

3. European Partnership Agreements (EPA)

- 79 Furthermore, the EU and its Member States have concluded several international agreements with third countries for the purpose of making them share to a greater or lesser extent the goals of the internal market. In several (but not all) cases, such agreements contain directly applicable provisions. Examples include the **EPA with Russia** (perhaps the most advanced one so far), EPAs with other economies in transition, the **Euromediterranean Agreement** and agreements with several developing countries.
- 80 Although such agreements have not been designed to deal specifically with tax issues, their general wording may, in principle, encompass direct taxes unless they contain a specific carve-out clause.

4. The Arbitration Convention

- 81 The Member States concluded the **Arbitration Convention** on 23 July 1990 to provide for binding arbitration when the tax authorities fail to find a solution within two years to double taxation arising within a multinational group due to different views of the tax authorities of the Member States concerned about the prices charged for transactions within this group. It should be noted that, even though the Commission preferred the form of a directive, the Member States selected a form of agreement that does not fall within the jurisdiction of the CJEU. Despite its legal form, it is part of the *acquis communautaire*.¹²² This means it is aimed at the removal of possible tax obstacles in cross-border situations within the internal market. This convention is possibly the only example of binding coordination in the field of direct taxes (see Chapter 2 m.no. 105 et seq. and Chapter 10). The Dispute Resolution Directive (see Chapter 10) has recently supplemented the Arbitration Convention.

III. The Enforcement of EU Law

- 82 Like every legal system, EU law possesses mechanisms to ensure its proper enforcement. Accordingly, there are **two ways of protecting rights arising from EU law**. Measures incompatible with EU law may be challenged either at the EU level under an infringement procedure or at the national level by nationals invoking directly effective EU law provisions before a national court.¹²³

A. European Union Level

- 83 The Commission serves as the guardian of the Treaties and the watchdog of Member States' compliance with European Union law. Usually, **an infringement**

122 Hinnekens, *The Uneasy Case and Fate of Article 293 Second Indent EC*, *Intertax* 2009, p. 604.

123 It should be noted that, in principle, a Member State national enjoys the right to rely on EU law before a national administrative body, which is, on the other hand, obliged to comply with EU law. However, the administrative body is not entitled to refer a preliminary question to the CJEU.

III. The BEPS project and the new impetus for the coordination of tax policies in the EU

A. The role of the EU in global tax coordination and the BEPS project

In the aftermath of the 2008 financial crisis, the attention of governments and public opinion focused on the need to counter tax evasion, tax avoidance and aggressive tax planning strategies of large multinational enterprises, the scale of which has exponentially grown in recent decades. 159

The determination to fight this phenomenon culminated first in a global shift towards tax transparency and subsequently in the **OECD/G20 Base Erosion and Profit Shifting (BEPS) Project**, which is an unprecedented plan for achieving **international tax coordination at the global level** in order to enhance the collection of taxes. On 5 October 2015, the OECD published the results of its work on a 15-point Action Plan that contains detailed recommendations aimed at changing domestic laws and/or tax treaties in order to keep taxing rights aligned with value creation and effectively countering double non-taxation at the global level.⁵⁷ 160

The EU has recognized the dramatic impact of BEPS activities on tax revenues of the Member States and has put forward its own agenda in addition to endorsing general coordination with the OECD. 161

An initial programme to address tax avoidance and profit shifting at the EU level was set out in the Communication issued on 6 December 2012 – thus, even earlier than the first OECD Report on BEPS – which envisaged a whole range of measures, from enacting EU legislation to soft law coordination.⁵⁸ The next comprehensive package was issued in March 2015.⁵⁹ This package focused on transparency initiatives, translating international initiatives in part to the EU level and addressing EU specific issues. Next, the Commission released a Communication in June 2015 entitled “A Fair and Efficient Corporate Tax System in the European Union: 5 Key Areas for Action”.⁶⁰ The objectives set out in the Communication, on the one hand, echoed the objectives of the BEPS project (i.e. aligning taxation and economic activity in the EU), emphasizing the need for a strong EU approach to corporate tax avoidance in the EU’s external relations. On the other hand, the creation of a growth-friendly and competitive corporate tax environment in the EU was acknowledged as a priority of EU tax policy. 162

As the activity of the EU intensified on this matter, the dilemma became more and more apparent: **what role should the EU play in fighting tax avoidance and** 163

