ARTICLE

Taxpayer Rights and Taxpayer Participation in Procedures Under the Dispute Resolution Directive

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The article examines the compatibility of the provisions of the Dispute Resolution Directive with the fair trial guarantees provided by the EU Charter of Fundamental Rights and the impact that the recent case law of the CJEU on the extent of its own competence may have on the design of the dispute resolution mechanism that the Directive provides for.

1 Introduction

The adoption of Council Directive (EU) 2017/1852 of 10 October 2017 on tax dispute resolution mechanisms in the European Union[1] (hereinafter: the Directive or the DRD) constitutes a major step forward as far as international tax treaty dispute resolution is concerned. The European Union, in the post-BEPS era, has moved towards the establishment of an improved mechanism for the resolution of double tax treaty disputes, as compared to the existing mutual agreement procedures (MAP) and arbitration procedures contained in the double taxation agreements and the MAP and arbitration procedure provided for in the Arbitration Convention.[2]

Indeed, the new instrument not only lays down effective procedures for the resolution of disputes concerning the application and interpretation of agreements and conventions that provide for the elimination of double taxation of income and, where applicable, capital; it also lays down, and this is the first time that this has been mentioned explicitly in the subject matter and scope of an instrument dealing with international tax dispute resolution, the rights and obligations of the affected persons when such disputes arise.[3] This is particularly important in the area of tax treaty dispute resolution, a procedure that is traditionally understood, designed and implemented as a state-to-state procedure, in which the affected taxpayer, lacking international law standing, may not be a party and is only marginally involved.[4]

There is an explicit acknowledgement of taxpayer rights in the Directive; in Recital 9 of the Directive particular reference is made to the right to a fair trial and the right to conduct business. Since the directive concerns a dispute resolution procedure, the right to a fair trial is particularly relevant, and therefore this article will focus on it, and in particular on the participation of the taxpayer in the procedures under the Directive (below, at section 2).

At the same time, certain recent developments in the case law of the Court of Justice of the European Union (CJEU) have taken place that clarify the competence to decide cases on the application and interpretation of double taxation agreements. This case law may affect, to a greater or lesser extent, any dispute resolution mechanism in the EU. The DRD, providing a dispute resolution mechanism for a particular set of disputes, needs to be examined in the light of this case law; therefore, these

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1 Council Directive (EU) 2017/1852 of 10 Oct. 2017 on tax dispute resolution mechanisms in the European Union, OJ L 265/1 1–14 (14 Oct. 2017).

2 For an analysis of the provisions of the Dispute Resolution Directive *see* P. Pistone, *Chapter 8, The Settlement of Cross-Border Tax Disputes in the European Union*, in *European Tax Law – Volume 1: General Topics and Direct Taxation* 331 et seq. (B. J. M. Terra, et al. eds, Kluwer 2018); for a comparison of the DRD provisions with those of the EU Arbitration Convention *see* the analysis in H. M. Pit, *Dispute Resolution in the EU: The EU Arbitration Convention and the Dispute Resolution Directive*, Doctoral Series Vol. 42 1537 et seq. (IBFD 2018).

3 *See* Art. 1 of the Directive entitled 'subject matter and scope'.

4 It is sufficient to refer here to the position in the OECD Model Tax Convention (2017): Commentary on Art. 25, at para. 36, where it mentioned that '[i]n its second stage – which opens with the approach to the competent authority of the other State by the competent authority to which the taxpayer has applied – the procedure is henceforward at the level of dealings between States, as if, so to speak, the State to which the complaint was presented had given it its backing. … [T]his procedure is indisputably a procedure between States (…)' (emphasis added).

CJEU judgments need to be examined carefully (below in section 3).

Taking into account this two-pronged analysis, certain improvements to the Directive may be considered as desirable (below in section 4).[5]

2 Taxpayer rights under the dispute resolution directive

2.1 *General Remarks*

There is a gap in the protection of the (procedural) taxpayer rights in the tax treaty dispute resolution mechanism, namely in the MAP, as complemented by arbitration. The gap lies in the fact that, although an individual MAP case directly involves a taxpayer, that taxpayer does not have any concrete rights as far as the procedure is concerned, other than the right to initiate it. This gap, directly related to the right to a fair trial, guaranteed by the European Convention of Human Rights and, particularly in the EU, by the Charter of Fundamental Rights, has been identified as a major handicap of the MAP and arbitration procedures.[6] Proposals for addressing this gap in the protection of taxpayers' rights have been put forward, calling for an enhancement of the level of participation of the taxpayer in the MAP and arbitration procedures.[7]

Against this backdrop, it is of particular importance that the European Commission, in taking the initiative to propose a directive for the resolution of double tax treaty disputes within the EU, pays special attention to the protection of taxpayer rights. As mentioned in the recitals,[8] the Directive respects the fundamental rights and observes the principles recognized in particular by the Charter of Fundamental Rights of the European Union and seeks to ensure full respect for the right to a fair trial[9] and the freedom to conduct a business.

2.2 *The Taxpayers' Right to a Fair Trial Under the EU Charter of Fundamental Rights*

With the entry into force of the Treaty of Lisbon, on 1 December 2009, the Charter of Fundamental Rights of the European Union (EUCFR or Charter)[10] became legally binding on the EU institutions and on national governments, just like the EU Treaties themselves.[11] There can be no doubt, and this is already indicated by the recitals of the directive itself, that tax proceedings forming part of EU law, just like the ones provided for in the dispute resolution Directive, are indeed covered by the provisions of the Charter.[12]

The Charter includes a wide variety of rights and guarantees; as far as the subject matter of the DRD is concerned, though, the right to an effective remedy and the right to a fair trial are particularly relevant.

