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## The Commission's proposal for a Directive on Double Taxation Dispute Resolution Mechanisms

**Citation for published version:**

Cerioni, L 2017, 'The Commission's proposal for a Directive on Double Taxation Dispute Resolution Mechanisms: Overcoming the final hurdle of juridical double taxation within the European Union?', *European Taxation*, vol. 57, no. 5.

**Link:**

[Link to publication record in Edinburgh Research Explorer](#)

**Document Version:**

Peer reviewed version

**Published In:**

European Taxation

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## **The Commission's Proposal for a Directive on Double Taxation Dispute Resolution Mechanisms: the final overcoming of juridical double taxation within the EU ?**

Luca Cerioni (\*)

**This article examines the Commission's proposal for a Directive on Double Taxation Dispute Resolution Mechanisms, by highlighting interpretative issues that its wording may arise and by discussing the conditions under which it could manage to lead to the elimination of (juridical) double taxation within the EU.**

### **1. Introduction**

In October 2016, the European Commission proposed a Directive on Double Taxation Dispute Resolution Mechanisms in the EU<sup>1</sup>. This proposal was presented as part of the implementation of the Commission's Action Plan on a Fair and Efficient Corporate Tax System (APFECTS), where the Commission, after stressing that the persistence of double taxation negatively affects cross-border investments and causes economic disruptions, had criticised the Arbitration Convention on transfer pricing (436/1990) and had announced proposals to improve the current mechanisms to resolve double taxation disputes in the EU<sup>2</sup>. After this Commission's stated intention in the APFECTS, part of the literature assessed the Commission's initiative in light of the functioning of the Arbitration Convention and in the context of the BEPS Action Plan, and concluded that turning the Arbitration Convention into an instrument of EU law would not solve specific shortcomings identified in relation to its functioning<sup>3</sup>.

In this backdrop, it appears important to assess to what extent the proposed Directive on Double Taxation Dispute Resolution Mechanisms would manage to eliminate all potential double taxation situations, as well as to identify any unresolved issue and any improvement still needed to achieve this objective.

For this purpose, part 2 shortly reviews the cases where the elimination of juridical double taxation within the EU has not yet been achieved, and it indicates the conditions that should be fulfilled by a Directive effectively capable of eliminating all cases of double taxation. Part 3 examines the proposed Directive in light of such conditions and identifies interpretative issues which appear to be raised by its wording, whereas Part 4 identifies critical issues in testing the proposal against juridical double taxation arising from parallel, non-discriminatory exercise of taxing rights. Part 5 suggests responses to these issues, and Part 6 formulates suggestions on potential amendments to the proposal that could allow it to become a more effective instrument for the elimination of juridical double taxation too.

### **2. The perceived need to overcome juridical double taxation arising from parallel, non-discriminatory exercise of taxing powers**

Although the Explanatory Memorandum of the proposal does not mention the 2011 Communication on double taxation in the single market<sup>4</sup> which had stressed the persistent obstacle created by situations

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<sup>1</sup> Commission proposal for a Council Directive on Double Taxation Dispute Resolution Mechanisms in the European Union, COM(2016)686 final, 25.10.2016, 2016/0338 (CNS)

<sup>2</sup> Commission Communication COM(2015)302final, A Fair and Efficient Corporate Tax System in the European Union: 5 Key Areas for Action, at 11-12

<sup>3</sup> H.M.Pit, *Commission Initiative To Improve Dispute Settlement Mechanisms within the European Union – The EU Arbitration Convention (90/436)*, in 56 *European Taxn.* 11, section 6 (2016). *Journals IBFD.*

of unresolved juridical double taxation, in this Communication the Commission had already indicated the necessity to ease and to accelerate dispute resolution within the EU<sup>5</sup>, after noting the inadequacy of dispute resolution mechanism provided by mutual agreement procedures (MAPs) based on the old Art. 25 of the OECD Model. In the same Communication, the Commission had indicated, among the situations of double taxation, the case of juridical double taxation created by parallel, non-discriminatory exercise of taxing rights by two Member States<sup>6</sup>.

Since 2006, the ECJ has been delivering a number of rulings concerning juridical double taxation on cross-border dividends payments - in *Kerckhaert and Morres*<sup>7</sup>, in *Orange Smallcap*<sup>8</sup>, in *Damseaux*<sup>9</sup>, in *Haribo and Salinen*<sup>10</sup>, in *Levy & Sebbag*<sup>11</sup> - as well as double levy of inheritance taxes (in *Block*<sup>12</sup>) and double levy of payroll taxes (in *CIBA*<sup>13</sup>). In all these rulings, the ECJ has been regarding itself as unable to remove double taxation resulting from the parallel exercise of taxing rights by two Member States, due to the lack of a unifying or harmonising EU legislation allocating responsibility to eliminate double taxation to one of the two jurisdictions<sup>14</sup>. Part of academic literature argued that, although the ECJ on the bases of its previous case law up to 2006 could have embarked on the allocation of taxing rights on a case-to-case bases, it was probably right not to do so, as a decision removing double taxation on a case-specific base would have opened the doors to years of uncertainty and litigation<sup>15</sup>. Other literature strongly criticised the ECJ's reasoning in these cases and it considered these ECJ decisions to be difficult to reconcile with other rulings where the ECJ had been finding that economic double taxation within the source State or within the shareholder residence State was an unjustifiable restriction if applied respectively only to non-resident shareholders or to dividends sourced in other Member States<sup>16</sup>. It was also convincingly observed that both economic double taxation and juridical double taxation resulted from the interaction of two separate taxing jurisdictions<sup>17</sup>, and that a potential explanation for the ECJ's different approach to economic and to juridical double taxation may be found in a respect by the ECJ for the OECD's long-standing efforts to devise appropriate mechanisms for the elimination of juridical double taxation<sup>18</sup>.

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<sup>4</sup> Commission Communication COM(2011)722 final, double taxation in the single market.

<sup>5</sup> COM(2011) 722 final, cit., at 10-11

<sup>6</sup> Id., at 5.

