Tax Dispute Resolution

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A Commentary on the EU Council Directive 2017/1852

Edited by

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List of Abbreviations

ACD	Competent Luxemburg Authority (the so-called *Administration des contributions directes*)
AEAT	Spanish Tax Agency (the so-called *Agencia Estatal de Administración Tributaria*)
CCCTB	Common Consolidated Corporate Tax Base
DGT	Spanish General Directorate of Taxation (the so-called *Dirección General de Tributos*)
ECJ	European Court of Justice
EU	European Union
FFC	Austria Federal Fiscal Code
FFCA	Austrian Federal Finance Court Act
FPC	French Procedural Code
IRA	Italian Revenue Agency
MAP	Mutual Agreement Procedure
MLI	Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting
TCA	Ireland Taxes Consolidation Acts 1997
TEAC	Portuguese Central Economic-Administrative Tribunal

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CHAPTER 4
France

Olivier Dauchez & Harold Turot

A. IMPLEMENTING MEASURES ADOPTED BY FRANCE IN RESPECT OF DIRECTIVE 2017/1852

The hair of the dog that bit you: quite ironically, the methods and procedures to respond to double taxation are not single, nor double, but multiple.

Directive 2017/1852 has been quickly implemented into French law by Article 130 of the Finance Law for 2019 No. 2018-1317 of 28 December 2018, under the new Articles L. 251 B to L. 251 ZH of the French Procedural Code (FPC). The implementation rules have been specified by a subsequent Decree No. 2019-616 dated of 21 June 2019 (hereinafter the 'Implementing Decree'), under the new Articles R. 251 D-1 to R. 251 ZF-1 of the FPC.[1]

1. In addition to implementation in recent years of measures to prevent tax avoidance and evasion and enhance transparency in tax matters, more efficient dispute resolution has emerged as another key requirement in improving legal certainty for taxpayers. Among the various measures which have been proposed, the EU has implemented thirty years ago a specific mechanism, the Arbitration Convention, which had previously constituted the EU's sole instrument on dispute resolution, but only applies to transfer pricing cases. The MLI also addresses this aspect under Articles 16 to 26. However, only twenty or so States have agreed to adopt its provisions on arbitration (Part VI – Articles 18 to 26). This is where Directive 2017/1852 comes in. A lot is at stake: just from a French perspective, 885 MAPs were under process as of 2018, according to the statistics released by the OECD on 16 September 2019. And that is before implementation of the BEPS and ATAD measures. Once they take effect, these figures are likely to shoot up. The fourth recital of Directive 2017/1852 acknowledges as much, albeit in the following diplomatic terms: '*Improvements to dispute resolution mechanisms are also necessary to respond to the risk that the number of double or multiple taxation disputes will increase, with potentially high amounts being at stake, because tax administrations have established more regular and focused audit practices.*'

   The rapidity with which Directive 2017/1852 was adopted, less than one year after the Commission's proposal, is a clear sign of both the importance of this issue for Member States and the EU's new role in the field of tax legislation.

These measures entered into force in France as from 1 July 2019, in accordance with Directive 2017/1852. They apply to all complaints submitted to the French tax authorities as from 1 July 2019 in respect of tax years commencing on or after 1 January 2018.

Directive 2017/1852 has not left to Member States a very wide margin of appreciation in the transposition of these rules. However, when making the choices which were left open by Directive 2017/1852, France has mainly adopted a strict and narrow approach which may unfortunately impediment the access to the procedure.

The big question is therefore not only how effective will Directive 2017/1852 itself be in tackling the challenges of resolution of double taxation disputes but also how the implementing choices made in France will impact this mechanism's efficiency. In an attempt to answer these questions, we will consider the scope and the terms of its dispute resolution mechanism of Directive 2017/1852 provisions as currently implemented into French law.

Directive 2017/1852 aims to strengthen the procedural framework so as to ease all potential bottlenecks. However, the measures implemented in France in order to achieve this may jeopardize the efficiency of this procedure.

B. GENERAL PROVISIONS

B.1. Subject Matter and Scope

The general principle is that only cases involving actual double taxation are eligible for the dispute resolution procedure of Directive 2017/1852.

