Managing transfer pricing disputes

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Agenda

Transfer pricing disputes in Luxembourg and worldwide
State of play and your lines of defense

Tax dispute resolution mechanisms
EU Directive 2017/1852 and its Luxembourg transposition

Mutual agreement procedure and binding arbitration
Key features and benefits

Questions and answers

Networking cocktail
Transfer pricing disputes
State of play and your lines of defense
Australian tax office loses $92m case against mining group Glencore

Federal judge dismisses ATO's attempt to curb complex copper processing transactions from CSA Cobar mine

Ben Butler
Tue 3 Sep 2019 03.51 BST

Google agrees to €1bn settlement with French tax authorities

The deal includes a $465 million tax adjustment

HARRIET AGNEW
13.09.2019

EU court orders Fiat to repay Luxembourg €30m in back taxes

In similar case, judges annul Commission order for Starbucks to repay the Netherlands a similar amount

HELEDD PRITCHARD
24.09.2019

Tax authority loses major court case on transfer pricing to Microsoft

Supreme Court verdict a slap in the face for SKAT

February 1st, 2019 12:10 pm| by Stephen Gadd
Dispute Prevention through Tax Compliance

Tax Compliance

Transfer Pricing Documentation
- Master File
- Local File
- Country-by-Country Reporting

Information Exchange (on request, automatic)

Co-operation with Tax Administration

Be on time!
Be consistent!
Advance Pricing Agreements (APA)
- unilateral, bilateral, multilateral
- for both future and roll-back years

International Compliance Assurance Programme (ICAP 2.0)
- Voluntary programme for the multilateral risk assessment of large multinational enterprises (MNEs)
- MNEs can engage with several tax administrations simultaneously.
- MNEs receive outcome letters detailing areas found to be “low risk” (i.e. not to be selected for audit).

Joint Audits
- Two or more tax administrations jointly engage with the taxpayer;
- with joint approach to fact finding; and
- common accepted outcome for international tax issues.
Tsunami of tax disputes in Luxembourg

- Administrative appeals
- Judicial claims
- Mutual agreement procedures
- Exchange of information on request

2018
1,478 administrative appeals filed
252 MAPs started
213 court cases lodged
1,383 requests for exchange of information

Dispute Resolution via Mutual Agreement Procedure

TP adjustment → (Economic) Double taxation

SpainCo (Spain) → LuxCo (Luxembourg)

Transfer price? → Complaint

Mutual agreement procedure

Competent Authority of Spain

Competent Authority of Luxembourg

Mandatory binding arbitration

Advisory Commission
MAP cases started by members of Inclusive Framework

Source: OECD MAP Statistics
Average time taken to close MAP cases

Transfer pricing cases: 33 months

Minimum standard for average timeframe: 24 months

Other cases: 14 months

Source: OECD MAP Statistics
OECD MAP Statistics
Outcomes of MAP cases closed in 2018

57% Agreement fully eliminating double taxation / fully resolving taxation not in accordance with tax treaty

2% Agreement partially eliminating double taxation / partially resolving taxation not in accordance with tax treaty

17% Unilateral relief granted

4% Resolved via domestic remedy = 80%

1% Agreement that there is no taxation not in accordance with tax treaty

6% Withdrawn by taxpayer

4% Objection is not justified

6% Denied MAP access

1% Any other outcome

2% No agreement incl. agreement to disagree
Tax dispute resolution
EU Directive 2017/1852 and its Luxembourg transposition
EU Directive 2017/1852 and its history

**1963**
*Mutual Agreement Procedure*
Article 26 Draft Double Taxation Convention on Income and Capital

**2015**
Final Reports of the OECD / G20 BEPS Project

**2018**
Enterprise into force of the Multilateral Instrument

**1990**
*Arbitration Convention* on the elimination of double taxation in connection with the adjustment of profits of associated enterprises

**2017**
*MAP guidance* from Luxembourg

**2017**
*Directive 2017/1852* on tax dispute resolution mechanisms in the EU

**2019**
Luxembourg bill n°7431 (pending)
Applicable to any complaints submitted from entry into force of the law [1 July 2019] onwards relating to tax years from 1 January 2018.