<sup>7</sup> BE: ECJ 14 Nov. 2006, Case C-513/04, *Mark Kerckhaert and Bernadette Morres v. Belgische Staat* [2006] ECR I-10967, ECJ Case Law IBFD

<sup>8</sup> NL: ECJ, 20 May 2008, *Staatssecretaris van Financiën v Orange European Smallcap Fund NV* [2008] ECR I-03747, ECJ Case Law IBFD

<sup>9</sup> BE: ECJ 16 July 2009, Case C-128/08, *Jacques Damseux v. Etat belge* [2009] ECR I-6823, ECJ Case Law IBFD

<sup>10</sup> AT: ECJ, 10 Feb. 2011, Joined Case C-436/08 and 437/08, *Haribo Lakritzen Hans Riegel BetriebsgmbH and Osterreichische Salinen AG v. Finanzamt Linz* [2011] ECR I-305, ECJ Case Law IBFD

<sup>11</sup> BE: ECJ 19 Sept 2012, Case C-540/11, *Daniel Levy and Carine Sebbag v. Etat Belge, SPF Finances* [2012] Order 212/581, ECJ Case-Law IBFD

<sup>12</sup> DE: ECJ 12 Feb. 2009, Case C-67/08, *Margarete Block v. Finanzamt Kaufbeuren* [2009] ECR I-00883, ECJ Case Law IBFD

<sup>13</sup> HU: ECJ 15 Apr. 2010, Case C-96/08, *CIBA Speciality Chemicals in Central and Eastern Europe* [2010] ECR I-02911

<sup>14</sup> E.g., *Kerckhaert and Morres* (C-513/04), para. 22; *Block* (C-67/08), para. 30; *Damseaux* (C-128/08) para 29-30; *Haribo and Salinen* (Cases C-436/08 and 437/08), para. 167-172; *CIBA* (C-96/08), para. 27 et seq.; *Levy and Sebbag* (C-540/11), para. 22

<sup>15</sup> S.Eden, *The Obstacles Faced by the European Court of Justice in Removing the "Obstacles" Faced by the Taxpayer: the Difficult Case of Double Taxation*, 43 British Tax Review 6, 2010, 610, at 628.

<sup>16</sup> B.J.M.Terra, P.J.Wattel, *European Tax Law*, Wolters Kluwer, 2012, at 1055-1057; C.HJI Panayi, *European Union Corporate Tax Law*, Cambridge University Press, 2013, 251-252.

<sup>17</sup> Terra,Wattel, supra note 16, at 1057

<sup>18</sup> Panayi, supra note 16, at 252

In fact, in addition to considering itself as unable to remove juridical double taxation, the ECJ had clarified that it is the responsibility of Member States to take measures to prevent this situation, by applying in particular the apportionment criteria set out in double tax conventions (DTCs) based on the OECD Model<sup>19</sup>, which latter aims at indicating how international juridical double taxation is to be eliminated<sup>20</sup>.

In light of the ECJ reliance on DTCs, its overall reasoning in those rulings does not mean that juridical double taxation arising from parallel, non-discriminatory exercise of taxing powers is compatible with the Treaty's objectives<sup>21</sup>. As juridical double taxation is undoubtedly an obstacle to the functioning of the single market, just as an "internal frontier" would be, this situation is inconsistent at least with Art. 26 of the TFEU, setting out as a key objective the establishment of an internal market *without internal frontiers*.

The Commission seemingly made this assessment in its 2011 Communication - despite not mentioning Art. 26 of the TFEU - when it included this case of juridical double taxation among the situations to be overcome, and the above ECJ rulings inevitably give no suggestion as to what the solution would have been if a Directive on Double Taxation Dispute Resolution Mechanisms had been in force. Moreover, after *Kerchaert and Morres* and after the amendment of Art. 25 of the OECD Model, 11 DTCs entered into between Member States newly included mandatory arbitration clauses which follow the arbitration clause in Art. 25(5) of the OECD Model, and, as a result of Action 14 ("Making Dispute Resolution Mechanisms more effective") of the OECD's action plan on base erosion and profit shifting (BEPS), 20 jurisdictions – among which 13 Member States – have committed themselves to providing mandatory arbitration procedures in DTCs with each other<sup>22</sup>. Additionally, the 2015 BEPS Final Report on Action 14 set out concrete measures for improving the effectiveness of MAP, including a timely resolution within an average timeframe of 24 months<sup>23</sup>.

However, even if a Directive on a Double Taxation Dispute Resolution Mechanism were in force (or if the relevant DTC had a mandatory arbitration clause), a fundamental issue stressed by the ECJ in the rulings in stake would remain unaltered: the lack of a general harmonising piece of EU legislation allocating competence between Member States for eliminating double taxation. In fact, the Directive would *not allocate* taxing powers and responsibilities for eliminating double taxation from a substantive viewpoint, i.e. it would not play the same role that, e.g., the Parent-Subsidiary Directive<sup>24</sup> or the Interest-royalties Directive<sup>25</sup> have for the operations falling within their scope. It would only provide for a procedural mechanism, through which Member States will be required to overcome double taxation within a given timeframe. Unlike the cases covered by the Parent-Subsidiary Directive<sup>26</sup> or by the Interest-royalties Directive<sup>27</sup>, an EU measure offering a procedural mechanism for the elimination of double taxation would allow the ECJ to rule – on the initiative of interested parties – not on the merit

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<sup>19</sup> E.g., *Kerckhaert and Morres* (C-513/04), para. 23; *Damseaux* (C-128/08), para. 30; *Levy and Sebbag* (C-540/11), para. 19

<sup>20</sup> OECD Model Tax Convention on Income and Capital, I-5 (15 July 2014), Models IBFD.

<sup>21</sup> L.Cerioni, *Double Taxation and the Internal Market: Reflections on the ECJ's Decisions in Block and Damseaux and the Potential Implications*, in 63 Bull. Intl. Taxn 11, section 3, 3.2 (2009), Journals IBFD.

<sup>22</sup> OECD/G20 Base Erosion and Profit Shifting Project, Making Dispute Resolution Mechanisms More Effective, Action 14: 2015 Final Report, 10.

<sup>23</sup> *Id.*, at 15

<sup>24</sup> Council Directive 2011/96/EU of 30 November 2011 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States (Parent-Subsidiary Directive), OJ L 345, 29.12.2011

<sup>25</sup> Council Directive 2003/49/EC of 3 June 2003 on a common system of taxation applicable to interest and royalty payments made between associated companies of different Member States (Interests - royalties Directive), OJ L 157, 26.6.2003

<sup>26</sup> Parent-Subsidiary Directive, Art. 4(1) and Art. 5

<sup>27</sup> Interest-royalties Directive, Art. 1

of the elimination of double taxation (i.e., not on whether it has been properly eliminated by the state in charge of doing so), but on whether the procedure has been properly followed and on whether *whatever* outcome eliminating double taxation has been achieved within the specific timeframe.