The scope of this new double taxation dispute resolution procedure, following Directive 2017/1852 in this aspect, is however broader than the one of previous mechanisms, in that it applies to a more extensive range of disputes, taxpayers and taxes.

Directive 2017/1852 applies to '*disputes [that] arise from the interpretation and application of agreements and conventions that provide for the elimination of double taxation of income and, where applicable, capital*'. Directive 2017/1852 therefore covers any and all disputes that may arise from the interpretation or application of Tax Treaties; this of course includes not only transfer pricing disputes but also matters of residence, existence of permanent establishments, deductibility of expenses, application of withholding taxes, etc.

Only cases involving actual double taxation are eligible for the dispute resolution procedure of Directive 2017/1852. The definition of 'double taxation' provided by Directive 2017/1852 is implemented verbatim into French law under L. 251 C of the FPC as meaning either:

- an additional tax charge;
- an increase in tax liabilities;
- the cancellation or reduction of losses that could be used to offset taxable profits.

The French implementation of Directive 2017/1852 has however tightened a little the scope of disputes covered, Article L. 251 B of the FPC providing that only disputes '*resulting in a taxation not compliant with these agreements and conventions*' that provide for the elimination of double taxation are covered by the mechanism. This additional requirement of unconformity was not provided for under Article 1 of Directive 2017/1852. In theory, it may seem redundant: a complaint introduced to eliminate a double taxation would obviously have no chance to succeed if the taxation is compliant with the Tax Treaty. However, in practice, it may give rise to a certain number of discussions, depending on the interpretation of the Tax Treaties by the tax authorities, and be a source of uncertainty in the implementation of the procedure.

Directive 2017/1852 procedure applies to '*any person, including an individual, that is a resident of a Member State* [...]'. This opens up the EU's dispute resolution procedure to a significantly wider range of taxpayers, in that both individual and corporate EU-resident taxpayers are now eligible. It is implemented into French law under Article L. 251 D of the FPC which specifies that the taxpayer must be '*resident of France or of another Member State within the meaning of the applicable tax treaty between France and this other Member Stat*es'. This requirement may give rise to the first difficulties, given the very strict interpretation by French courts of this requirement when construing Tax Treaties, if, for instance, the taxpayer is not fully subject to tax in France or another Member State but still suffers from double taxation.

The permanent establishment is here again an issue at stake: unlike under the Arbitration Convention, permanent establishments are not specifically cited in the provisions detailing the mechanism's scope.

Disputes involving relations between a permanent establishment and either its parent or another company were definitely covered by the Arbitration Convention, but it is important to ascertain whether they also fall within the scope of Directive 2017/1852. The draft directive from 2016 was clearly intended to cover permanent establishments: its definition of 'taxpayer' included '*any person or permanent establishment subject to income taxes [...]*'. Although this definition was not retained in the final Directive 2017/1852, its removal does not appear to reflect any intention to exclude permanent establishments from the benefit of the mechanism. Indeed, the seventh recital of Directive 2017/1852 stipulates that '*[t]he improved dispute resolution mechanism should build on existing systems in the Union, including the Union Arbitration Convention. However, the scope of this Directive should be wider than that of the Union Arbitration Convention, which is limited to disputes over transfer pricing and the attribution of profits to permanent establishments. This Directive should apply to all taxpayers that are subject to taxes on income and capital covered by bilateral tax treaties and the Union Arbitration Convention*'. Based on this reference to the Arbitration Convention and the fact that the latter specifically provides that its arbitration procedure is open to permanent establishments, it seems reasonable to deduce that permanent establishments similarly fall within the scope of Directive 2017/1852.

Given that Directive 2017/1852 extends the scope of the EU's dispute resolution mechanism to encompass individual as well as corporate taxpayers, it necessarily covers a broader range of taxes than the Arbitration Convention. Thus, in addition to disputes involving corporate income taxes, the mechanism also applies to personal

income tax and wealth tax disputes (including inheritance or gift taxes if those taxes are covered by the applicable Tax Treaty). The French implementation corresponds to Directive 2017/1852 in that regard.

C. COMPLAINT TO START A MAP

C.1. Filing a Complaint to Start a MAP

One of the issues identified by the EU Commission's impact study on the Arbitration Convention was the implicit or explicit denial of access to the procedure for certain claims. Directive 2017/1852 mechanism aims to resolve this issue by broadening taxpayer's access to the dispute resolution procedure, introducing stricter rules of implementation for both taxpayers and competent authorities alike, especially as regards time frames, and offering taxpayers rights of appeal if they are denied access to the procedure.