57 OECD, Base Erosion and Profit Shifting <<http://www.oecd.org/ctp/beps.htm>> accessed 25 October 2015.

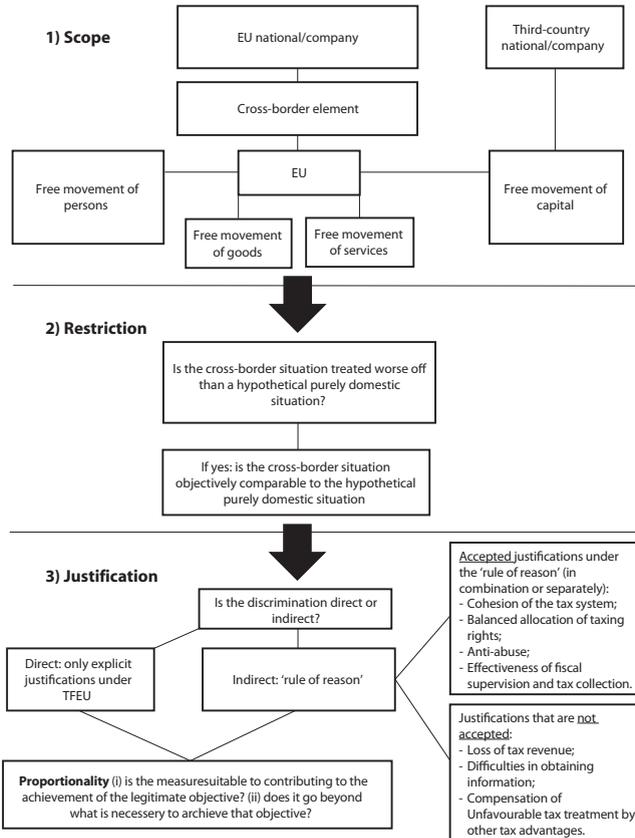
58 COM (2012) 722 final.

59 COM(2015) 136 final.

60 COM(2015) 302 final.

The steps followed by the CJEU in applying fundamental freedoms

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B. Free Movement of Persons

The free movement of persons can be divided into three main categories; free movement of **workers**, freedom of **establishment**, and right to **move and reside freely** in other Member States without pursuing economic activity therein. Each of these manifestations of the freedom will be examined in turn. 200

1. Workers

Starting with the **free movement of workers**, Art. 45 et seq. TFEU prohibits discrimination based on the nationality of workers. For the purposes of direct taxation, this entails that the home and the host Member State not treat a worker worse off because he or she is performing work in a Member State other than the Member State of his or her nationality. 201

State on the basis of a provision transposed into national law in accordance with its obligation to implement EU legislation may not be qualified as State aid.⁴⁹ This applies for both mandatory provisions in a directive, as well as options included therein that the Member States can choose to apply.⁵⁰ Only where EU legislation leaves room for discretion to unilaterally grant specific advantages, can the measure be imputable to the Member State and, therefore, State aid could arise.⁵¹

C. The Prohibition of State Aid and the Fundamental Freedoms

The prohibition of State aid, like the prohibition of discrimination (Art. 18 TFEU), the freedom of establishment (Art. 49 TFEU), and the free movement of services (Art. 56 TFEU), capital (Art. 63 TFEU) and workers (Art. 45 TFEU), has been designed to ensure that free competition in the internal market is not distorted. While the State aid rules are aimed at ensuring that Member States do not provide selective advantages to certain undertakings to the detriment of others, the fundamental freedoms are designed to remove barriers to the free movement of services, goods, capital and persons.⁵² **328**

It is important to stress that the scope of the prohibition on State aid is much broader than that of the fundamental freedoms. The latter prohibit discrimination of cross-border activities carried out by individuals, as well as undertakings, in inbound and outbound situations. By contrast, the State aid prohibition is also applied in purely domestic situations and disallows any form of discrimination that involves the granting of an advantage to particular undertakings.⁵³ However, the prohibition of State aid and the fundamental freedoms can be seen as two sides of the same coin: Measures that put, for instance, resident undertakings in a better position than non-resident ones typically do not fall within the ambit of the fundamental freedoms, but may be covered by the scope of the State aid rules. **329**

As mentioned, the Commission is the competent authority to assess the compatibility of State aid. To ensure a consistent application of the State aid rules, the CJEU has held that where an aid measure violates another provision of the Treaty, e.g. the fundamental freedoms, the Commission cannot find it to be com- **330**

49 CJEU, 5 April 2006, Case T-351/02, *Deutsche Bahn AG v Commission*, ECLI:EU:T:2006:104, paras. 101-103; Terra, Value Added Tax and State aid law in the EU, in: van Arendonk (eds.), *VAT in an EU and International perspective* (2011) p. 316.