Article 47 of the Charter provides for the right to an effective remedy and the right to a fair trial. The provisions of article 47 EUCFR correspond to those of articles 13 and 6(1) ECHR, with one major difference: in Union law the right to a fair trial includes in its scope tax matters. Indeed, within the EU, the fair trial guarantees cannot be limited to only some or just one category of disputes, excluding from their scope of protection whole categories.[13] In all other respects, the guarantees afforded by the ECHR apply in a similar way to the Union.[14] Therefore, and as a result of the application of the EUCFR, taxpayers are afforded greater protection under

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5 Taking into account the fact that the deadline for the transposition of the Directive is the 30th of June 2019, according to Art. 22 of the Directive, with a view to its application to any complaints submitted from 1 July 2019 onwards relating to questions of dispute relating to income or capital earned in a tax year commencing on or after 1 Jan. 2018 (according to Art. 23 of the Directive), it is important that certain issues are clarified, so that, once applicable, the procedure provides certainty for all parties involved.

6 *See* for a summary of this discussion, K. Perrou, Chapter 11: Participation of the Taxpayer in MAP and Arbitration: Handicaps and Prospects in International Arbitration in Tax Matters 287 et seq. (M. Lang et al. eds, IBFD 2016).

7 *See* the proposals in K. Perrou, *Taxpayer Participation in Tax Treaty Dispute Resolution*, Doctoral Series Vol. 28 (IBFD 2014); P. Baker & P. Pistone, *BEPS Action 16: The Taxpayers' Right to an Effective Legal Remedy Under European Law in Cross-Border Situations,* 25(5/6) EC Tax Rev. 335–45 (2016); G. Almeida, *Should Taxpayers Have Access to the International Tax Arbitration Procedure?* Proceedings of the 10th International RAIS Conference on Social Sciences and Humanities, ASSEHR Vol. 211. (Atlantis Press 22 Aug. 2018).

8 *See* recital number 9 of the Directive.

9 *See also* the discussion in S. Dorigo, *Taxpayers' Rights: The Growing Recognition of the Right to a Fair Trial in Tax Controversies in the European Union*, 87 Tax Notes Int'l 795–99 (2017) and J. Voje, *EU Tax Dispute Resolution Directive (2017/1852): Paving the Path Toward a European Tax Court?*, 58(7) Eur. Tax'n 309–18 (2018).

10 Charter of Fundamental Rights of the European Union, OJ C 326/391 (26 Oct. 2012).

11 *See* Art. 6(1) Treaty on European Union (TEU).

12 On the impact of EU Charter of Fundamental Rights on the rights of taxpayers *see* Pistone, *Chapter 4, The EU Charter of Fundamental Rights, General Principles of EU Law and Taxation*, in *European Tax Law*, *supra* n. 2, at 153 et seq. On the impact of the entry into force of the Lisbon Treaty on the ECJ's approach to fundamental rights, *see* S. Besson, *Chapter 1: The Human Rights Competence in the EU The State of the Question after Lisbon*, in: *Human Rights and Taxation in Europe and the World* Greit Series 37 et seq. (G. Kofler, M. Poiares Maduro & P. Pistone eds, IBFD 2011); S. Iglesias Sánchez, *The Court and the Charter: The Impact of the Entry into Force of the Lisbon Treaty on the ECJ's Approach to Fundamental Rights*, 49(5) Com. Mkt L. Rev. 1565(2012); for the impact of the EUCFR on tax proceedings *see* A. van de Vijver, *International Double (Non-)taxation: Comparative Guidance from European Legal Principles,* 24(5) EC Tax Rev. 240–57 (2015); E. Poelmann, *Some Fiscal Issues of the Charter of Fundamental Rights of the European Union*, 43(2) *Intertax* 173–78 (2015); L. Sabbi, *Country Note: The Reasonable Time of Tax Proceedings in the Italian Legal System,* 46(6/7) Intertax 584–93 (2018).

13 As stated by the LU: CJEU 23 Apr. 1986, Case C-294/83, *'Les Verts' v. European Parliament,* ECLI:EU:C:1986:166.

14 *See* the explanations provided under Art. 47 in the document *Explanations relating to the Charter of Fundamental Rights,* OJ C 303/17 (14 Dec. 2007); according to Art. 6(1) TEU these Explanations constitute authentic interpretation of the provisions of the Charter.

the Charter, as the *Ferrazzini* formula[15] can no longer be invoked within the EU.[16]

According to Article 47 of the Charter, everyone has the right to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law; and everyone shall have the possibility of being advised, defended and represented.[17] Access to an effective remedy is guaranteed only if someone is party to the proceedings before an independent tribunal and has the same control over the proceedings as the other party; this right entails a series of individual rights that complement each other.[18] Effectiveness, on the other hand, depends on the ability of a dispute resolution body to review all aspects of a case; on its ability to make a final and binding decision, that solves the dispute; and on the level of foreseeability and timeliness of the proceedings.[19]

2.3 *The Position of the Taxpayer Under the DRD*

Under the DRD, affected persons are not formally involved in the proceedings as parties. In a number of instances, however, they enjoy certain rights and guarantees that significantly enhance their position in relation to the MAP and arbitration under tax treaties or under the Arbitration Convention, in the sense that they have a higher level of control over the proceedings.[20]

In particular, pursuant to Article 3(1) of the Dispute Resolution Directive, taxpayers have the right to submit a complaint, initiating the dispute resolution procedure. Furthermore, under Article 5(3) of the Directive, in cases where all competent authorities of the Member States concerned have rejected the complaint, the affected person is entitled to appeal against the decision of the competent authorities of the Member States concerned in accordance with national rules. The taxpayer is therefore protected from any arbitrary rejection of his case as well as from the possible denial of the tax authorities to hear his case; it appears that if a case is eligible and the taxpayer wishes to employ the DRD mechanism, the tax authorities do not have any option to deny him access to that mechanism.

In addition, according to Article 6(1) of the Directive, an Advisory Commission shall be set up, in accordance with Article 8, by the competent authorities of the Member States involved, upon a request made by the affected person to those competent authorities. The competent authorities have no discretion as to whether to set up the Advisory Commission if the request submitted by the taxpayer is in conformity with the provisions of the Directive. This obligation is enforceable upon the competent authorities. According to Article 7 of the Directive, if an Advisory Commission is not set up within the period provided for in Article 6(1), the relevant affected person may apply to a competent court or to any other national appointing body designated in the national law of the Member State concerned, requesting that an Advisory Commission be set up. The same procedure is provided for the appointment of the independent persons and their substitutes.