Moreover, if the duration of the overall procedure were such that the concerned taxpayer would continue to be facing double taxation for a number of tax years during which the procedure was pending, the taxpayer could still suffer a disadvantage in comparison with (taxpayers operating at a purely domestic level or with) a situation where an EU legislative measure allocated Member States the responsibility to eliminate double taxation.

Accordingly, a legislative measure providing for a procedural mechanism would be able to lead to an outcome *equivalent* to that of a general legislative measure allocating taxing powers to one of the concerned States only if it met two cumulative conditions: *a*) it allowed *all* potential cases of (economic and juridical) double taxation suffered by all categories of taxpayers (with the sole exception of economic double taxation deriving from transfer pricing adjustments), to be brought within its scope of application; *b*) it offered a mechanism for a speedy and timely dispute resolution before the deadlines of fulfilment of tax obligations for the tax year at issue.

To meet these two conditions, a Directive on Double Taxation Dispute Resolution Mechanisms should arguably: *a*) have a provision clearly and unequivocally stating that *all* potential cases of economic double taxation (except for transfer pricing cases covered by the Arbitration Convention) and of juridical double taxation would fall within its scope of application, to make it clear that double taxation would be eliminated even when it could not otherwise be on the basis of national rules and of DTCs, and *b*) require the dispute settlement to be completed before the deadline for compliance with tax obligations in both jurisdictions concerned in the concrete cases.

In light of the perceived need to overcome all cases of double taxation, and of the conditions that would need to be fulfilled for this purpose by a Directive on Double Taxation Dispute Resolution Mechanisms, the effectiveness of the proposed Directive can be assessed.

### **3. The Commission's proposal for a Directive on Double Taxation Dispute Resolution Mechanisms**

#### *3.1. The key mechanisms*

The Commission proposal for a Directive on Double Taxation Dispute Resolution Mechanisms builds to a large extent on the Arbitration Convention, and it would broaden the scope of dispute resolution mechanisms to cover *all* cross-border situations subject to double taxation on business profits.

Under Art. 1 (subject matter and scope), the proposed Directive would lay down “rules on the mechanisms to resolve disputes between Member States on how to eliminate double taxation of *income from business* and the rights of the taxpayers in this context”<sup>28</sup>. Accordingly, it *would not apply* to individual taxpayers who do not carry out self-employed activities or business activities (i.e. it would not apply to non-business taxpayers finding themselves in situations such those at stake in *Kerchaert and Morres*, in *Block* or in *Damseaux* or in *Levy and Sebbag*). Although the proposed Directive does not contain a definition of “income from business” for its purpose, Art. 1 – by excluding from its application only “any income within the scope of a tax exemption or to which a zero tax rate applies” – would seem to imply a broad definition and to suggest that the proposed Directive would apply to

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<sup>28</sup> COM(2016)686 final, cit., Art. 1(1)

companies receiving foreign portfolio dividends, when those dividends come from another Member State<sup>29</sup>.

Additionally, for the dispute resolution mechanism to apply, a specific complaint by the taxpayer must be accepted by at least one of the Member States concerned<sup>30</sup>. Any business taxpayer subject to double taxation would be able to submit a complaint to each of the competent tax authorities, irrespective of whether or not he uses the remedies available under national laws of the Member States concerned, within 3 years of the first notification of the actions resulting in double taxation. After the submission of the complaint, national tax authorities would be bound to acknowledge receipt of the complaint and inform the other tax authority, within one month of the receipt<sup>31</sup>; to request the taxpayer any additional information, within two months<sup>32</sup>; to take a decision on the complaint, within six months<sup>33</sup>.

The proposal, in Art. 3, only lays down a formal requirement for admissibility of the complaint. This requirement would consist of providing the competent authorities of each of the Member States concerned with specific information<sup>34</sup>, among which the tax periods affected, the details of the relevant facts and circumstances of the case, and generally the nature and date of the actions giving rise to double taxation, the applicable national rules and DTCs, an explanation of why the taxpayer considers that there is double taxation, and details of any appeal and litigation initiated by the taxpayers before national courts. If the taxpayer provides the requested information, the complaint would be admissible, and the tax authorities would need to make, within six months of receiving it, a decision as to whether to accept the complaint on its own merit. If the complaint was accepted, a MAP would start, and the tax authorities would try, within two years, to agree on the elimination of double taxation<sup>35</sup>. In case of failure to reach agreement, the dispute would *automatically* go to arbitration as a default mechanism: in fact, there would be an obligation on the two concerned national tax authorities to set up either an arbitration panel, named “Advisory Commission” (AC)<sup>36</sup>, which would deliver its opinion on the manner of eliminating double taxation within six months, *or* an Alternative Dispute Resolution Commission (ADRC)<sup>37</sup>, which could differ from the Advisory Commission as regards its composition and form, but would play the same role. The opinion of the AC or of the ADRC would be notified to the concerned national tax authorities, which, within further six months, would need to make a decision on how to eliminate double taxation and which, without such a decision, would be bound by the opinion of the AC or of the ADRC<sup>38</sup>. If the AC were not set up by national tax authorities within a specific timeframe<sup>39</sup>, the taxpayer would be able to require the national courts to appoint independent persons<sup>40</sup>, who would choose the chairman of the AC. Importantly, under Art. 14(4), the final decision, binding on the tax authority, would be enforceable by the taxpayer and be implemented under the national laws of Member States which, as a result of this decision, would need to amend their initial taxation, irrespective of any time limits prescribed by national law, and, in case of failure of implementation, the taxpayer would be able to refer to the national court of the concerned jurisdictions.

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<sup>29</sup> In *Haribo and Salinen* (Joined Case C-436/08 and 437/08), para. 167-172, where the ECJ reiterated its previous findings, inbound foreign dividends were distributed by subsidiaries resident in third countries.

<sup>30</sup> COM(2016)686 final, cit, Explanatory Memorandum, at p. 7-8; also Art. 3(5).

<sup>31</sup> Id., Art. 3(2)

<sup>32</sup> Id., Art. 3(4)

<sup>33</sup> Id., Art. 3(5)

<sup>34</sup> Id., Art. 3(3)

<sup>35</sup> Id., Art. 4(1)

<sup>36</sup> Id., Art. 6(3) and 13(1)

<sup>37</sup> Id., Art. 9

<sup>38</sup> Id., Art. 14(1) and (2).

<sup>39</sup> Id., Art. 7(1)

<sup>40</sup> Id.