50 Quigley, *European State aid law and policy* (2015) p. 33.

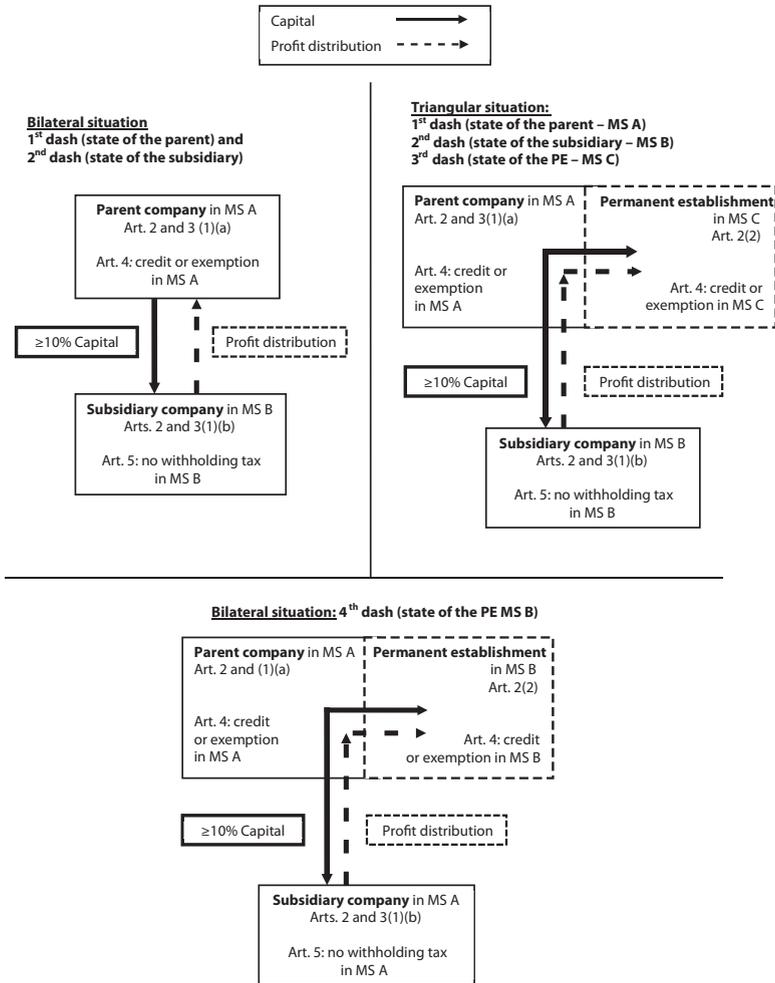
51 Notion of aid notice, para. 44.

52 Micheau, Fundamental freedoms and State aid rules under EU law: the example of taxation, *ET* 2012, p. 213.

53 Szudoczky, Convergence of the analysis of national tax measures under the EU State aid rules and the fundamental freedoms, *EStAL* 3/2016, p. 363 et seq.

E. Overview of the Scope of the Directive (Art. 1)

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IV. Abuse

The 2015 amending Directive has introduced in Art. 1(2) and (3) of the Directive a general anti-abuse clause (“GAAR”) that will prevent Member States from granting the benefits of the Directive to arrangements that are not “genuine”, i.e. that have been put into place to obtain a tax advantage without reflecting any economic reality. The GAAR sets the minimum standards for countering such practices, while allowing the Member States to apply stricter national or treaty

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the scope of the Merger Directive, Member States have to apply those provisions in a non-discriminatory way. Furthermore, the provisions on the prohibition of State aid have to be complied with.⁵³

V. Withdrawal of the Benefits of the Directive

A. Tax Evasion and Tax Avoidance

553 The Merger Directive includes in Art. 15 an anti-abuse clause providing that a Member State may refuse to apply or withdraw the benefit of all or any part of the Directive where it appears that the reorganization has as its principal or as one of its principal objectives tax evasion or tax avoidance. However, the Directive does not include a definition of tax evasion or tax avoidance. Since the Member States are free to transpose the Merger Directive into domestic tax law by any means they choose, they have implemented **different anti-abuse clauses reflecting the different views on what constitutes abuse**. Having regard to corporations within the meaning of Art. 1 of ATAD 1, Member States from now on are, however, also bound by the GAAR in Art. 6 of ATAD 1, which serves as a minimum standard. Art. 6 of ATAD 1 is wide enough to also cover reorganizations.⁵⁴ Irrespective of this conclusion, the CJEU has already decided upon Art. 15(1)(a), shedding some light on the interpretation of the anti-abuse clause of the Merger Directive.⁵⁵