As to the broader access to the procedure, Directive 2017/1852 provides for the simultaneous submission of complaints to two (or more) competent authorities: '*The affected person shall simultaneously submit the complaint with the same information to each competent authority, and shall indicate in the complaint which other Member States are concerned.*' This is in line with Action 14 of the BEPS plan, which seeks to '*improve the resolution of tax-related disputes*' and pursuant to which taxpayers may, and indeed must, submit their complaint to the competent authorities of each of the Member States concerned. Conversely, under the Arbitration Convention, taxpayers could in principle only submit complaints to the competent authority of the Member State in which the affected person is resident or has its permanent establishment.

The French transposition achieves a satisfactory and balanced result in that respect by implementing into Article L. 251 D of the FPC the rules of Directive 2017/1852 which provide that individuals and undertakings that are not large undertakings and do not form part of a large group – as these terms are defined in Directive 2013/34/EU on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings – i.e., primarily micro-entities and small- and medium-sized enterprises, do not need to submit their complaints and any additional information requested to both competent authorities but only to the competent authority of the Member State in which they are resident. In those cases, the French tax authorities must handle themselves all the communications to be done with the other concerned tax authorities.

At least there is now a clear rule, answering the ever-returning question of whether or not the second competent authority should be informed.

However, as mentioned above, Directive 2017/1852 permits stricter rules of implementation. In this respect, the process applicable under Directive 2017/1852 as implemented into French law is as follows.

As under the Arbitration Convention, taxpayers have three years as from receipt of the first 'administrative measure' which may trigger double taxation.

Regarding the Arbitration Convention, the French tax authorities' guidelines had stipulated that, for cases involving reassessments on which the taxpayer was invited to submit its observations, the notice in question was the reassessment proposal.

Regarding the Directive, the Implementing Decree specifies (FPC, Article R. 251 D-2) that the 'administrative measure' referred to under Article L. 251 D can be a:

- reassessment proposal; or
- tax reassessment based on the automatic taxation procedure; or
- tax collection in case of withholding tax.

As to the procedure for submitting a complaint:

- according to Directive 2017/1852, affected persons must submit their complaint in the official language of each authority's Member State or else another language that the Member State in question accepts; this requirement of complaint drafted in French has been transposed by the Implementing Decree;
- the terms regarding the content of the complaint specified by the Implementing Decree (FPC, Article R. 251 D-2) are basically the same as under Article 3 of the Directive; i.e., complaints must include:
  - (i) the name(s), address(es), tax identification number(s) and any other information necessary for identification of the affected person(s) who presented the complaint to the competent authorities and of any other person concerned;
  - (ii) the taxes and tax periods concerned;
  - (iii) details of the relevant facts and circumstances of the case;
  - (iv) copy of the documents issued by the French tax authorities and by the other Member State in question, as well as any other supporting document;
  - (v) an explanation of why the affected person considers that there is a question in dispute and a presentation of the national rules or international agreement or convention on the basis of which the complaint is submitted;
  - (vi) details of any appeals and litigation initiated in such respect and copies of any decision issued in such respect;
  - (vii) information on any other complaint submitted under another MAP or dispute resolution procedure and a declaration acknowledging that initiating this procedure ends these previous initiated ones.

Surprisingly enough, the French list does not reproduce the requirement for a commitment from the affected person to respond as completely and quickly as possible to any requests made by the competent authority.

D. THE RESOLUTION OF THE QUESTION IN DISPUTE UNDER THE MAP

D.1. Decision of the Competent Authority with Reference to the Complaint

As to the handling of the complaint, the competent authorities have two months from receipt of the complaint in which to acknowledge receipt and, if necessary, inform the other competent authority involved. They also have three months as from receipt of the complaint in which to request any additional information from the taxpayer concerned. The taxpayer has three months as from any such request in which to provide the competent authorities with the additional information in question. All information provided must be sent simultaneously to both competent authorities concerned: this was of course already generally accepted as best practice in dispute resolution procedures, but Directive 2017/1852 makes it mandatory. These rules are implemented under Article R. 251 D-3 of the FPC, unless the taxpayer falls within the exception provided for under Article L. 251 D.