The taxpayer would therefore not be left without remedy in the event of failure by the national tax authorities to concretely set up the arbitration panel.

The choices to set specific deadlines for each step of the process prior to the MAP, to introduce an automatic arbitration procedure as well as a specific timeframe for tax authorities to comply with the obligation to set up the AC or the ADRC, and to entitle the taxpayer to petition national courts in the event of failure by national tax authorities to set up the AC or the ADRC, would make the proposed Directive capable of effectively overcoming major shortcomings of the Arbitration Convention, which were stressed by literature: the absence of a default mechanism, missing deadlines, and unsatisfactory interaction with domestic remedies<sup>41</sup>. In this respect, the proposal appears to have adopted most of the suggestions for improvement of the working of the Arbitration Convention, which were made by such literature<sup>42</sup>.

According to Art. 5 of the proposal, the competent authorities may decide to reject the complaint *if* it is inadmissible, or *if* there is no double taxation, or *if* the complaint is submitted after the allowed time-limit<sup>43</sup>, and the taxpayer may appeal a rejection before national courts. In this case, subject to the condition that the appeal was successful in at least one of the Member States, the dispute resolution mechanism would be even simplified, as it would enter directly the automatic arbitration phase.

The Explanatory Memorandum clarifies that, *only* in case of rejection of the appeal in *both* Member States, the procedure would end without arbitration<sup>44</sup>, thereby leaving unaltered the situation which gave rise to the taxpayer's complaint.

Arguably, one can assume that the taxpayer would comply with the formal requirement for admissibility (in terms of providing the information requested by Art. 3) and that he would have no interest in submitting the complaint later than the deadline. As a result, the only remaining ground of rejection by the national tax authorities on receiving the complaint, and by the national tax courts in deciding the appeal, would be the *absence of double taxation*.

According to the proposal's wording, the taxpayer would need to specify the circumstances giving rise to double taxation, together with the *applicable national rules and DTCs* and with an explanation of the reasons why the taxpayer *considers* that there is double taxation<sup>45</sup>. This wording suggests that the (complaint and) the appeal may be rejected on grounds of lack of double taxation when the tax authorities and the domestic court do not believe (unlike the concerned taxpayer) that in the specific case there is a double taxation *to be eliminated according to the applicable national rules and DTCs*. It also would seem to make the "necessity to ensure that the taxpayers is not taxed twice on the same income", referred to in the Preamble<sup>46</sup>, subject to applicable national rules and DTCs.

Consequently, the proposal does not meet the first of the two conditions that, in section 2, was indicated for a Directive on Double Taxation Dispute Resolution Mechanisms to be able to (always) overcome cases of juridical double taxation: the condition of having a provision including, with a clear and unequivocal wording, *all* potential cases of double taxation within its scope of application, i.e. a provision covering those situations even when they could not be overcome through the application of national provisions and of DTCs.

It also does not appear to meet the second condition, i.e. a dispute settlement completed before the deadline for compliance with tax obligations in both jurisdictions concerned in the concrete cases for

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<sup>41</sup> Pit, supra n. 3, section 4, 4.1, 4.2. and 4.3.

<sup>42</sup> Pit, supra n. 3, section 5, 5.1.

<sup>43</sup> COM(2016)686final, cit., Art. 5(1)

<sup>44</sup> Explanatory Memorandum, at p. 8

<sup>45</sup> COM(2016)686final, cit., Art. 3(3)(e)(i)

<sup>46</sup> COM(2016)686final, cit., Preamble, Recital (4)

the specific tax year affected, given the overall timeframe of the procedural mechanisms (which may take more than 4 years). As Art. 15(2) of the proposal makes it clear that, *pending the procedures* set out in the proposal, the taxpayer could still be subject to administrative or judicial proceedings in the involved Member States, he could avoid these proceedings only by complying with all (tax reporting and payment) obligations under domestic laws of both jurisdictions (despite the situation which he considers gives rise to double taxation) until the last procedural phase is concluded. Art. 14 4), by leaving to the taxpayer with the *ex post* onus of enforcing the final decision under the law of the Member State which would have to give up its tax claim, demonstrates that, from the taxpayer's viewpoint, the procedural mechanism would certainly not be equivalent to an *ex ante* legal certainty of not bearing tax obligations in one of the jurisdictions.

Nonetheless, due the wording of the proposed Directive referring generically to “any taxpayers subject to *double taxation*”, the fact that the proposal does not meet the two conditions indicated in section 2, *does not appear* to be sufficient, on its own, to conclude that it would fail to overcome the cases of juridical double taxation.

Specifically, the Explanatory Memorandum, taken together with Art. 1, with Art. 2, with Art. 3(3)d, with Art. 15(1) and with Art. 15(6) of the proposal governing “interactions with national proceedings and derogations”, as well as with specific statements in its Preamble, can give rise to at least two different interpretations about the possibility for the proposed Directive to eliminate double taxation through its procedural mechanism.

### 3.2. *The possible alternative interpretations*

The Explanatory Memorandum specifies that the proposed Directive would not replace existing mechanisms, and that Member States, whilst being provided with more detailed procedural provisions for the elimination of double taxation disputes, “are left with sufficient flexibility to agree amongst them *on a mechanism of their choice*”<sup>47</sup>.

A first interpretation, based on this wording, would seem to indicate that the proposed Directive would not replace the dispute resolution mechanisms set out in DTCs between Member States, but would only offer an *additional* procedural mechanism, so that national tax authorities could choose among all available mechanisms. This *first interpretation* would appear to be strengthened by Art. 3(3)d, requiring taxpayers to indicate the *applicable* DTCs in their complaint, and by Art. 15(6), whereby the submission of a case to the automatic dispute resolution procedure set out in the proposal would put an end to any ongoing MAP or dispute resolution procedure on the same dispute in case the same Member States are concerned. National tax authorities would thus be able to switch from a MAP under a DTC, which therefore would remain in force, to the procedure set out in the proposal. This first interpretation would also imply that, where a DTC does not contain a mandatory arbitration clause, the MAP provided for by the DTC would *not be automatically superseded* by the mandatory arbitration set out in the proposal, *unless* at least one of the tax authorities agrees to do so as part of their “*choice*” (in the wording of the Explanatory Memorandum) among all available mechanisms and procedures.

