

The Dispute Resolution Mechanisms Regulations

GUIDANCE NOTE

(9 November 2020)

Scope of this guidance note

This guidance note is intended as a general overview of the European Union Dispute Resolution Mechanisms Directive Implementation Regulations (SL 123.191). They are not meant to change or replace any provision of the regulations or to add anything to them.

Scope of the regulations

The European Union Directive on tax dispute resolution mechanisms (Directive 2017/1852 of 10 October 2017) was transposed to Maltese law by means of the European Union Dispute Resolution Mechanisms Directive Implementation Regulations (SL 123.191). The regulations provide for mechanisms to resolve disputes between Malta and other EU Member States that may arise from conflicting interpretations of agreements and conventions that provide for the elimination of double taxation of income. They apply, in particular, to disputes in the interpretation of double taxation agreements between EU Member States and of the Union Arbitration Convention (Convention on the elimination of double taxation in connection with the adjustment of profits of associated enterprises (90/463/EEC)) and provide remedies for taxpayers who could suffer prejudice if a dispute remains unresolved.

Complaint

A person who is affected by a dispute may submit a complaint to the Commissioner for Revenue (CfR) requesting its resolution. The complaint must be filed within 3 years from the date on which that person receives the first notification of an action that gives rise to the dispute. The complaint must contain detailed information and must satisfy all the requirements of regulations 4 and 5. The complainant must also send a copy of the complaint to the tax authorities of all the other EU Member States involved in the dispute. The CfR may request the complainant to provide additional information. If the complainant receives such a request within 3 months from the date on which he submits his complaint, he must provide the additional information within a further 3 months.

Decision on the admissibility of a complaint

Within 6 months from the receipt of a complaint, and of any further information that the complainant may have been requested to produce, the CfR must decide on its admissibility. If a complaint does not comply with the requirements of the regulations, the CfR may declare it inadmissible and inform the complainant accordingly. If the CfR does not give a decision on the admissibility of a complaint within the 6 months period mentioned above, he will be deemed to have accepted the complaint as admissible.

Where the complaint is declared inadmissible by any of the tax authorities of the Member States involved in the dispute, the complainant may request the setting up of an advisory commission for a decision on this preliminary issue. The request for the setting up of an advisory commission must be made within 50 days from the date on which the complainant has been informed that his complaint

is inadmissible. The advisory commission must adopt a decision on this preliminary issue within 6 months from the date it is set up.

Resolution by mutual agreement

When a complaint is admitted (by the tax authorities directly or following a decision of the advisory commission), the CfR is bound to seek to resolve the issue by mutual agreement with the other EU Member States concerned and the regulations give him 2 years for this purpose, which may be extended by a further 1 year.

If the EU Member States concerned do not reach a mutual agreement within the time allowed for this procedure, and unless any of them has in the meantime unilaterally afforded a remedy that resolves the dispute, the complainant may request the setting up of an advisory commission to give an opinion on the merits of the complaint. This request must be made in writing within 50 days from the date on which he is informed that the member states concerned have failed to reach a mutual agreement.

Decision on the merits

An advisory commission must adopt an opinion on the merits of a complaint within 6 months from the date it is set up. This period may be extended by a further 3 months. The commission must deliver its opinion to the CfR and to the other tax authorities of the member states involved in the dispute.

Once the opinion is delivered, the CfR and the other tax authorities must try to agree on a final decision. This decision can be different from the opinion of the advisory commission, but if the tax authorities fail to reach such an agreement within 6 months, the opinion of the advisory commission becomes a final decision.

Composition of the advisory commission

As stated above, an advisory commission is to be set up at the request of the complainant either to decide upon the question of the admissibility of the complaint or to give an opinion on the merits of the complaint.

Each of the EU Member States involved in the dispute must appoint a representative and an independent person of standing to sit on the advisory commission. The appointments must be made within 120 days from the date of the complainant's request. The EU Member States may agree, in any particular case, to have 2 representatives, instead of 1, and to appoint 2 independent persons of standing, instead of 1. The EU Member States are to appoint a substitute for each independent person of standing to act in case that person is for some reason prevented from carrying out this function. The representatives and the independent persons of standing so appointed must then appoint another person to act as chair.

The independent persons of standing are to be chosen from a list prepared in advance as required by the directive. If the Member States concerned do not agree on the manner on how the independent persons of standing are to be chosen from this list, the appointment will be carried out by drawing lots. The chair is also to be appointed from this list. Unless the other members on the commission agree otherwise, the chair must be a judge.

Procedure in the event that the tax authorities do not appoint an advisory commission

The regulations provide for a remedy for the complainant in the event that the tax authorities do not make the necessary appointments of the independent persons of standing within 120 days from the relative request. Where the CfR does not appoint an independent person of standing, the complainant may refer the matter to the Malta Arbitration Centre.ⁱ If the CfR and the tax authorities of the other member states involved in the dispute have all failed to make the appointments, and there is more than one complainant, an application to the Malta Arbitration Centre can only be made by those of them who are resident in Malta. Upon such a request, the chairperson of the Malta Arbitration Centre will proceed to make the appointment of the independent person of standing and a substituted from the list of independent persons of standing referred to above.

Alternative Dispute Resolution Commission

The regulations envisage the possibility of disputes being referred to an alternative dispute resolution commission (ADRC) rather than to an advisory commission. This alternative procedure can be adopted as long as the members states involved in the dispute so agree. The composition of an ADRC and the processes it adopts for the resolution of a dispute will be determined by agreement of the member states involved and can be different from the provisions that regulate the advisory commission.

Interaction with national law

The regulations are in addition to any other right that taxpayers have under the Income Tax Acts to dispute tax claimed by the CfR . They contain provisions that avoid conflicts that different procedures involving the same subject matter could otherwise give rise to.

ⁱ In their current form, the regulations assign the function of appointing independent persons of standing on an advisory commission (in cases where the tax authorities fail to do so) to the Administrative Review Tribunal. However, the regulations are being amended and this function is being assigned to the Malta Arbitration Centre. Applications for this purpose are to be sent to the registrar of the Centre.