Furthermore, according to Article 11(4) of the Directive, the procedure regarding the adoption of the Rules of Functioning is also ultimately controlled by the taxpayer. As provided for in the last sentence of Article 11(4), where the independent persons and the Chair have not agreed on

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[15] The *Ferrazzini* formula, contained in ECtHR 12 July 2001, case no. 44759/98, *Ferrazzini v. Italy*, para. 29 and reproduced in the subsequent case law of the Court in tax cases, reads as follows: 'the assessment of tax and the imposition of surcharges fall outside the scope of Article 6 under its civil head'. The judgment was heavily criticized in legal theory; *see* indicatively, P. Baker, *The Decision in Ferrazzini: Time to Reconsider the Application of the European Convention on Human Rights to Tax Matters*, 29(11) Intertax 360 (2001); P. Baker, *Should Article 6 ECHR (civil) Apply to Tax Proceedings?*, 29(6/7) Intertax 205 (2001); L. Gerard, *Sur l'applicabilité de l'article 6, volet civil, de la Convention européenne des droits de l'homme aux contentieux fiscaux: A propos de l'arrêt CEDH 12 juillet 2001 Ferrazzini c/Italie*, Revue de droit fiscal 447 (2002); E. Bates, *Article 6: Right to a Fair Trial (Case Comment)*, 27 Eur. L. Rev. 139 (2002); Case Comment, *Civil Procedure: Length of Taxation Proceedings – Civil Rights and Obligations*, Eur. Hum. Rts L. Rev. 104 (2002); N. Lee, *Time for Ferrazzini to be Reviewed?*, 6 Brit. Tax Rev.589 (2010); R. Attard, *Chapter 22: The Classification of Tax Disputes, Human Rights Implications*, in *Human Rights and Taxation in Europe and the World, supra* n. 12.

[16] *See* on this point B. J. M. Terra – P. J. Wattel, *European Tax Law* (Kluwer 2012), at s. 3.1.4; Pistone, *supra* n. 12, at 153 et seq. Baker has pointed out that the line of ECtHR jurisprudence establishing that Art. 6 ECHR does not apply to ordinary tax proceedings is balanced very precariously on very weak foundations; *see* Baker , *supra* n. 15, at 211. For a justification of the full extension of the ECHR's principles to taxation, *see* A. E. La Scala, *Chapter 32: The Taxpayer's Human Rights in the Examination of the European Court of Human Rights*, in *Legal Remedies in European Tax Law,* GEIT Series 495 et seq. (P. Pistone ed., IBFD 2009); M. G. de Flora, *Chapter 23: A New Vision on Exercising Taxing Powers and the Right to Fair Trial in Judicial Tax Procedures under Art. 6 ECHR*, in *Human Rights and Taxation in Europe and the World, supra* n. 12.

[17] The obligation imposed on the Member States in the second subparagraph of Art. 19(1) TEU, to provide remedies sufficient to ensure effective legal protection in the fields covered by Union law, corresponds to that right.

[18] On this issue *see* the examples detailed in K. Perrou, *Tax Law Disputes Before Investment Arbitration Panels: Practical Experience,* 56 Eur. Tax'n 10 (2016); as seen from the experience of investment arbitration panels, participation in the proceedings includes the right to nominate an equal number of arbitrators; to agree on the appointment of the president and of the secretary; to influence the rules of arbitration, the procedure and the timetable; to be present during the proceedings, either in person or through legal representatives, to be represented by counsel and to enjoy free communication with the members of the arbitration panel; to file reports, memorials, counter-memorials, and any other documentation relevant to the case; to submit observations and comments; to use expert opinions and witness reports; to examine witnesses and experts and to use interpreters; to have access to all the records (such as written transcripts of the oral proceedings, translations, minutes of meetings etc.).

[19] Compare D. de Carolis*, The EU Dispute Resolution Directive (2017/1852) and Fair Trial Protection under Art. 47 of the EU Charter of Fundamental Rights,* 58 Eur. Tax'n 11 (2018), at s. 3, where he discusses the substance of fair trial protection.

[20] *See* however, on the position of the taxpayer under the DRD, especially in comparison to the EU Arbitration Convention, the detailed analysis in Pit, *supra* n. 2, at s. 32.2, where he discusses the rights and involvement of affected persons during the five phases of the Dispute Resolution Directive in comparison with the current state of play under the EU Arbitration Convention. Pit submits that, similar to that Convention, under the Directive, affected persons do not have a real involvement during all of its five phases.

the Rules of Functioning or have not notified them to the affected person, the affected person or affected persons may apply to a competent court in one of the Member States concerned in order to obtain an order for the implementation of the Rules of Functioning.

As far as the oral hearings, the provision of information and the submission of evidence are concerned, Article 13(1) of the Directive provides that for the purposes of the procedure before the Advisory Commission, where the competent authorities of the Member States concerned agree, the affected person(s) concerned may provide the Advisory Commission or Alternative Dispute Resolution Commission with any information, evidence or documents that may be relevant for the decision. The affected person(s) and the competent authorities of the Member States concerned shall provide any information, evidence or documents upon request by the Advisory Commission or Alternative Dispute Resolution Commission.

Additionally, according to Article 13(2), affected persons shall appear or be represented before the Advisory Commission or Alternative Dispute Resolution Commission upon request by the respective Commission. Article 13(2) gives the affected persons the right to submit a request to appear or be represented before an Advisory Commission or Alternative Dispute Resolution Commission; such right, however, is only granted upon consent of the competent authorities of the Member States concerned. In the author's view, however, even though, legally, a competent authority has the right to deny the request of a taxpayer to appear before the dispute resolution body, in practice there seems to be little room for the competent authorities to deny such a request, once submitted. Indeed, with the exception of cases where such a request could constitute an abusive practice on the part of the affected taxpayer, a rejection of the taxpayer's request without any justification would be problematic.

Regarding the adoption of a final decision, the Directive once again provides for the involvement of the taxpayer. According to Article 15(3) of the Directive, in the absence of notification of the final decision on the resolution of the question in dispute to the affected person within thirty days of the decision having been taken, the affected person may appeal in its Member State of residence in accordance with the applicable national rules in order to obtain the final decision. In this way, the conclusion of the procedure is safeguarded. The implementation of the decision is also guaranteed, and ultimately made dependent on the taxpayer. Article 15, last indent, provides that where the final decision has not been implemented, the affected person may apply to the competent court of the Member State that failed to implement the final decision, in order to enforce implementation thereof.