A second, alternative interpretation, however, appears to be suggested by specific statements in the Preamble: the interpretation whereby, *whenever* the mechanisms of DTCs prove inadequate to eliminate all kinds of double taxation, these mechanisms are replaced by the automatic arbitration procedure set out by the proposal. In fact, the Preamble acknowledges the inadequacy of the mechanisms provided for in DTC to ensure the elimination of double taxation in a *timely* manner in *all* cases, as well as the needs to ensure that taxpayers are not taxed twice on the same income and that mechanisms on dispute resolution are comprehensive, effective and sustainable<sup>48</sup>. Such an interpretation also appears to be

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<sup>47</sup> Explanatory Memorandum, at 3

<sup>48</sup> COM(2016) 686 final, cit., Preamble, Recital (3)

suggested by the comprehensive definition of double taxation set out in Art. 2(3), which implicitly can embrace both economic and juridical double taxation, and by Art. 15(1), whereby “the fact that a decision causing double taxation taken by a Member State becomes final according to national law shall not prevent the taxpayers from having recourse to the *procedures* provided for in this Directive”. If this statement is considered as referring to the complaint phase, it appears to be necessary in order not to deprive the proposal of its own purpose. However, if read in relation to *all* procedures set out in the proposal, including the automatic arbitration, it strengthens the interpretation whereby these procedures should always apply if the mechanisms provided for in DTC prove inadequate.

Under this second interpretation, the proposal would obviously be capable of eliminating the juridical double taxation arising out of parallel, non-discriminatory exercise of taxing powers. The fact that the ECJ, in the relevant case-law, relied on DTCs<sup>49</sup>, implies that, should this kind of situation arise again in the future, the arbitration procedure set out by the proposed Directive would automatically apply whenever the bilateral DTC lacks a mandatory arbitration clause, and would thus leave no space for the outcome that occurred in *Kerckhaert and Morres*, or *Dameseux*, etc..

The first interpretation would be more favourable for Member States’ revenues, the second more favourable for taxpayers.

Although taxpayer – if tax authorities adopted the first interpretation – could arguably bring their case before the ECJ in the event of failure to eliminate juridical double taxation (on the ground of allegedly improper interpretation of the provisions above indicated), this route would not necessarily be the most attractive to taxpayers.

It appears thus necessary to examine to what extent - if the proposal were introduced with its current wording and if tax authorities and national courts adopted the first interpretation – the proposal could still be suitable for eliminating juridical double taxation.

#### **4. The cases of parallel, non-discriminatory exercise of taxing powers vs. the Commission’s proposal: critical issues**

As already mentioned, the Commission’s proposal, due to its own choice to focus on business profits, would not cover individual taxpayers gaining non-business incomes (or holding non-business assets subject to taxation)<sup>50</sup> in other Member States. Moreover, for *business* taxpayers in a Member State, inbound dividends received from other Member States often enjoy a participation exemption. In this case – at least for (individual and corporate) business taxpayers - the situations of juridical double taxation on cross-border dividend payments (which have been occurring in the majority of cases)<sup>51</sup>, would not even risk arising.

Nevertheless, the ECJ case-law has clarified important points. Firstly, Member States retain the freedom to switch from the exemption method to the credit method and to apply different methods for domestic and for inbound EU dividends if they so wish<sup>52</sup>. Secondly, the ECJ does not have jurisdiction, under Article 267 TFEU, to rule on a possible infringement, by a contracting Member State, of provisions of DTCs entered into with another Member States<sup>53</sup>. Lastly, the ECJ may not examine the

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<sup>49</sup> Supra, part 2

<sup>50</sup> As in the *Block* (C-67/68) case.

<sup>51</sup> Supra, part 2

<sup>52</sup> DE: ECJ 11 Sep. 2014, Case C-47/12, *Kronos International Inc. v. Finanzamt Leverkusen* [2014] ECR I-2220, ECJ Case Law IBFD, para. 66-67

<sup>53</sup> DE: ECJ 6 Dec. 2007, Case C-298/05 *Columbus Container Services BVBA & Co. v. Finanzamt Bielefeld Innestadt* [2007] ECR I-10451, ECJ Case Law IBFD, para. 46

relationship between a national measure and the provisions of a DTC since that question does not fall within the scope of the interpretation of EU law<sup>54</sup>.

As a result of such findings, the question as to whether the juridical double taxation at stake could be eliminated through the proposed Directive, would remain important *whenever* a Member State does not adopt – for business taxpayers - the exemption method for income arising in other Member States or does not credit foreign taxes, even if this situation derives from a change in the domestic legislation which defeats a tax credit provided for by a DTC. E.g., in *Damseux*, despite the existence of a DTC between Belgium and France, which DTC provided for a tax credit for withholding tax at source, Belgium, as a jurisdiction which would have been responsible for granting the tax credit, had argued that this DTC merely memorialized reliefs previously granted under domestic provisions, without creating new rights for taxpayers, and Belgian courts had held that, as a result, subsequent national legislation repealing those reliefs did not infringe the DTC<sup>55</sup>. Ultimately, the domestic (Belgian) courts had interpreted the DTC as allowing juridical double taxation (according to this line of reasoning)<sup>56</sup>. The situation was nearly identical in *Levy and Sebbag*, where the DTC provided for a tax credit in accordance with rules set out in Belgian legislation for dividends, and Belgian legislation had subsequently removed the tax credit<sup>57</sup>.

However, in all such cases of juridical double taxation, there were common features: the concerned taxpayer had brought the allegation of infringement of the free movement of capitals before a court of his residence State; he had not mentioned the existence of a MAP in the DTC; the internal provisions of the source State levying the (withholding) tax had not been called into question.

Against this background, Art. 3 of the proposal – by requiring the taxpayer to indicate the circumstances giving rise to double taxation, the internal rules of the two jurisdictions and the provisions of the applicable DTCs - would seem to give rise to two critical issues. The solutions to these issues, would determine whether juridical double taxation could be eliminated through the proposed Directive even in case its provisions were intended according to the first interpretation indicated in 3.2. above .

A first issue is whether the proposal would leave the tax authorities free to reject the complaint (and would also leave the courts in both Member States free to reject an appeal by the taxpayer), thereby failing to eliminate the juridical double taxation at stake, on the ground that the proposed Directive is not a “unifying or harmonising” EU measure attributing the competence to eliminate double taxation to one of the two countries (a measure that would have needed to exist, according to the ECJ wording in the above rulings, for the ECJ itself to find juridical double taxation to be incompatible with fundamental freedoms).