D.2. MAP

The French authorities must accept or reject the complaint within six months from its submission or else from the taxpayer's response to their requests for additional information (FPC, Article L. 251 E).

The six-month delay is postponed in the event the taxpayer files a tax complaint under Article L. 190 of the FPC until the outcome of this complaint (FPC, Article L. 251 E III).

During such six-month period, either authority may decide to resolve the question in dispute on a unilateral basis. In such cases, the relevant competent authority must notify the other competent authority and the taxpayer of its decision. Any such unilateral action will terminate the dispute resolution proceedings.

Complaints that are accepted proceed to the MAP stage. Directive 2017/1852 also stipulates that if the competent authority fails to take any decision on a complaint, '*the complaint shall be deemed to be accepted by that competent authority*'. This provision for tacit acceptance, which plays in favour of taxpayers, should encourage the competent authorities to respect the six-month deadline so as to ensure that they need to only consider further those complaints with due merit.

The mutual agreement phase remains the phase during which the French tax authorities and the competent authorities of the other Member States concerned attempt to agree on how to resolve the dispute. With a view to enabling them to do so, the Directive extends the duration of this phase and clarifies the date from which it starts to run. Note, however, that if serious penalties are (or may be) imposed on the income or capital in question, access to the MAP may be denied or any ongoing proceedings stayed.

The duration of the mutual agreement phase is in principle two years (i.e., the same as under the Arbitration Convention), but either competent authority can now

request its extension to three years, provided it supplies written justification (FPC, Article L. 251 G). If the taxpayer files a tax complaint under Article L. 190 of the FPC, the time limit is postponed until the outcome of this complaint (FPC, Article L. 251 J).

This change is in line with the BEPS measures, which have prompted the OECD to amend the MAP clause in its Model Convention, granting competent authorities a period of three years in which to resolve disputes. It also reflects past experience: the two-year deadline (which under the Arbitration Convention is fixed unless the taxpayer concerned agrees to an extension) was not often met. Under the combined effect of this new extension right, practical experience and France's election under the MLI, it seems likely that proceedings will now often last for three years, especially given that the condition of written justification will probably be more or less a formality (indeed, it is not clear what would happen if the second competent authority disagrees with the justification given).

The Directive also clarifies the date from which the mutual agreement phase begins to run. Whereas the revised Code of Conduct for the Arbitration Convention stipulates that the two-year period runs as from the later of either the date of the tax assessment notice (or equivalent) or the date on which the competent authority receives the request and the minimum information required, the Directive, duly implemented in that respect, defines just one start point: the last notification of a decision of one of the Member States on the acceptance of the complaint (FPC, Article L. 251 G). This should clear up the issue of differing interpretations between competent authorities and establish a more efficient standard practice with a view to resolving disputes more quickly.

The Directive has left to the Member States the possibility to provide that the competent authorities may still deny a taxpayer access to the MAP if it comes to light that it is subject to any sanctions 'for tax fraud, wilful default and gross negligence' in respect of the income or capital in connection with which the MAP is sought.

Similarly, if any judicial or administrative proceedings that could potentially lead to such penalties are ongoing, the competent authorities may stay the proceedings under the Directive pending their conclusion. The wording of Directive 2017/1852 on this point is similar to that of the Arbitration Convention; unfortunately, the drafters have chosen not to follow the recommendation from the revised Code of Conduct for the Arbitration Convention, according to which access should only be denied in exceptional cases.

France has chosen to implement both these rules: under Article L. 251 J of the FPC, the MAP is stayed when the judicial or administrative proceedings can potentially lead to the confirmation of penalties provided for under:

- Article 1728, 1, b of the FTC: 40% penalty for default in filing a declaration or a deed thirty days after receipt of a formal notice;
- Article 1728, 1, c of the FTC: 80% penalty in the event of hidden activity;
- Article 1729 of the FTC: 40% penalty for wilful default, 80% in the event of abuse of right as set forth under Article L. 64 of the FPC or 40% when the taxpayer was neither the principal initiator nor the principal beneficiary of the abuse, 80% penalty for fraud;

- Article 1732, a of the FTC: 100% penalty in the event of opposition to the tax audit;
- Article 1758, first paragraph of the FTC: 40% penalty for default in filing foreign assets;
- Article 1758, last paragraph of the FTC: 80% in the event of presumptive taxation based on outward signs of lifestyle.