Taking into account the aforementioned rights and guarantees provided for the taxpayer by the DRD, it appears that the DRD does indeed place the taxpayer in a better position as compared with the MAP and arbitration under tax treaties.

2.4 *Analysis: Fair Trial Guarantees Under the DRD*

As mentioned in section 2.2, the right to a fair trial is guaranteed in cases where a tax payer is granted access to an independent tribunal. In general, it appears that the Advisory Commission provided for in article 6 of the DRD,[21] has enough guarantees of independence. Indeed, the rules on the appointment of its members, on the duration of their term, the guarantees provided against outside pressure and the overall appearance of independence, are all capable of ensuring that the DRD Advisory Commission is independent from the competent authorities and from the affected taxpayer as well, qualifying it as an independent tribunal in the context of the right to a fair trial. In addition, the options and possibilities that the DRD offers for the involvement of the taxpayer are in many cases important and, also, enforceable and it appears that indeed the taxpayer has adequate control over the proceedings. Last but not least, the Rules of Functioning for the Advisory Commission or Alternative Dispute Resolution Commission, provided for in Article 11 of the Directive, allow Member States to agree to a higher level of taxpayer participation in the procedure and to grant wider protection of taxpayer rights in general.[22]

In this context, and subject to the adoption of certain fair trial guarantees in the Rules of Functioning, it appears that even if the taxpayer is not formally a party according to the provisions of the directive, he nevertheless in practice has enough control over all the stages of the procedure, that, in the author's opinion, amount to 'participation' in the context of the right to a fair trial. The full extent, however, of the compatibility of the procedure before the Advisory Commission with the fair trial guarantees can only be assessed after the Rules of Functioning are adopted.

In conclusion, the DRD has indeed extended the rights of the affected taxpayer, in the sense that the procedure before the Advisory Commission presents guarantees of independence, providing at the same time real control to the taxpayer over the development of the procedure. Therefore, it can be concluded that the DRD procedure respects the right to an effective remedy and to a fair trial guaranteed by the

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[21] There seems to be a lower standard for the Alternative Dispute Resolution Commission provided for in Art. 10 of the Directive; this choice, however, is not justified.

[22] Issues that could be agreed upon in the Rules of Functioning include, indicatively, the right of the taxpayer to participate on an equal footing, as compared to the competent tax authorities that are parties to the proceedings; the right of the taxpayer to participate in adversarial proceedings, by being present or represented before the Advisory Commission and whether the judgment delivered will be reasoned in every case, even when baseball arbitration is employed as the dispute resolution method.

EUCFR to a greater extent than these rights are respected under the current MAP and arbitration procedures.

The right to a fair trial, however, requires that the taxpayer has access to an independent court or tribunal that can decide his case in a binding manner. This aspect of the right to a fair trial, the requirement that a taxpayer is party to proceedings before a court or tribunal, has not been clarified, as far as the DRD is concerned. In particular, to date, the issue of whether Member States have the obligation to provide for the participation of the taxpayer as a proper party to the procedures provided for in the DRD, has not been discussed.

This discussion is relevant: if there is indeed such an obligation, Member States have to provide for it in the national legislation implementing the Directive. In order to examine whether there is such an obligation, two recent decisions of the CJEU need to be examined. In this respect, it is necessary to examine more closely two important judgments of the Court: the judgments in the cases *Austria v. Germany*[23] and *Slovak Republic v. Achmea.*[24]

3 The evolving CJEU case law and its impact on the participation of the taxpayer in the procedures under the directive

3.1 *General Remarks*

The Dispute Resolution Directive was first proposed by the Commission on 26 October 2016 and it was adopted by the Council on 10 October 2017. Two important judgments of the Grand Chamber of the Court of Justice, which were delivered, the first one a little before the adoption of the Directive and the second soon after its formal adoption, appear to affectaffect the design of the mechanism provided for in the Directive. The combined effect of the judgments of the Court in *Republic of Austria v. Federal Republic of Germany*, and *Slovak Republic v. Achmea*, has shed new light on what compatibility with the EU Charter of Fundamental Rights, and, in particular, with the right to a fair trial, may entail for the dispute resolution mechanism provided for in the Directive.

These two cases will be discussed in the following two sections.

3.2 *The Judgment in Austria v. Germany*

On 12 September 2017, the Court of Justice ruled in Case C-648/15 *Austria v. Germany* on the interpretation and application of the double taxation convention between Austria and Germany on the basis of Article 273 TFEU; a provision which allows the Member States to submit to the Court of Justice (CJEU) a dispute between them concerning a matter related to the EU Treaties.[25] The case is interesting, as it was the first time that the Court was called on to give a binding interpretation of a provision included in a Double Tax Convention (DTC) between two Member States.

According to Article 273 TFEU, the CJEU has competence to rule on 'any dispute between Member States which relates to the subject matter of the Treaties if the dispute is submitted to it under a special agreement between the parties'. In the context of the dispute between Austria and Germany concerning the interpretation of Article 11(2) of the DTC between Austria and Germany there was no doubt that the first and the third conditions were fulfilled; indeed, there was a dispute between two Member States and the competence had been conferred upon the CJEU by means of special agreement between the two Member States, which was contained in their bilateral DTC. The crucial point, therefore, was whether the interpretation of Article 11(2) of the DTC between Austria and Germany was a matter relating to the subject matter of the Treaties.

In that respect, the Court reasoned that this will be the case where an 'objectively identifiable link' exists between the dispute and the subject matter of the Treaties.[26] As far as disputes relating to double taxation are concerned, the Court concluded that such an 'objectively identifiable link' with the subject matter of the Treaties exists, as the avoidance of double taxation (through tax treaties) has a manifestly beneficial effect on the functioning of the internal market, which the EU is bound to establish further to Article 3(3) of the Treaty on European Union (TEU) and Article 26 of the Treaty on the Functioning of the European Union (TFEU).[27]

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[23] AU: CJEU 12 Sept. 2017, Case C-648/15, Republic of Austria v. Federal Republic of Germany, ECLI:EU:C:2017:664.