Secondly, the issue seems to arise as to whether (a national tax authority could accept the complaint, or) a competent court in at least one of the involved Member States could uphold the appeal, due to the arbitration procedure which did not exist (or, in any case, which was not invoked by the concerned taxpayer) in the situations examined by the ECJ, or due to the ECJ’s mentioning of the Arbitration Convention in *Karcheart and Morres* and in *Damseaux* as an example of measure eliminating double taxation (but not applicable to the situation at stake), and/or due to other ECJ case-law relating to the elimination of withholding taxes on outbound dividends in the source States. A successful appeal would pave the way for the arbitration procedure, thus for the proposed Directive to succeed in eliminating juridical double taxation.

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<sup>54</sup> *Columbus Containers* (C-298/05), para. 47

<sup>55</sup> P.Smet and H.Laloo, *ECJ to Rule on Taxation of Inbound Dividends in Belgium*, 45 *European Taxn.* 4, 158-159 (2005), *Journals IBFD*.

<sup>56</sup> *Damseux* (C-128/08), para. 14 and 23

<sup>57</sup> *Levy and Sebbag* (C-540/11), para. 5

Tentative responses to these two issues are suggested below.

### **5. The end of parallel-non discriminatory double taxation, or the parallel, non-discriminatory exercise of taxing rights as a limit to the effectiveness of the proposed Directive ?**

As regards the first issue, the starting point would be that, as highlighted in part 3, a key reason under Art. 5 of the proposed Directive for rejection of a complaint by one or both the concerned tax authorities, and for rejection of an appeal brought by a taxpayer before a domestic court, would be that tax authorities and domestic courts do not believe, unlike the taxpayer, that in the concrete case there is a situation of double taxation to be eliminated according to internal provisions and according to the DTC between the involved jurisdictions.

E.g., if a business taxpayer falling outside the scope of the Parent-Subsidiary Directive, in his complaint, explained that a situation of double taxation arises because its residence State denies him a tax credit on inbound (intra-EU) dividends against a withholding tax paid in another Member State, despite a DTC between the two countries providing for a tax credit, the response of the tax authority could be expected to take into account domestic provisions (as already affected by the ECJ case-law or potentially in breach of ECJ case-law) and to vary in two alternative scenarios. In a first hypothesis, if the denial of the relief operates only for intra-EU dividends and not for domestic dividends, and if the DTC introduced the right to a tax credit *irrespective of* pre-existing national provisions, the tax authority could arguably accept the complaint, and, in case of rejection, the taxpayer may reasonably be expected to win the appeal before a domestic court. This would hold true, in particular, in a monistic jurisdiction where international treaties prevail over different domestic provisions by virtue of the domestic Constitution itself<sup>58</sup>. In fact, he would be able to argue *both* that the situation would lead to a discriminatory double-taxation of intra-EU dividends vis-à-vis domestic dividends, *and* that a provision of the DTC would be breached: this aspect would mark a significant difference in comparison not only with the scenarios in *Kaerckaert and Morres* or in *Damseaux* or in *Levy & Sebbag* but also with the situation in *Haribo and Salinen*, where, despite there was a disparity of treatment between domestic and foreign withholding taxes, the DTC was not invoked<sup>59</sup>.

Nonetheless, in a second hypothesis, if the relief was denied both for domestic and for intra-EU dividends, and if the DTC did not create a new right unrelated to national law, the situation would be exactly the one at stake in *Kaerckaert and Morres* or in *Damseux* or in *Levy & Sebbag*. In this case, the tax authority of the residence State could reject the complaint (and the domestic court could reject the appeal), if the taxpayer stated, in its complaint under Art. 3, that juridical double taxation should be eliminated due to its hindering the free movement of capitals. The national tax authority would in fact be able to refer exactly to the ECJ's wording in those rulings, on the ground both that a general EU measure directly attributing the responsibility to eliminate juridical double taxation to one of the two jurisdictions is still lacking, and that the provisions on free movement of capitals cannot be used for this purpose. In the proposal, there would appear to be no provision preventing the tax authority, and the domestic courts, from arguing that this double taxation, although creating a *de facto* disadvantage for the taxpayer, in *legal terms is not a double taxation to be eliminated* under domestic provisions (left unaffected by the ECJ case-law) and *under the applicable DTC*: this could be a situation where, under Art. 5 of the proposed Directive, the *absence of double taxation* could be the ground for rejection.

Obviously, this ground for rejection could also be used by the tax authority of the source State (and, when hearing an appeal, by a domestic court in this State), thereby leading to the closing of the procedure and to the inability of the proposed Directive, in this situation, to eliminate juridical double

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<sup>58</sup> Such as, e.g., in France, Spain or Italy. On the difference between monistic and dualistic systems, inter alia: D.Jancic, *Recasting monism and dualism in European Parliamentary Law: The Lisbon Treaty in Britain and France*, 2013, LSE Research Online, at 8 ss.

<sup>59</sup> *Haribo and Salinen* (C-436/08 and 437/08), para. 154-173

taxation. It could *not be sufficient*, for the taxpayer to escape this outcome, to point out in the complaint and in the appeal that the ECJ also mentioned the Arbitration Convention as an example of measure eliminating double taxation<sup>60</sup>, and to argue that the proposed Directive would ultimately be an extension of the scope of the Arbitration Convention outside transfer pricing. In fact, the Arbitration Convention as a multilateral treaty has the specific objective of eliminating economic double taxation arising out of transfer pricing adjustments and it has the same role that would be played by an EU measure directly attributing the responsibility to do so to one of the States, which measure could not be introduced because the determination of the arm's length price in transfer pricing disputes could only be made on a case-by-case basis. Conversely, the proposed Directive – due to its covering situations different from transfer pricing – only sets out a procedural mechanism to be used for *any* situations where a general substantive EU measure eliminating double taxation could well be introduced, but has not been introduced to date. In a similar situation, the ECJ's rulings under consideration could be a limit to the effectiveness of the proposed Directive, due to the impossibility both of equating the proposed Directive with the Arbitration Convention from the viewpoint of its (in)ability to replace a substantive measure eliminating double taxation, and of relying on provisions on fundamental freedoms. On these bases, the response to the first question above raised in section 4 would thus appear to be in the affirmative, at least *if* the applicable DTC between the two concerned jurisdictions – which DTC would need to be indicated by the taxpayer in its complaint addressed to tax authorities under Art. 3 - *does not contain* a mandatory arbitration procedure.