The same penalties are listed under Article L. 251 M of the FPC providing that the procedure before the advisory commission cannot be initiated where any of the aforementioned penalties has been applied and has become final.

These limitations may substantially impediment the resort to the dispute resolution procedure, in light of the very common use of these penalties by the French tax authorities; it is indeed quite rare nowadays to see a tax reassessment notice without application of at least the 40% penalty for wilful default and the French courts have broadly enforced the application of this penalty. The French parliamentary work specifies that this implementation choice has been driven by the French tax authorities' intention to give access to this dispute resolution procedure only to 'taxpayers acting in good faith'.

D.3. Appeal of the Taxpayer Against the Decision Rejecting the Complaint

Directive 2017/1852 sets out the grounds on which the competent authority of a Member State may reject a taxpayer's complaint. Complaints can only be validly rejected on the specific grounds listed in Directive 2017/1852, namely: lack of information, absence of a question in dispute, or failure to submit the complaint within the three-year period. This limitative list of grounds for rejections has not been implemented into French law, Article L. 251 E of the FPC merely stating that the rejection must take the form of a reasoned decision. Directive 2017/1852 provisions should nevertheless be applicable in that respect.

One of the most significant developments of Directive 2017/1852 is the right for taxpayers to contest the rejection of their complaints; under Directive 2017/1852, taxpayers can now refer the matter to a second body. The procedure for such appeals depends on whether the complaint has been rejected by all competent authorities or just one of them:

- if all competent authorities concerned deny access to the MAP, the taxpayer now has the right to appeal this decision '*in accordance with national rules*'. This means that taxpayers can contest the rejection of a complaint before their national courts: under French law, the French appeal procedure will take the form of an ordinary complaint before the judge having jurisdiction, administrative or judicial, as provided under the general rules set out by Article L. 199 of the FPC (FPC, Article L. 251 F). In view of the average duration of proceedings in France, the appeal procedure should have allowed for an expedited ruling, so as to avoid dragging out what will already be a lengthy dispute resolution process. This is especially crucial in light of the fact that the

French authorities neither suspend collection of taxes pending dispute resolution nor pay interest on any taxes subsequently refunded;

– if just one of the competent authorities concerned or one of the national courts rejects the taxpayer's complaint, the taxpayer can request that an advisory commission rules on its admissibility (FPC, Article L. 251 K, 1°). Under the Arbitration Convention, the advisory commission's role was limited to the arbitration stage of proceedings. The Directive thus grants it a new prerogative: ruling on appeals when a taxpayer contests the rejection of its complaint by one of the two competent authorities involved. In the event of such an appeal, the advisory commission is set up in the same way as for the mutual agreement stage. The advisory commission must be set up within 120 days as from receipt of the taxpayer's request provided for under Article L. 251 K of the FPC (FPC, Article L. 251 L) and render its ruling within six months as from the date it is set up (FPC, Article L. 251 N, I).

Directive 2017/1852 stipulates under Article 7 (3) that, if the competent authorities fail to set up the advisory commission in due time, the taxpayer may apply to the competent court or national appointing body to set up the advisory commission in their stead and that, in such cases, the applicable procedure will be '*the same as the procedure under national rules in matters of civil and commercial arbitration that applies when courts or national appointing bodies appoint arbitrators because parties have failed to agree in this respect*'. The competent authority that initially failed to set up the advisory commission will then be entitled to appeal the decision of the court or national appointing body, provided it has the right to do so under the relevant national law. However, Article 7(3) of the Directive has not been implemented into French law and, if applicable, this new appeal procedure is left without precision: would Articles 1450 *et seq.* of the Civil Procedure Code, governing civil and commercial arbitration in France, and Articles 1504 *et seq.* governing international arbitration be applicable? And would the President of the Paris *Tribunal Judiciaire* (District Court) acting as the 'supporting judge' be the competent court? These issues remain unclear.

E. DISPUTE RESOLUTION PROCEDURE

E.1. Request of Appointment of the Advisory Commission

Under the Directive, the time frames for each phase may be extended if necessary in light of the particularities of the disputes submitted. Moreover, the competent authorities can now choose between a new ad hoc commission or the advisory commission in the arbitration phase.