[24] SK: CJEU 6 Mar. 2018, Case C-284/16, *Slovak Republic v. Achmea,* ECLI:EU:C:2018:158.

[25] *See* J. Luts and C. Kempeneers, *Case C-648/15 Austria v. Germany: Jurisdiction and Powers of the CJ to Settle Tax Treaty Disputes Under Art. 273 TFEU Article,* 27(1) EC Tax Rev. 5–18 (2018); B. Michel, *Austria v. Germany (Case C-648/15): The ECJ and Its New Tax Treaty Arbitration Hat*, 58(1) Eur. Tax'n (2018); H. Verhagen, *The European Court of Justice as Court of Arbitration for Disputes under DTA's (Case C-648/15, Austria v. Federal Republic of Germany),* Kluwer International Tax Blog (13 Sept. 2017) http://kluwertaxblog.com/2017/09/13/european-court-justice-court-arbitration-disputes-dtas-case-c-64815-austria-v-federal-republic-germany/ (accessed 30 Apr. 2019); C. Staringer, *Austria: CJEU Recent Case from Austria – Austria/Germany (C-648/15),* in *CJEU – Recent Developments in Direct Taxation 2017* 1 (M. Lang et al. (eds), Linde Verlag 2018); S. Dorigo, *Austria-Double Taxation and the EU Fundamental Freedoms: Advocate General Mengozzi's Opinion in Austria v. Germany (Case C-648/15),* 57 Eur. Tax'n 10 (2017).

[26] *See* Republic of Austria v. Federal Republic of Germany (C-648/15), *supra* n. 23, para. 25.

[27] *See Ibid*., para. 26; the Court explicitly refers to the European Commission's (EC) communication of 2011 on 'Double Taxation in the Single Market'. *See* European Commission, *Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee, Double Taxation in the Single Market*, COM (2011) 712 final (11 Nov. 2011).

Although this was just the second instance in which the Court was called to interpret Article 273 of the TFEU, the Court's reasoning is succinct, since most requirements had been clarified in earlier case law, or were fulfilled beyond reasonable doubt.[28] In addition, it is pointed out that the Court regularly reviews cases where both economic and judicial double taxation are questioned as to their compliance with fundamental freedoms, and double taxation agreements are increasingly becoming agreements interpreting EU law obligations.[29]

The fact that the Court confirms expressly the view that disputes on the interpretation of double tax treaties between Member States have an objectively identifiable link with the subject matter of the Treaties, creates a new environment for the DRD.[30]

One might wonder whether the same option might have been adopted in the DRD, had the judgment in the *Austria v. Germany* case been delivered earlier. It appears however that such a hypothesis cannot be supported. Indeed, the Commission, apart from issuing a proposal for a Directive, had also examined other options with respect to the resolution of international tax disputes within the EU. One of the suggestions brought forward was for the Commission to issue a 'recommendation' to encourage Member States to follow the example of the Austria-Germany DTC. This proposal was, nevertheless, withdrawn, since it was considered that it could place a disproportionate burden on the Court.[31]

In any case, the Directive has, since, moved in a different direction, and some commentators argue that it now appears unlikely that the European Union will replace the Directive's current arbitration system with the CJEU as a European tax treaty arbitration court.[32] While this may, indeed, be so, the possibility of the creation of a European tax treaty arbitration court cannot be entirely ruled out, mainly for two reasons.

Firstly, it is important to note that Member States, in the context of the Economic and Financial Affairs Counsil (ECOFIN) meeting that led to the adoption of the directive, agreed upon a unanimous Statement to be included in the minutes, providing that 'Member States shall endeavour to explore the possibilities to further enhance the resolution of disputes among Member States relating to the interpretation and application of tax agreements and conventions by way of a permanent body, including the possibilities provided for under Article 273 TFEU'.[33] Secondly, it appears that in the *post-Achmea* era of dispute resolution, the creation of such a European tax treaty arbitration court might be a little more than a possibility; it could amount to a requirement under EU law. It is important, therefore, to examine more closely the judgment of the Court in the *Achmea* case and its impact on the DRD mechanism.

3.3 *The Judgment in Achmea*

The *Achmea* case[34] is not a tax case. It concerns the compatibility of the arbitration clause, found in the bilateral investment treaty (BIT) between the Netherlands and Slovakia, with EU law. The Court held that the arbitration clause contained in that BIT is incompatible with EU law, as where EU-related disputes are referred to bodies that are outside the EU jurisdiction, the effectiveness of EU law may be undermined and the autonomy of EU law may be adversely affected.[35] This is not the first case in which the Court has put forward this argumentation and reached this conclusion[36]; however, it is a very important one, due to the large number of intra-EU BITs that may potentially be

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[28] *See* on this point the comment by Luts & Kempeneers, *supra* n. 25, at s. 4.2.

[29] *See* H. Hofmann, *Double Tax Agreements: Between EU Law and Public International Law* in *Double Taxation Within the European Union* 75–86, at 84 & 85 (A. Rust (ed.), Kluwer 2011).

[30] Luts & Kempeneers, *supra* n. 25, at s. 4.2, discuss the question of whether this judgment reaches as far as to impose an obligation on Member States to provide for a mechanism in such agreements to submit disputes arising under it to the Court, when concluding international agreements inter se that have an 'objectively identifiable link' with the subject matter of the Treaties (such as DTCs). They point out (and support the point with references to the relevant literature) that in the scholarly commentary, the views on this important issue do not converge, as on the one hand, some scholars argue that – based on a combined reading of Art. 273 TFEU and Art. 344 TFEU – Art. 273 TFEU is not merely optional for the Member States, whereas, on the other hand, most (German) scholars argue that the Member States have a mere right, not an obligation, to submit DTC disputes to the Court under Art. 273 TFEU. The authors point out that 'given the fundamental importance of this discussion, it is regrettable that the Court did not (find itself in a position to) settle this debate in the present case.' The authors also compare the procedure provided for under Art. 273 TFEU with the procedure provided for in the DRD, with particular reference to the position of the taxpayer in each of the two options; *see* Luts & Kempeneers, *supra* n. 25, at s. 4.5.