In this respect, it could still be observed that if, in the situations considered by the ECJ in the rulings at stake, the bilateral DTC had included a mandatory arbitration clause, the taxpayer would arguably have resorted to this clause and the DTC could have been able to eliminate the juridical double taxation: as a result, given the emphases that, in the absence of a general harmonizing EU measure attributing the individual Member States the responsibility of eliminating double taxation, the ECJ placed on DTCs on those rulings, the ECJ could have come to a different conclusion<sup>61</sup>. The same argument could be made based on the view that the ECJ, as regards juridical double taxation, simply intended to respect all efforts made by the OECD to devise mechanisms capable of eliminating juridical double taxation<sup>62</sup>. Consequently, the concerned taxpayer, in event of a bilateral DTC including a mandatory arbitration procedure, could convincingly use this argument, which, if accepted by a tax authority (or, in case of appeal against a rejection, if accepted by court in at least one of the involved countries), would lead to the MAP set out by the proposed Directive and to its automatic mandatory arbitration procedure, and it would thus imply the elimination of juridical double taxation. In other words, it is submitted that, only where the DTC at issue includes a mandatory arbitration procedure, the *application* of the automatic arbitration procedure provided for by the proposal could replace – and be more effective than – the arbitration procedure included in the DTC<sup>63</sup>. This would further imply that, should even more Member States commit to introducing a mandatory arbitration clause in their bilateral DTCs with each other as a result of Action 14 of the BEPS Action Plan and should they *actually* introduce this clause, the possibilities for the proposed Directive to eliminate juridical double taxation via arbitration would correspondingly increase, to extend to all cases arising between Member States which have introduced a mandatory arbitration clause in DTC between themselves.

Moreover, and as a consequence of this first conclusion, the response to the second issue (raised in part 4) seems to depend on whether, in the concrete case, there is any *other* difference between the situations at stake in the ECJ's rulings (and the allegations made by taxpayers in those situations) on the one hand, and the allegations made by taxpayers in the complaint to tax authorities under Art. 3 of the proposal (and in the appeal against rejection under Art. 5), on the other hand. In this respect, apart

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<sup>60</sup> *Kerchaert and Morres* (C-513/04), para. 22; *Damseaux* (C-128/08), para. 28

<sup>61</sup> Cerioni, *supra* n. 21, section 4, 4.2.

<sup>62</sup> Panayi, *supra* note 16, at p. 252

<sup>63</sup> If the first interpretation indicated in 3.2. were followed by tax authorities and courts.

from the case of a DTC containing a mandatory arbitration clause, two potential routes seems to be available.

Firstly, the taxpayer - without alleging breach of specific fundamental freedoms – could still argue, in the event of introduction of the proposed Directive in its current version, that this Directive ultimately is one of the measures intended to remove an obstacle (double taxation) to the working of the internal market, and thus to ensure the functioning of an internal market without internal frontiers under Art. 26 TFEU<sup>64</sup>. Because this provision was not invoked in the rulings dealing with juridical double taxation, and therefore was not mentioned in the ECJ's reasoning, the tax authorities receiving the complaint, or in case of appeal (against a rejection) the domestic courts hearing the appeal, would be able to find all margins for appreciating the merit of the complaint and for assessing whether the internal provisions giving rise to double taxation, and the DTC at stake leaving the risk of this outcome, would be inconsistent with a measure aimed at achieving the objective indicated in Art. 26. In the author's view, the negative response that, in *Levy and Sebbag*, the ECJ gave to the question as to whether Art. 4(3) of the TEU (whereby Member States should abstain from measures jeopardising the achievement of the Treaty's objectives) had been breached by a subsequent amendment in domestic legislation resulting in the reintroduction of a juridical double taxation previously eliminated by a DTC<sup>65</sup>, is not sufficient to conclude that tax authorities should reject a complaint based on an infringement of a measure concretely aimed at pursuing the objective stated in Art. 26. Art. 4(3) – which refers generically to “the Union's objectives” - should be intended as an expression of the general public international law principle of “*pacta sunt servanda*” and should be seen as having a declaratory or programmatic character<sup>66</sup>; it was indeed regarded as such in *Levy and Sebbag* when the ECJ stated that Art. 4(3) only sets a general obligation whose concrete contents depends, from case to case, on other Treaty provisions or on secondary legislation<sup>67</sup>. Nevertheless, Art. 26, if taken in conjunction with specific statements the Preamble of the proposed Directive<sup>68</sup>, could be seen as setting a specific fundamental objective, to be concretely achieved, among other, through an hoc measure such as the (proposed) Directive.

Secondly, the taxpayer could rely on those ECJ rulings dealing with national provisions of the source state (i.e., of the residence state of the paying company) which had applied withholding tax to outbound cross-border dividends but not on domestic dividends, as it occurred, e.g., in the 2006 *Denkavit International* ruling<sup>69</sup>, in the 2007 *Amurta* ruling<sup>70</sup> or the 2012 *Santander* ruling<sup>71</sup>. In those rulings, the ECJ had found in essence that, in respect of outbound cross-border dividends falling outside the purpose of the Parent-Subsidiary Directive, once the source state, unilaterally or under a DTC allowing it to do so, taxes non-resident shareholders on dividends which they receive from resident companies, the position of these non-resident shareholders become comparable to the position of resident shareholders<sup>72</sup>. On those bases, it had ruled that, *irrespective of any taxation* in the Member State of

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<sup>64</sup> Supra, part 2

<sup>65</sup> For an analysis of the case, K.Daxhofer and E.Huisman, *Levy & Sebbag: The ECJ Has Once Again Been Asked To Deliver Its Opinion on Juridical Double Taxation in the Internal Market*, 53 Eur. Taxn. 8, 400 (2013), Journals IBFD.

<sup>66</sup> Daxhofer et al., supra n. 64, section 3, 3.3.