Competent authorities may agree to apply it to complaints submitted prior to that day or to earlier tax years.
Mutual agreement procedure (MAP) and binding arbitration

Key features and benefits
<table>
<thead>
<tr>
<th>Key benefits of the mutual agreement procedure under the TDRM Directive 2017/1852</th>
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<tbody>
<tr>
<td><strong>Broad scope.</strong> Interpretation and application of tax treaties and of the arbitration convention. Not limited to transfer pricing. Not limited to double taxation.</td>
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<tr>
<td><strong>Multilateral.</strong> Taxpayers may request multilateral MAPs – involving any number of competent authorities in the EU.</td>
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<td><strong>Clear timelines.</strong> Taxpayers are assured of an outcome within a fixed and enforceable time frame.</td>
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<td><strong>More effective.</strong> Arbitration is mandatory (if no mutual agreement in 2-3 years) and is binding on authorities.</td>
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<td><strong>Persons to apply.</strong> Affected persons can also be individuals who are resident of a Member State. But not PEs of persons with headquarter outside the EU.</td>
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<td><strong>Unlock the procedure.</strong> Recourse to courts possible to push the procedure forward.</td>
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<td><strong>Tacit agreement.</strong> Complaint shall be deemed to be accepted, if there is no competent authority decision on acceptance or rejection within 6 months.</td>
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<td><strong>No prescription period.</strong> Implementation of decision or opinion without delay and irrespective of any time limits prescribed by national law.</td>
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### Key benefits of the mutual agreement procedure under the TDRM Directive 2017/1852

<table>
<thead>
<tr>
<th>Special provisions.</th>
<th>Clear decision.</th>
<th>Double track possible.</th>
<th>Flexible MAP.</th>
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<tbody>
<tr>
<td>Individuals and smaller undertakings may be allowed to communicate with their local competent authority only.</td>
<td>Mutual agreement takes the form of an administrative act that is binding and enforceable.</td>
<td>Recourse to remedies under national law is still possible. MAP and national proceedings may run in parallel (in practice, suspension granted).</td>
<td>Competent authorities are encouraged to use mediation or conciliation in final stages of the mutual agreement procedure.</td>
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<td>Three years to submit complaint and initiate MAP, even if taxation has become final under national law.</td>
<td>Submission of complaint puts an end to on-going MAP under tax treaty or arbitration convention.</td>
<td>Upon preliminary ruling request, Court of Justice of the EU may secure uniform application, further develop the law and protect taxpayers’ rights.</td>
<td>Respect for the fundamental rights of taxpayers, like fair trial and freedom to conduct a business.</td>
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# Key benefits of the mutual agreement procedure under the TDRM Directive 2017/1852

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<td>Opinions will be published as an abstract or - with the consent of affected person – in their entirety.</td>
<td>Expenses for independent persons of standing will, in principle, be borne by the Member States.</td>
<td>Dispute resolution can take the form of “final offer” arbitration or “independent opinion” process.</td>
<td>Representatives of competent authorities and individual persons of standing know the subject-matter.</td>
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<tr>
<th>Clear instructions.</th>
<th>Choice of commission.</th>
<th>Chair to be a judge.</th>
<th>Broad definitions.</th>
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<tr>
<td>Rules of Functioning for Advisory Commission shall be notified to affected person (incl. time frame). Standard rules established by EU Commission.</td>
<td>Ad-hoc structure (Advisory Commission) or permanent structure (Standing Committee of Alternative Dispute Resolution Commission)</td>
<td>Opinions are adopted by simple majority. Where a majority cannot be reached, the vote of the chair shall determine the final opinion.</td>
<td>“Double taxation” includes the cancellation or reduction of tax losses.</td>
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Managing Disputes

Dispute
- Surrender and pay!
- Fight for your right!
- Let experts decide!
- Go beyond right and wrong!

Resolution
Tax Dispute Resolution in Luxembourg

Dispute Resolution

- Controversy with tax administration
- Litigation before tribunal (and court)
- Mutual agreement by competent authorities
- Arbitration by advisory commission

Mediation
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