[31] *See* the analysis and comments in Luts & Kempeneers, *supra* n. 25, at s. 4.5.

[32] This is the conclusion reached by Staringer, *supra* n. 25, at s. 6.

[33] Council of the European Union, *Outcome of the Council Meeting, 3543rd Council Meeting Economic and Financial Affairs*, 9581/17 (23 May 2017).

[34] *Slovak Republic v. Achmea* (C-284/16), *supra* n. 24.

[35] *See ibid.*, para. 59 where the Court states that 'In those circumstances, Article 8 of the BIT has an adverse effect on the autonomy of EU law'.

[36] In 2006, in the *Sellafield* case (IE: CJEU 30 May 2006, Case C-459/03, *Commission v. Ireland,* ECLI:EU:C:2006:345) the Court held that arbitration proceedings initiated on the basis of the UN Convention on the Law of the Sea (the Montego Bay Convention) by Ireland against the UK was contrary to the duty of cooperation enshrined in the then in force Arts 10 EC and 292 EC (and Arts 192 and 193 EA), as 'the act of submitting a dispute of this nature to a judicial forum such as the Arbitral Tribunal involves the risk that a judicial forum other than the Court will rule on the scope of obligations imposed on the Member States pursuant to Community law' (*see* para. 177 of the judgment). In 2014, in the Opinion of the Court, 18 Dec. 2014, Avis 2/13, *Accession of the EU to the ECHR*, ECLI:EU:C:2014:2454, the Court blocked the accession of the EU to the ECHR, holding, inter alia, that the draft accession agreement did not contain adequate safeguards that Art. 344 TFEU would in all cases be respected; the Court stated that '*the fact that Member States or the EU are able to submit an application to the ECtHR is liable in itself to undermine the objective of Art. 344 TFEU and, moreover, goes against the very nature of EU law, which requires that relations between the Member States be governed by EU law to the exclusion, if EU law so requires, of any other law*' and therefore '*only the*

affected and due to the fact that it may have very far-reaching implications, in other areas of law as well.[37]

In the *Achmea* judgment the Court argued very clearly that a Member State, by accepting the jurisdiction of the BIT arbitral tribunal for the disputes referred to it, has excluded from the EU judicial system, and hence from the jurisdiction of the Court, a whole range of disputes that may potentially involve the application and interpretation of EU law.[38] Such an action of a Member State, however, is not compatible with the principle of sincere cooperation provided for in the first subparagraph of Article 4(3) of the TEU, as it calls into question not only the principle of mutual trust between the Member States but also the preservation of the particular nature of the law established by the Treaties, ensured by the preliminary ruling procedure provided for in Article 267 of the TFEU.[39]

The Court followed a three-pronged analysis in order to reach this conclusion, which can be, schematically described as follows:

(1) Was the arbitral tribunal in *Achmea* dealing with disputes that are liable to relate to interpretation or application of EU law?

The first step was to ascertain whether an arbitral body under the BIT is called to resolve disputes that are liable to relate to the interpretation or application of EU Law.[40] The Court found that in addition to the interpretation of the BIT itself, the arbitral tribunal may also be called on to interpret or indeed to apply EU law, particularly the provisions concerning the fundamental freedoms, including freedom of establishment and free movement of capital.

(2) Was the BIT arbitral tribunal a 'court or tribunal' under Article 267 TFEU?

Having answered the first question in the affirmative, the second step in the Court's analysis was to establish whether the BIT arbitral tribunal was situated within the judicial system of the EU, and in particular whether it could be regarded as a court or tribunal of a Member State within the meaning of Article 267 TFEU.[41] This was crucial, since the consequence of a tribunal set up by Member States being situated within the EU judicial system is that its decisions are subject to mechanisms capable of ensuring the full effectiveness of the rules of the EU law.

In order to answer this question, the Court examined two instances in which such bodies have been characterized as 'courts or tribunals' under Article 267 TFEU: (a) whether they are part of the system of judicial resolution of disputes in a Member State (b) whether it is a court common to more Member States.

The Court found that the BIT arbitral tribunal was an exceptional court, and it did not form part of the judicial system of any of the Member States that were parties to the BIT; therefore criterion (a) was not satisfied. Furthermore, the Court found that the BIT arbitral tribunal was not similar to the BENELUX Court of Justice, that is common to a number of Member States, as the latter constitutes a step in the judicial proceedings before national courts, which the BIT arbitral tribunal was not. Therefore, since the BIT arbitral tribunal did not have any link with the regular judicial system of the Member States, it could not be considered as 'court or tribunal' under Article 267 TFEU.

(3) Were the BIT arbitral tribunal's decisions subject to review by national courts, in the course of which the fundamental provisions of EU law could be examined?

Having answered the second question in the negative, the Court turned then to an alternative criterion, i.e. to ascertain whether the decisions of the BIT arbitral tribunal were subject to review by national courts. Where the decisions of a dispute resolution body are subject to review by the courts of a Member State, it means that the questions of EU law which such dispute resolution may have to address can be submitted to the Court by means of a reference for a preliminary ruling.[42]

The Court pointed out that the BIT arbitral tribunal was subject to only limited judicial review: its decisions are final; it determines its own procedure and it chooses its seat, and consequently, the law applicable to the procedure governing judicial review of the validity of the award by which it puts an end to the dispute before it. Since, in the case at hand, the parties had chosen Frankfurt as seat of the arbitral tribunal, German law

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express exclusion of the ECtHR's jurisdiction under Art. 33 of the ECHR over disputes between Member States or between Member States and the EU in relation to the application of the ECHR within the scope ratione materiae *of EU law would be compatible with Art. 344 TFEU*' (*see* paras 201 et seq.).