When the competent authorities are unable to resolve the dispute before them within the time frame allowed for the MAP, they must inform the taxpayer, detailing the points on which they have been unable to agree. The taxpayer may then request that the dispute be submitted to arbitration (FPC, Article L. 251 I).

Directive 2017/1852 offers various avenues for dispute resolution in the arbitration phase. Taxpayers' cases may now be handled either by an advisory commission or

by a new ad hoc body: the alternative dispute resolution commission. This new commission has been introduced as a way to offer greater flexibility in handling disputes that have not been resolved through the MAP as well as to ensure the timely resolution of disputes during the arbitration phase. The advisory commission or alternative dispute resolution commission is in principle required to issue an opinion within six months, but the Directive allows them to extend this deadline by a further three months if they deem it necessary (FPC, Article L. 251 Y). In such cases, the commission in question must inform the taxpayer of the extension.

Taxpayers can request the advisory commission to be set up in two cases:

- as indicated above, if just one of the competent authorities concerned or one of the national courts rejects the taxpayer's complaint (FPC, Article L. 251 K, 1°);
- if the competent authorities indicate to the taxpayer that they have failed to resolve the dispute through the MAP in which to request that an advisory commission be set up (FPC, Article L. 251 K, 2°).

Pursuant to Article R. 251 K-1 of the FPC, taxpayers have then fifty days to file a written request to set up the advisory commission as from the:

- receipt of the notice of rejection of the taxpayer's request for opening the MAP, provided for under Article L. 251 E;
- date on which a decision is delivered by the court on the appeal provided for under Article L. 251 F (right to appeal open when all tax authorities have denied access to the MAP);
- date of notification of the decision provided for under Article L. 251 I, when the French tax authorities and the other concerned Member State's tax authorities have not been able to reach an agreement as to how to resolve the question in dispute.

E.2. Appointment of the Advisory Commission

The advisory commission must be set up within 120 days as from receipt of the taxpayer's request (FPC, Article L. 251 L).

The advisory commission comprises:

- a chair;
- one (or two) representative of each competent authority concerned; and
- one (or two) independent person of standing appointed by each Member State (FPC, Article L. 251 P).

These representatives and independent persons of standing appoint the chair; unless they agree otherwise, the chair of the advisory commission will be a judge (FPC, Article L. 251 S). A substitute is also appointed for each independent person of standing. The Implementing Decree also specifies that at least three persons on the list

of independent persons of standing to be provided to the EU Commission are designated by the Budget Minister (FPC, Article R. 251 P-1).

There are strict rules on who can be appointed as an independent person of standing – the following appointments can be objected by the tax authorities:

- any person who has belonged to or worked on behalf of one of the tax administrations concerned at any time over the past three years (FPC, Article L. 251 Q II, 1°);
- any person who holds or has held any voting right in or is or has been an employee of or adviser to any person involved in the dispute, at any time during the last five years prior to the date of his or her appointment (FPC, Article L. 251 Q II, 2°);
- any person who does not present enough guarantee of his or her impartiality regarding the resolution of the dispute at hand (FPC, Article L. 251 Q II, 3°);
- any person who is or has been an employee of an enterprise that provides tax advice or who otherwise gives or has given tax advice on a professional basis at any time over the past three years, at least, prior to the date of his or her appointment (FPC, Article L. 251 Q II, 4°).

So as to ensure the complete impartiality and integrity of the independent persons of standing, it is also provided that '*[f]or a period of 12 months after the decision of the advisory commission was delivered, an independent person of standing who is part of the advisory commission shall not be in a situation that would have given cause to a competent authority to object to his appointment*' (FPC, Article L. 251 Q IV).

Lastly, the sentence of Article L. 251 S of the FPC providing that the chair of the advisory commission shall in principle be a judge is another step in the advisory commission's transformation into a more court-like body.