<sup>67</sup> *Levy and Sebbag* (C-540/11), para. 26-29

<sup>68</sup> COM(2016) 686 final, cit., Preamble, Recital (3)

<sup>69</sup> FR: ECJ 14 Dec. 2006, Case C-170/05, *Denkavit International and Denkavit France SARL v Ministere de l'Économie, des Finances et de l'Industrie* [2006] ECR I-11949, ECJ Case Law IBFD

<sup>70</sup> NL: ECJ 8 Nov. 2007, Case C-379/05, *Amurta SGPS v. Inspecteur van de Belastingdienst/Amsterdam*, [2007] ECR I-9569, ECJ Case Law IBFD

<sup>71</sup> FR: ECJ 10 May 2012, Joined Cases C-338/11 to C-347/11, *Santander Asset Management SGIIC SA, on behalf of FIM Santander Top 25 Euro Fi (C-338/11) v Directeur des résidents à l'étranger et des services généraux and Santander Asset Management SGIIC SA, on behalf of Cartera Mobiliaria SA SICAV (C-339/11 to C-347/11) and Others v Ministre du Budget, des Comptes publics, de la Fonction publique et de la Réforme de l'État* [2012]ECLI: EU: C: 2012: 286, ECJ Case Law IBFD

<sup>72</sup> *Denkavit International (C-170/05)*, para. 35; *Amurta (C-379/05)* para. 38

residence, economic double taxation would arise only because of the exercise by the source State of its taxing powers, and it had eventually concluded that non-resident (corporate) shareholders would be subject to an unjustifiable restriction of the free movement of capitals if the source state ensured the elimination of economic double taxation only for domestic distributions and not for cross-border outbound distributions<sup>73</sup>.

Although the ECJ in those cases took into account only the situation in the source state regardless of the situation in the residence State (“single country approach”), if one considers the overall cross-border situation of the concerned non-resident taxpayers, it could be realized that a situation of *economic double taxation* in the source State - caused by the application of a withholding tax - determines the overall situation of *juridical double taxation* arising from parallel, non-discriminatory taxing powers if the residence state does not grant relief for the withholding tax paid in the source state.

As a result, the elimination of economic double taxation in the source state would result, at practical level, in the elimination of the juridical double taxation at stake. The concerned taxpayer could therefore indicate, in his complaint under Art. 3 of the proposed Directive, that the situation of double taxation is determined by a situation of *economic double taxation* in the source state in circumstances where, according to ECJ case-law, this should not arise.

If the complaint were so motivated, it would arguably be inevitable for national tax authorities or (as a matter of consistency with ECJ case-law) at least for national courts hearing the appeal, to acknowledge the legitimacy of the taxpayer’s claim. This, under the proposed Directive, would determine the opening of the MAP and would lead, in the absence of an agreement, to the automatic arbitration.

## 6. Desirable improvements to the current version

Apart from the possibility for the concerned taxpayers of drafting the complaint as above indicated, if the proposed Directive is assessed by supposing that the first interpretation indicated in 3.2. were to apply, its effectiveness would end up being improved to a higher extent, the greater the number of Member States which will include mandatory arbitration clauses in their bilateral DTCs in the context of the efforts to improve disputes resolution mechanisms (consistently with Action 14 of the OECD BEPS Action Plan).

Lacking the introduction of a mandatory arbitration clause by *all* Member States in their DTCs with each other, the proposed Directive could still manage to be an instrument for a uniform elimination of juridical double taxation within the EU – without the need for taxpayers to bring interpretative issues before the ECJ - if it were amended in three key provisions.

Specifically, Art. 15, dealing with the interaction between the proposed Directive and national proceedings, would need to be supplemented by a provision specifying that the automatic arbitration procedure set out in Art. 6 *always* applies, irrespective of whether or not the DTC applicable between the two concerned jurisdictions contains a mandatory arbitration procedure. This simple amendment would completely clarify that the second interpretation indicated in 3.2. (the more favourable to taxpayers) should apply, i.e. would clarify that the automatic arbitration procedure set out in the proposal not only *replaces* any mandatory arbitration clause already existing in current bilateral DTCs

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<sup>73</sup> *Denkavit International* (C-170/05), para. 56; *Amurta* (C-379/05) para 84; *Santander* (C-338/11 to C-347/11), para. 55

– which is already evident in Art. 6(5) – but also *takes over the role of* a mandatory arbitration clause in case of bilateral DTCs which do not provide it.

This amendment would also clarify that the DTCs to be indicated in the complaint under Art. 3 remain applicable *only* as far as their provisions distributing taxing powers are concerned, and it would *always* make the situations, for which a complaint is raised, different from those at stake in the ECJ's rulings dealing with juridical double taxation. This would restrict the scope for rejection of the complaint by tax authorities, or of appeal by the courts, to probably (very few) cases in which the taxpayer *wrongly* (i.e. by virtue of an error on factual circumstances) considered any double taxation to be in existence.

Secondly, Art. 14(4), which currently would leave the taxpayer with the burden of administrative or judicial enforcement of the final decision (after having suffered double taxation pending the procedure)<sup>74</sup>, would arguably need to be replaced by a new provision. This should state that the taxpayer would be *automatically* entitled to the retrospective refund of all taxes, with interests, which he has paid as a result of the act giving rise to double taxation, and which become retrospectively undue at the conclusion of all procedural steps. In this way, the proposal would manage, although only *ex post*, to achieve an outcome comparable to that of a dispute resolution mechanism allowing a settlement before the deadline for compliance with tax obligations in both Member States concerned.

A last amendment should obviously broaden the subjective scope of the proposed Directive (under Art. 1), to include *non-business* taxpayers too. This would always prevent even individuals receiving non-business income (or holding assets taxed in another EU country) from ending up in situations of (partly) unrelieved juridical double taxation.

## 7. Conclusions

The proposed Directive on Double Taxation Dispute Resolution Mechanisms – in light of its provisions – would seem not to meet to the two cumulative conditions highlighted in section 2, and which would be necessary to achieve the same outcome as a (still lacking) harmonising Directive on the general attribution of the competence to eliminate juridical double taxation outside the scope of the specific measures already introduced. It also would seem to raise interpretative doubts affecting the assessment of its ability to eliminate all kinds of (economic and juridical) double taxation.

Nevertheless, the taxpayer could, ultimately, still manage (apart from the timing aspect) to achieve this purpose by using the (proposed) Directive (should it be introduced with the current provisions), through an appropriate motivation of his complaint under the proposed Art. 3, and this result could be achieved uniformly throughout the EU to a greater extent the higher the number of jurisdictions that will include a mandatory arbitration clause in their DTCs consistently with Action 14 of the BEPS Action Plan.

Otherwise, specific amendments would be appropriate, for (overcoming the interpretative issues that may currently arise and) ensuring that – irrespective of the DTCs at stake – the procedure set out in the proposed Directive be always effective in timely eliminating juridical double taxation too, and for including, within the subjective scope of application, non-business income as well.

These improvements to the current version would make it possible for the proposed Directive to fully eliminate all possible cases of double taxation, thereby giving a decisive contribution to the proper functioning of the internal market.

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<sup>74</sup> Supra 3, 3.1.