[37] As an example of the possible implications that the *Achmea* judgment may have in other areas of law besides bilateral investment treaties, *see* the European Commission, *Communication from the Commission to the European Parliament and the Council, Protection of intra-EU investment*, COM(2018)547 final (19 July 2018), where the Commission citing the Achmea judgment, took the position that it should be extended to multilateral agreements such as the Energy Charter Treaty, as regards intra-EU relations. For other reactions to the *Achmea* judgment *see* D. Dragiev, *2018 In Review: The Achmea Decision and Its Reverberations in the World of Arbitration,* Kluwer Arbitration Blog (16 Jan. 2019), http://arbitrationblog.kluwerarbitration.com/2019/01/16/2018-in-review-the-achmea-decision-and-its-reverberations-in-the-world-of-arbitration/ (accessed 30 Apr. 2019).

[38] *See Slovak Republic v. Achmea* (C-284/16), *supra* n. 24, paras 56 & 58. This fact distinguishes the BIT state-investor arbitration from commercial arbitration, which the Court has accepted i.e. compatible with the EU legal system; *see Slovak Republic v. Achmea* (C-284/16), *supra* n. 24, paras 54–56.

[39] *Slovak Republic v. Achmea* (C-284/16), *supra* n. 24, para. 58.

[40] *Ibid.*, §39 et seq.

[41] *Ibid.*, §43 et seq.

[42] *Ibid.*, §50 et seq.

applied, which provided only for limited review, concerning in particular the validity of the arbitration agreement under the applicable law and the consistency with public policy of the recognition or enforcement of the arbitral award.

In that regard, the BIT arbitration was not similar to private, commercial arbitration, for which the Court has accepted the limited scope review, under condition that such review allows the national court to examine the fundamental provisions of EU law and refer preliminary questions, if necessary. The Court points out that *'while the latter originate in the freely expressed wishes of the parties, the former derive from a treaty by which Member States agree to remove from the jurisdiction of their own courts, and hence from the system of judicial remedies which the second subparagraph of Article 19(1) TEU requires them to establish in the fields covered by EU law, disputes which may concern the application or interpretation of EU law.'*[43]

In conclusion, regarding the essence of the *Achmea* judgment, the remarks of Advocate General Bot, in his opinion in case C-1/17, *Request for an opinion by the Kingdom of Belgium*, delivered on 29 January 2019, paint a very clear picture. The Advocate General suggests that the approach adopted by the Court in the *Achmea* judgment appears *'to have been primarily guided by the idea that the judicial system of the European Union, in so far as it is based on mutual trust and sincere cooperation between Member States, is inherently incompatible with the possibility of Member States establishing, in their bilateral relations, a parallel dispute settlement mechanism which may concern the interpretation and application of EU law. To that extent, Article 344 TFEU has been interpreted by the Court as precluding such a mechanism; the fact that the disputes in question are between investors and States is not a bar to such preclusion. Article 267 TFEU was supplementary, since the preliminary ruling procedure was necessarily affected by the operation of such a mechanism.'*[44]

The DRD mechanism should be analysed in the light of these deliberations.

3.4 *Analysis: The Impact on the MAP and Arbitration Procedures of the DRD*

Having analysed the case law of the CJEU that has an impact on the DRD, it is necessary to examine whether there are other arguments that can be put forward in order to justify that an exception is provided for the type of disputes that are covered by the DRD. Cases providing for exceptions however must be scrutinized with regard to their compatibility with EU law.

First of all as a starting point, it must be pointed out that, as Advocate General Bot recently remarked,[45] the judicial system of the European Union, in so far as it is based on mutual trust and sincere cooperation between Member States, is inherently incompatible with the possibility of Member States establishing, in their bilateral relations, a parallel dispute settlement mechanism which may concern the interpretation and application of EU law.

Since the MAP and arbitration under the DRD creates such a parallel system, one could argue that the MAP and arbitration for the resolution of double tax treaties disputes might be problematic, from an EU law perspective.[46]

It appears that the combined reading of the two cases, *Austria v. Germany* and *Slovak Republic v. Achmea*, could lead to the conclusion that there is now an obligation on the Member States to ensure that disputes concerning the interpretation and application of their bilateral DTCs are dealt with by bodies that qualify as courts or tribunals themselves, under Article 267 of the TFEU, or, that they are dealt with by bodies that are not qualified as such, but they are subject to judicial review, in the course of which fundamental EU law issues can be examined and preliminary questions may be referred to the Court.

There are still, however, a number of issues that need to be examined before reaching a final conclusion. First of all, it has to be examined whether the fact that direct taxation does not fall within the competence of the Union justifies a derogation of the CJEU case law that affects the dispute resolution mechanisms in the EU. It appears that this argument could not be upheld, as the Court has already in its judgment in *Austria v. Germany* declared itself competent to rule on disputes that arise between two Member States and which concern the interpretation or the application of their bilateral double tax agreement.

Another question that should be examined is whether the fact that the dispute resolution procedure in DTCs is designed as a state-to-state procedure can justify derogations from the judicial review of national courts and, as a consequence, effective supervision by the CJEU. This issue requires an analysis that goes further than the scope of this article. As a preliminary remark, it should be pointed out that although the MAP is designed as and remains to date a procedure between states, it nevertheless applies to individual cases,

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[43] *Ibid.*, §55.

[44] CJEU Opinion Advocate General Bot 29 Jan. 2019, Opinion 1/17, *Request for an opinion by the Kingdom of Belgium*, ECLI:EU:C:2019:72, §105.

[45] *Request for an opinion by the Kingdom of Belgium* (Opinion 1/17), *supra* n. 44.

[46] Indeed, since the DRD duplicates, with some important enhancements, the MAP and arbitration procedure for the resolution of double taxation disputes under DTCs, the same considerations apply for the MAP and arbitration, whether this is under a DTC or under the DRD. The analysis in this article will focus on the DRD, which covers intra-EU relations, but it is understood that the same concerns apply for the MAP and arbitration based on DTCs, i.e. mainly the MAP and arbitration between EU Member States and third countries.

which are eligible to be solved by national courts.[47] The nature of the dispute is and remains a tax law dispute, the same as any other tax dispute between a taxpayer and a tax authority. The only thing that changes is the dispute resolution body: under a DTC the dispute is resolved by mutual agreement of the tax authorities, whereas under the domestic legislation the same dispute would have been resolved by a court. It seems, therefore, that there is no justification for a derogation from the review of the national courts where the MAP is chosen instead of recourse to domestic courts.