Pursuant to Article L. 251 T of the FPC, the functioning rules of the advisory commission must be notified by the French tax authorities to the taxpayer with the following elements specified by the Implementing Decree (FPC, Article R. 251 T-1):

- the limit date by which the opinion on the dispute resolution must be delivered and the means of delivery of this opinion;
- the applicable regulatory or legal provisions, agreement or convention;
- the description and the main features of the dispute;
- the mandate on which the concerned tax authorities agree with respect to the legal and factual issues to be resolved;
- the structure of the dispute resolution body;
- the timeline of the dispute resolution procedure;
- the number of members, their names, details about their qualification and experience, as well as communication of the conflict of interest about them;
- the rules on the taxpayer's and third parties' participation to the procedure, the exchanges of notes, information or evidence, the costs, the applicable method to resolve the dispute and any other procedural or organizational issue that the French tax authorities deem necessary.

E.3. Appointment of the Advisory Commission Made by a Competent Court

If it is not set up within this time, the taxpayer may apply to the competent court or national appointing body to set up the advisory commission and thus to appoint the independent persons of standing who are to be its members. In France, it will be the President of the Paris *Tribunal Judiciaire* pursuant to Article L. 251 R of the FPC. Article L. 251 Z provides that the advisory commission must base its opinion on the provisions of the applicable agreement or convention as well as on any applicable national rules.

E.4. Alternative Dispute Resolution Commission

Pursuant to the Directive 2017/1852 stipulations, Article L. 251 ZD of the FPC provides that the French authorities and the other Member States' competent authorities may decide to set up an alternative dispute resolution commission. It is also provided that the competent authorities may decide that this alternative dispute resolution commission can depart from the rules applicable to the advisory commission, such as the requirement to base its opinion on the provisions of the applicable agreement or convention as well as on any applicable national rules.

This ad hoc body and the way in which it operates reflect the EU Commission's desire to offer competent authorities greater flexibility so as to allow them to resolve disputes as efficiently as possible. The competent authorities have a great deal of freedom in deciding how the alternative dispute resolution commission should be set up and operate. As a result, the alternative dispute resolution commission may differ significantly from the advisory commission in its make-up and functioning. The independent persons of standing appointed to make up an alternative dispute resolution commission must nonetheless satisfy the conditions of independence and impartiality, in the same way as for the advisory commission.

The competent authorities also have the option of setting up an alternative dispute resolution commission on a more permanent basis, as a 'standing committee', provided they both agree. What makes this ad hoc body particularly interesting is that it can '*apply […] any dispute resolution processes or technique to solve the question in dispute in a binding manner*'. The Directive cites the technique of 'final offer' arbitration (also known as 'last best offer' arbitration) as one example. This opens the door to a range of alternative dispute resolution methods, such as collaborative practice, participatory proceedings, mediation or conciliation. These methods are typically used in civil disputes and would therefore probably need to be adjusted for application to matters of tax law.

However, the precise details of functioning of this permanent standing committee having not yet been discussed at the EU level, France has not implemented the Directive's provision in that respect.

F. COMMON PROCEDURAL PROVISION

F.1. Enforcement of a Decision Taken under the MAP or Dispute Resolution Procedure

When the competent authorities reach an agreement as to how to resolve the question in dispute during the mutual agreement phase, their decision is binding on them and enforceable by the taxpayer, provided the latter accepts the decision and withdraws from all other ongoing proceedings for remedies, particularly domestic judicial proceedings. The taxpayer must provide evidence that it has taken action to terminate any such proceedings within sixty days from the date on which the competent authorities notify it of their decision (FPC, Article R. 251 H-1).

The advisory commission and alternative dispute resolution commission both adopt opinions by a simple majority of their members (FPC, Article L. 251 Z). All opinions are delivered in writing (FPC, Article R. 251 Y-1). Precise details on the requisite content of opinions would be helpful: Directive 2017/1852 specifies only that they must be based on the provisions of the applicable agreement or convention as well as on any applicable domestic rules. In drafting opinions, the advisory commission and alternative dispute resolution commission could look to the revised Code of Conduct for the Arbitration Convention, which stipulates that opinions should in particular include the relevant information on the complaint (i.e., the names and addresses of the enterprises involved, identification of the competent authorities involved, a description of the facts and circumstances of the dispute and a clear statement of what is claimed), the names of the members of the advisory commission, a short summary of the proceedings, and details of the arguments and methods on which the decision in the opinion is based.

