invitation only by Competent Authorities rather than a formal right. Elevating this opportunity to a recognized right to be heard would not only improve transparency but also strengthen procedural fairness in dispute resolution processes under the DRM.

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<sup>1</sup> EBIT's Members include Airbus Group, BP, Carlyle, Carrier, Caterpillar, GSK, Huawei, International Paper, Johnson and Johnson, PepsiCo, Pfizer, Procter and Gamble, Prosus/Naspers, RELX, RTX, Schroders and Vattenfall. For more information on EBIT see: [www.ebit-businessstax.com](http://www.ebit-businessstax.com)

Additionally, although Competent Authorities are not required to provide explanations under the current framework for their decisions under MAP (first phase) but doing so could greatly enhance understanding and confidence in the resolution process. This should be done, however, without compromising the autonomy of the decision-makers. This transparency helps build trust between taxpayers and Tax Authorities and encourages a more collaborative approach to resolving disputes. At the same time, EBIT's Members also consider that such an approach should not be made mandatory as this may hamper the resolution process in certain cases. The primary objective remains of course that the dispute is resolved. Therefore, Competent Authorities should be allowed discretion on whether to give further explanation on the decision reached.

EBIT's Members are also concerned about certain practices used by Tax Administrations. Tax Administrations sometimes make significant adjustments pre-emptively when they anticipate entering into a MAP, allowing themselves an opportunistic 'bargaining position'. These pre-emptive adjustments can distort the fairness of outcomes and undermine the integrity of the resolution process. This highlights the importance of increased oversight and safeguards to ensure that MAP resolutions are based on genuine assessments rather than strategic manoeuvres by Tax Administrations. In this regard, EBIT's Members recommend that the European Commission consider introducing BEPS 14 MAP mechanism peer reviews within the EU, which might be helpful in stopping some of the bad behaviour from some Tax Administrations in their audit behaviours intended to make taxpayers not use MAP and other DRM tools. There are statistics on the use of the Arbitration Convention - a similar approach could be designed for the DRM. Striking a good balance between the interests of taxpayers and Tax Administrations in the dispute resolution process is essential for maintaining the integrity and effectiveness of the DRM.

Furthermore, in EBIT's Members' experience, tax assessments - that have implications across borders - are often made to appear or are justified as a purely domestic situation, making it impossible to access the international dispute resolution mechanisms, not just the DRM. One typical example is a transfer pricing adjustment disguised or presented solely as a non-deductible cost under domestic tax legislation. These cases not only make the resolution processes (including arbitration) less effective, but also go against the principles of fairness and equality in cross-border taxation. Therefore, it is crucial to expand the scope to include such scenarios: all taxation that has potential cross-border effects should be allowed under the DRM, regardless of how it is classified under domestic law. This ensures that taxpayers are not unfairly disadvantaged due to jurisdictional technicalities and promotes consistency and fairness in resolving cross-border tax disputes.

With the Directive (EU) 2022/2523 on ensuring a global minimum level of taxation for multinational enterprise groups and large-scale domestic groups in the Union (the "Pillar Two Directive"), most EU Member States introduced the regime of imposing a minimum tax of 15 % into their domestic legislation. However, the Pillar Two Directive does not contain any dispute resolution mechanism and this despite the fact that levying the minimum tax will have cross-border consequences and give rise to disputes between taxpayers and Tax Administrations situated in different EU Member States. Pillar Two may and will go further than just a domestic minimum tax. EBIT's Members would strongly recommend an extension of the scope of the DRM to also cover cross-border Pillar Two issues. The references to the double tax treaties and the Arbitration Convention are limiting the full potential of the DRM in this case. Further, introducing a resolution mechanism for cross-border Pillar Two issues will make the EU a frontrunner in solving these disputes.

In conclusion, EBIT's Members consider the DRM an important framework for addressing the challenges raised by cross-border tax disputes within the EU. However, we respectfully suggest that the European Commission consider the issues and practice-based recommendations mentioned in this paper during its DRM review: ensuring that Competent Authorities do not unduly restrict the practical application of the DRM, broadening the scope of DRM to include

coverage of Pillar Two issues, beefing up and formalizing taxpayers' rights to engage with Competent Authorities, enhancing transparency in dispute resolution decision-making processes and introducing BEPS 14 MAP mechanism peer reviews. Additionally, practices like pre-emptive adjustments by Tax Administrations availing themselves of an opportunistic bargaining position and the disguised classification of tax assessments as purely a domestic matter to impede the use of the dispute resolution mechanisms and should be examined further and duly addressed to maintain their integrity and effectiveness. Ultimately, fostering a collaborative and transparent approach to dispute resolution is crucial for building trust, fairness, and equity in cross-border taxation.

We trust this contribution is helpful to you. EBIT's Members are always keen to exchange views and engage in dialogue with the European Commission on this important subject.

Yours sincerely,

**European Business Initiative on Taxation – May 2024**

For more information on EBIT please contact the EBIT Secretariat via Bob van der Made: Tel.: + 32 472 745 631 | Email: [bob@vandermadeconsulting.com](mailto:bob@vandermadeconsulting.com)).

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