554 First of all, the implementation of the anti-abuse clause of the Merger Directive in domestic tax law does **not necessarily lead to legislative action**. The transposition of a directive may also be achieved through the general legal context so that a formal and express re-enactment of the provisions of the directive in specific national provisions is not necessary. If, however, the Member States do not implement a specific anti-abuse provision based on Art. 15(1)(a) and also do not have any domestic anti-abuse clause that may be applicable to cross-border reorganizations covered by the Merger Directive, they may not neglect the application by the argument of abuse. Consequently, the **anti-abuse clause under the Merger Directive itself has no direct effect**. This is based on the case law of the CJEU that directives cannot of themselves impose obligations on an individual.⁵⁶ Rather it is necessary for the Member States to **formulate their own anti-abuse clauses**. In formulating them, they are – within the limits of primary EU law – free to decide on the conditions that should apply and whether to withdraw the benefits of the Merger Directive entirely or only some of the benefits. Furthermore, the Member States must not fall short of the requirements stipulated by

53 See Chapter 4, m.no. 303 et seq.

54 Art. 6 ATAD 1 refers to “arrangements” or “series of arrangements”, which may also include reorganizations.

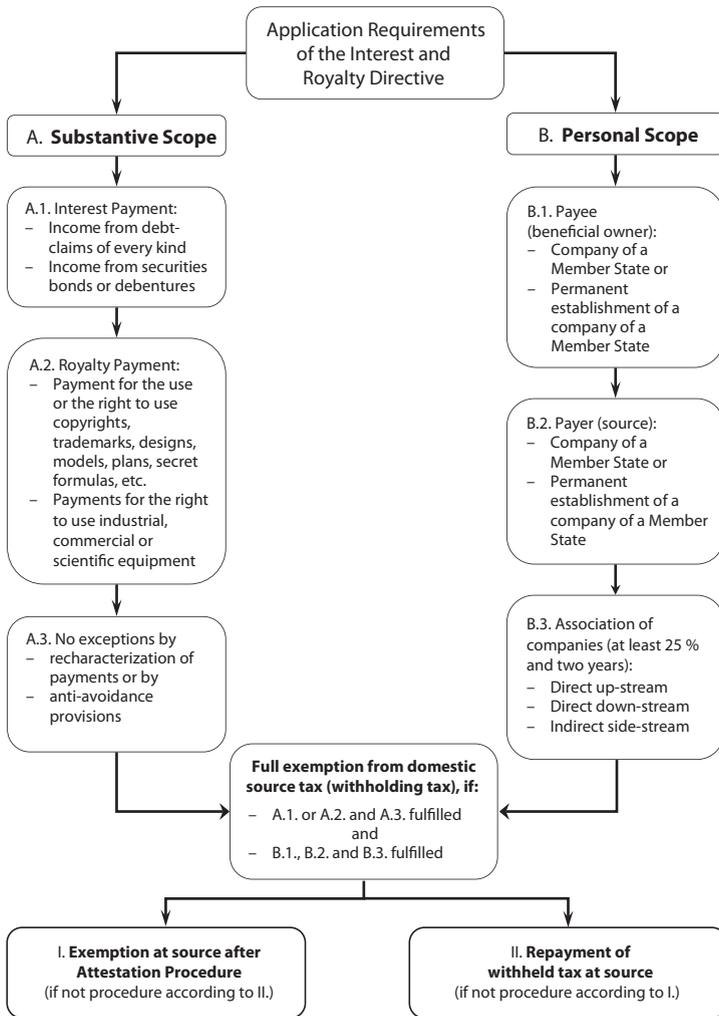
55 CJEU, 17 July 1997, Case C-28/95, *Leur-Bloem*, ECLI:EU:C:1997:369; CJEU, 5 July 2007, Case C-321/05, *Kofoed*, ECLI:EU:C:2007:408; CJEU, 20 May 2010, Case C-352/08, *Zwijnenburg*, ECLI:EU:C:2011:282.