Another issue that has to be assessed is the fact that the MAP is entirely optional and it is entirely up to the taxpayer to decide whether to present his case to the competent authorities or to pursue it before the national courts. The question is whether the optional character of the MAP justifies the derogation, since, one can argue, these cases are not in principle and a priori excluded from the review of national courts. It must be pointed out, however, that the CJEU has held in relation to commercial arbitration, where the freely expressed wishes of the parties is the rule, a limited review by national courts is allowed, provided that in the course of such review the fundamental provisions of EU law can be examined.[48] It appears that there is no reason for divergence from this approach in cases where the MAP is concerned.

A last point that could be raised is the fact that any agreement that is reached under a MAP, whether or not complemented by arbitration, can be effective only if the taxpayer agrees with it. If the taxpayer does not agree, then the MAP (and any arbitration proceedings that may have taken place) does not have any effect; it is as if they never happened. Again, however, in the author's view this is not the point. The point is that once the taxpayer has given his consent (if he does), the case is once and for all removed from the competence of the national courts, and therefore from the review of the CJEU. The risk of divergent interpretation of DTCs within the EU, especially as far as their compatibility with EU law is concerned, a task entrusted to the CJEU, remains, and potentially adversely affects the autonomy of the EU legal order.

In conclusion: two principles affect the design of the MAP and arbitration under the DRD; one is the right to a fair trial, which must be respected in all cases where the rights of the taxpayers are affected; the other is the preservation of the autonomy of the EU legal order. In light of the discussion in the previous sections, certain improvements to the DRD might be considered desirable.

4 Concluding remarks: the way forward

The Dispute Resolution Directive presents a great opportunity for the EU Member States to agree to the creation of an effective EU dispute resolution mechanism for disputes regarding the application and interpretation of double taxation conventions that respects all the guarantees of the right to a fair trial and is free from the flaws of the current MAP and arbitration procedures.

The benefits of the mutual agreement procedure as a means for resolving DTC disputes are not negligible. The MAP has provided competent authorities with the opportunity to discuss and resolve disputes in an amicable and collaborative way, providing great flexibility for the competent authorities at a very low cost to the taxpayer. Successful MAPs are indeed very successful. Therefore, it is of crucial importance that MAP is preserved as the basic option, available in all cases as a first stage so that all parties can use its advantages.

From a fair trial point of view, however, the MAP in its current form, as a state-to-state procedure without the participation of the taxpayer, can only be saved if it is complemented by judicial proceedings, in which the taxpayer participates as a party.[49] Only when a judicial procedure is added to the MAP, may the MAP remain a flexible, informal, and purely administrative procedure, taking place between the competent authorities concerned without need for the formal participation of the taxpayer; the most suitable procedure would be multiparty arbitration, in which the affected taxpayer is a party.[50]

The EU law environment in relation to the dispute resolution directive, as it has been shaped by the CJEU case law highlighted in the previous sections, leads to the conclusion that the DRD arbitration phase should be designed as real arbitration,[51] that ensures (1) the

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[47] The author has dealt with this issue extensively in Perrou, *supra* n. 7; *see* in particular, the analysis in Ch. 3 on International Double Taxation Disputes as Disputes between the State(s) and the Taxpayer(s).

[48] *See Slovak Republic v. Achmea* (C-284/16), *supra* n. 24, §55 with further references to the case law of the CJEU.

[49] In general, a system in which no sufficient degree of independence is guaranteed during the phase of the determination of the case by an administrative body will only be compatible with the fair trial requirements if it is supplemented by review of the administrative body's decision by a body that complies with the fair trial requirements; a case where a government decision may not be contested constitutes an infringement of the right to a court; *see* e.g. the judgment of the ECtHR 21 Feb. 1990, case no. 11855/85, *Håkansson and Sturesson v. Sweden* at para. 63, where it was concluded that according to Swedish law, the dispute in question could be determined only by the Government as the final instance. The Government's decisions were not open to review as to their lawfulness by either the ordinary courts or the administrative courts, or by any other body which could be considered to be a 'tribunal' for the purposes of Art. 6, para. 1 ECHR; there was thus a violation of Art. 6, para. 1 on this point.

[50] For a detailed analysis on this point and a discussion of viable proposals that comply with the right to a fair trial *see* the author's previous research in Perrou, *supra* n. 7, Ch. 8.

[51] It seems doubtful whether the 'Advisory Commission' or the 'Alternative Dispute Resolution Commission' of the DRD could be regarded as courts or tribunals being 'situated within the EU judicial system'; *see* F. Boulogne, *Implications of the CJEU's Achmea Decision (C-284/16) on Tax Treaty Arbitration*, Kluwer International Tax Blog (26 Mar. 2018) http://kluwertaxblog.com/2018/03/26/implications-cjeus-achmea-decision-c-28416-tax-treaty-arbitration/ (accessed 30 Apr. 2019).

participation of the taxpayer and (2) the effective supervision of its decisions by the CJEU. There is room for the DRD to adapt.

For example, one possibility is provided through Article 10(1) of the Directive. Under that article Member States may also agree to set up an Alternative Dispute Resolution Commission in the form of a committee that is of a permanent nature (a 'Standing Committee'). In addition, according to Article 11(2)(f) of the Directive on the Rules of Functioning, Member States are expected, in agreeing such Rules of Functioning, to determine the rules governing the participation of the affected person(s) and third parties in the proceedings, exchanges of memoranda, information and evidence, the costs, the type of dispute resolution process to be used, and any other relevant procedural or organizational matters. Member States are therefore not prohibited, but rather encouraged to provide for the participation of the taxpayer in the procedure; the desired level of participation is, without doubt, to be determined based on the standards set by the right to a fair trial.

These provisions of the Directive offer possibilities that can be further explored in order to design the procedure in accordance with the guiding principles of the right to a fair trial and the respect for the autonomy of the EU legal order.

In the preamble to the Directive it is stated that 'this Directive seeks to ensure full respect for the right to a fair trial.' The drafters of the Directive, wisely, left enough discretion to the Member States, certainly allowing them to shape the procedure in such a way.