Article L. 251 ZA of the FPC provides that the advisory commission must deliver its opinion to the competent authorities, which will then have six months in which to take a final decision. The competent authorities may deviate from the advisory commission's opinion, provided they are able to agree on an alternative resolution (as under the Arbitration Convention). In the same way as for decisions issued further to the MAP, the decision delivered by the competent authorities in this context is binding on them and enforceable by the taxpayer, provided the latter accepts the decision and withdraws from all other ongoing domestic proceedings, supplying the competent authorities with evidence that it has done so within sixty days from the date on which they notify it of their decision (FPC, Article L. 251 ZC). This stipulation that the taxpayer must accept the competent authorities' decision in order for it to be binding marks a difference between the Directive and the 2015 proposal for revision of the Code of Conduct, which does not require the taxpayer's consent to the competent authorities' decision. In practice, however, as noted in the proposed revision of the Code of Conduct, the taxpayer should generally be satisfied provided the double taxation has been resolved.

The Member States concerned are required to implement the competent authorities' decision (which concerns solely the taxable basis in question) under their national law, amending the disputed taxation according to the applicable domestic rules. French

implementation is very terse in that respect, merely providing that the final decision, once notified and accepted, modifies accordingly the taxpayer's taxation (FPC, Article L. 251 ZC II). However, the Directive stipulates that, if the competent authorities fail to notify the taxpayer of their final decision within thirty days of taking it, or if the relevant Member State fails to implement the final decision, the taxpayer may appeal in accordance with the applicable national rules in its Member State of residence in order to obtain the final decision or enforce its implementation, as the case may be.

The Directive stipulates that the competent authorities may publish final decisions provided the taxpayer agrees. However, even if the competent authorities or the taxpayer do not agree to publication of the final decision in its entirety, the Directive provides that an abstract must still be published, containing 'a description of the issue and the subject matter, the date, the tax periods involved, the legal basis, the industry sector, [...] a short description of the final outcome [and] a description of the method of arbitration used'. Under French law, the publication takes the form of an automatic transmission to the EU Commission of an abstract of the final decision for publication purposes (FPC, Article L. 251 ZF, clarified by Article R. 251 ZF-1). The Implementing Decree merely adds that, before being transmitted to the EU Commission, the abstract must be communicated to the taxpayer who has sixty days to request that information covered by commercial and industrial secret or contrary to public order not be published (FPC, Article R. 251 ZF, II).

F.2. Interaction Between Directive 2017/1852 and the National Proceedings

As under the Arbitration Convention, the Directive stipulates that the instigation of proceedings under national law, or even a final ruling under national law, will not prevent a taxpayer from availing itself of the remedies offered under the Directive. Indeed, a court judgment does not always suffice to resolve a situation of double taxation. Taxpayers may therefore simultaneously submit a dispute to the competent authorities under the Directive and to the French courts under the domestic appeal procedure (see, above, section D.2, FPC, Article L. 251 E III) or file a complaint to the French courts during the MAP (see, above, section D.2, Article L. 251 J), both resulting in a postponement of delays.

However, the MAP will be terminated if the French court seized by the taxpayer's complaint delivers a ruling which becomes final after the filing of request by the taxpayer to set up the advisory commission but before the delivery of the advisory commission's opinion (FPC, Article L. 251 ZH).

F.3. Interaction Between Directive 2017/1852 and the Tax Treaty Proceedings

Article L. 251 ZG of the FPC governs the interaction between the various dispute resolution procedures available under Directive 2017/1852, the Arbitration Convention and Tax Treaties. In accordance with Directive 2017/1852, it provides that the opening of proceedings under Directive 2017/1852 procedure will put an end to any other

ongoing proceedings in relation to the same matter pursuant to an agreement or convention, as from the date on which the complaint is first received by one of the Member States and that such opening will prevent the taxpayer from resorting to any other mutual agreement or dispute resolution procedures provided for under an agreement or convention entered into by France.

Although, strictly speaking, this provision does not prevent taxpayers from submitting disputes to the resolution procedures available under Tax Treaties, it could nonetheless result in a change in practice: previously, French taxpayers tended to submit complaints under both the treaty provisions and the Arbitration Convention, based on the French tax authorities' guidelines, so as to ensure that the double taxation issue would be resolved and to avoid the risk of time-barring in certain countries which take a particularly strict view in terms of limitation periods.