56 CJEU, 5 July 2007, Case C-321/05, *Kofoed*, ECLI:EU:C:2007:408, para. 42 et seq.

a later attestation, the source Member State has to provide for a **reimbursement procedure**, the principles of which are laid down in Art. 1(15) and (16).⁷³

VI. Overview of the Functioning of the Directive

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73 Distaso/Russo, *The EC Interest and Royalties Directive – A comment*, ET 2004, p. 153; Rodriguez, in: Thömmes/Fuks (eds.), *EC Corporate Tax Law* (October 2004) para. 265 et seq.

transactions between associated enterprises or through a structured arrangement. It may not do so where one of the other jurisdictions involved has made an equivalent adjustment to remedy such mismatch (Art. 9(3) ATAD).

- 667 For the most part, ATAD 2 is comprehensive in dealing with hybrid mismatch situations and corresponds to the global action in this area through the BEPS Project. An alternative solution for solving hybrid mismatches proposed in literature was to have a uniform classification method.⁹⁴ In this regard, the original Art. 9 proposed a uniformly applicable linking rule, which may have helped in avoiding confusion even though it differed from the proposals made in BEPS Action 2. However, instead of proposing uniformly applicable rules, the linking rules in ATAD 2 align the tax treatment of one State with that of the other State and propose different solutions for different situations.

IV. Implementation and Application of the ATAD

- 668 The ATAD generally needs to be transposed into domestic law by the Member States by 31 December 2018. However, the ATAD provides for longer **transposition periods** for some of its measures: Member States are given the option to transpose the rules on exit taxation by 31 December 2019. With the ATAD 2, the implementation period for the rules on hybrid mismatches has also been extended to 31 December 2019, while the implementation period for the rules on reverse hybrid mismatches (Art. 9a ATAD) was extended to 31 December 2021. In addition, Member States may apply national interest limitation rules until 1 January 2024, if they are ‘equally effective’ to those of the ATAD.
- 669 The CJEU requires national courts to **interpret national law** as far as possible to achieve the result pursued by a directive.⁹⁵ This obligation becomes relevant where Member States fail to transpose the ATAD into their national laws. However, the CJEU emphasizes in its settled case law that an interpretation of domestic law by referring to a directive must not lead to an interpretation *contra legem*.⁹⁶
- 670 A future concern may be whether ATAD measures that are not implemented by Member States within the required period may be given **direct effect**. In this regard, the CJEU repeatedly emphasizes that a directive “*may not of itself impose obligations on a private individual and may not therefore be relied on as such against such a person.*”⁹⁷ Thus, where the ATAD or parts of it are not transposed into na-

94 Fibbe, *EC Aspects of Hybrid Entities* (2018) pp. 294-296.

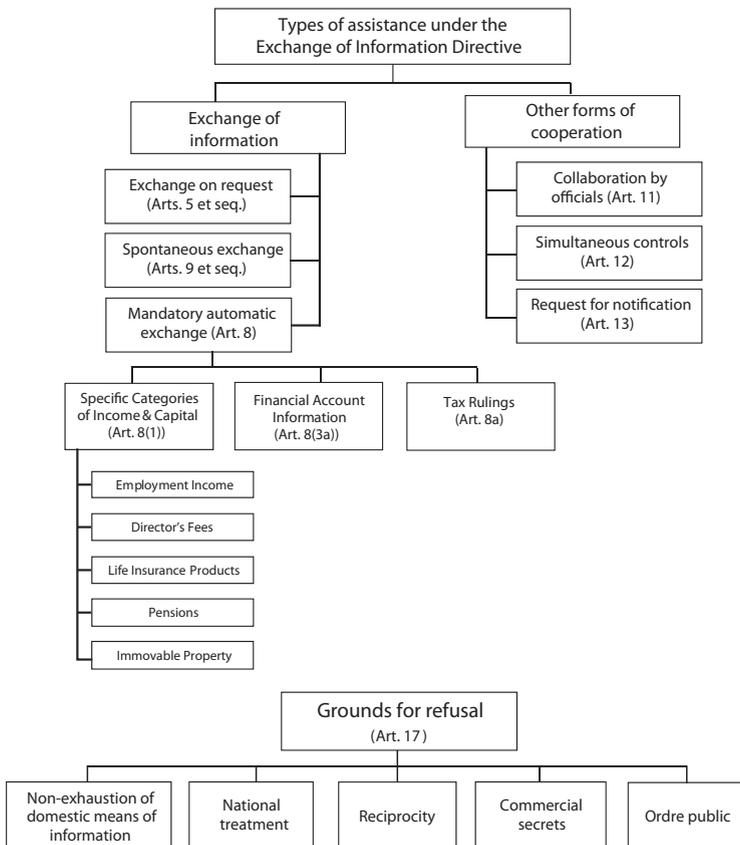
95 CJEU, 13 November 1990, Case C-106/89, *Marleasing SA v La Comercial Internacional de Alimentacion SA*, ECLI:EU:C:1990:395, para. 8. See also Chapter 1, m no. 16.

96 CJEU, 15 April 2008, Case C-268/06, *Impact*, ECLI:EU:C:2008:223, para. 100; 21 September 2016, Case C-605/15, *Aviva*, ECLI:EU:C:2017:718, para. 37; 21 September 2017, Case C-326/15, *DNB Banka*, ECLI:EU:C:2017:719, para. 42.

97 CJEU, 22 February 1990, Case C-221/88, *Busseni*, ECLI:EU:C:1990:84, para. 23; 14 September 2000, Case C-343/98, *Collino*, ECLI:EU:C:2000:441, para. 20; 21 September 2016, Case C-605/15, *Aviva*, ECLI:EU:C:2017:718, para. 36. See also Chapter 1, m no. 12 et seq.

(see also Chapter 3, m.no. 280 et seq.).¹⁷⁶ Bi- or multilateral agreements (e.g. DTCs and the MAATM Convention) may qualify as equivalent, although they lack comparable enforcement possibilities.¹⁷⁷ Asking for an agreement on mutual assistance with a third country as a prerequisite for a tax benefit related to capital investments may be disproportionate only if the necessary information does not require a complex assessment and may be verified effectively without relying on a mutual assistance mechanism.¹⁷⁸

N. Overview of the Directive on Administrative Cooperation



176 E.g. CJEU, 6 October 2011, Case C-493/09, *Commission v Portugal*, ECLI:EU:C:2011:635, para. 50.

177 CJEU, 10 April 2014, Case C-190/12, *Emerging Markets*, ECLI:EU:C:2014:249, para. 85 et seq.; similar CJEU, 19 July 2012, Case C-48/11, *A Oy*, ECLI:EU:C:2012:485, para. 37 et seq.; see on these judgments Binder/Pinetz, *Ensuring the Effectiveness of Fiscal Supervision in Third Country Situations*, *EC Tax Review* 2014, p. 328 et seq.

178 CJEU, 17 October 2013, Case C-181/12, *Welte*, ECLI:EU:C:2013:662, para. 64 et seq.

C. Chart Illustrating the Main Differences between the Arbitration Procedure under the Directive, the Convention, the MLI and Art. 25(5) OECD Model

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| | Art. 25(5) OECD Model Convention | Arbitration Convention | Arbitration Directive | MLI |
|--|---|---|--|--|
| Dispute subjects | Competent authority disputes | Only transfer pricing disputes | Disputes arising from the interpretation and application of agreements and conventions that provide for the elimination of double taxation of income and, where applicable, capital | Taxation not in accordance with the provisions of the Covered Tax Agreement |
| Threshold period of MAP before arbitration is triggered | Disputes that remain unsolved after two years (may be replaced by a three-year period, or may be extended indefinitely in specific cases) | Disputes that remain unsolved after two years (time limit may be waived if competent authorities mutually agree and with consent of the taxpayers concerned) | Disputes that remain unsolved after two years (period may be extended by up to one year) | Disputes that remain unsolved after two years (period may be replaced by a three-year period, or may be extended indefinitely in specific cases) |
| Persons involved in the procedure | The two competent authorities | The two competent authorities. Under certain conditions limited involvement of taxpayer | The two competent authorities. Under certain conditions limited involvement of affected person(s) | The two competent authorities |
| Composition of the decision making body | Each competent authority appoints an arbitrator; the two arbitrators appoint a third arbitrator who chairs the panel | Advisory commission composed of independent president, two authority representatives (this number may be reduced to one by agreement between the competent authorities) and two independent members | Advisory commission composed of one chair, one representative of each competent authority and one independent person of standing. ⁸⁵ If an alternative dispute resolution committee (ADRC) is set up, such ADRC might have a different composition. | Each competent authority appoints an arbitrator; the two arbitrators appoint a third arbitrator who chairs the panel |

86 If the competent authorities agree, the number of representatives of each country and/or independent persons of standing may be increased to two for each competent authority.