

## TAX DISPUTE RESOLUTION MECHANISM IN THE EUROPEAN UNION OR MUTUAL AGREEMENT PROCEDURE TO AVOID DOUBLE TAXATION?

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### **Abstract**

*This paper aims to clarify how the provisions of Council Directive (EU) 2017/1852 on tax dispute resolution mechanisms in the European Union should be understood and applied. This directive is supplemented by the provisions of its Implementing Regulation (EU) 2019/652 of the Commission, adopted on April 24, 2019, which establishes the standard operating rules for the advisory commission or the alternative dispute resolution commission.*

*On August 22, 2019, the Romanian Government adopted Ordinance No. 19/2019, amending and supplementing the Tax Procedure Code, which was later consolidated by the adoption of Law No. 127/2021. Both legislative acts are reflected in Title IX of the Tax Procedure Code: "Resolution of Tax Disputes Arising from the Interpretation and Application of Agreements and Conventions Providing for the Avoidance/Elimination of Double Taxation," Chapter II, which regulates a mutual agreement procedure to avoid/eliminate double taxation. This legislative framework ensures that Romania has fully transposed the aforementioned European regulations into its national legal system. Understanding and navigating this complex procedure, which can only be initiated by the affected party but involves negotiations carried out exclusively between the national tax authorities of the Member States, may offer valuable insights for both the European and national legislators. Strengthening this procedure would enhance its effectiveness as a legal instrument for resolving tax disputes and addressing circumstances that could be highly detrimental to European taxpayers.*

**Keywords:** *avoidance of double taxation; tax disputes; contentious procedure; mutual agreement procedure; national tax authorities of the Member States.*

**JEL Classification:** K34; K41.

### **1. INTRODUCTION**

The financial and fiscal activity of modern states faces various situations or circumstances that are extremely difficult to resolve, as they are extremely difficult to identify and delineate. One of these situations refers to the multiple taxation of a taxpayer (Dumiter and Jimon, 2016), a situation that must always be

viewed in parallel with non-compliant practices found at the opposite extreme, when the taxpayer manages to avoid the jurisdiction of the national tax laws of multiple states.

As a general practice, the avoidance of double taxation is achieved through agreements between two (or more) states, through which the parties establish general rules and methods that will be equally applied for the proper taxation-by only one state-of the assets and income of taxpayers conducting activities with cross-border elements (Dumiter and Jimon, 2017).

These rules must have a general character, as a variety of taxes or social contributions can be subject to either double taxation or, conversely, to non-taxation by any state. This includes corporate income tax for companies operating in multiple countries, dividend tax, as well as VAT or excise duties-mentioning only the most important taxes that may be owed by legal entities-or income tax and social contributions in the case of individual taxpayers (Costaş and Tofan, 2023).

At the level of the European Union, a suitable solution for these situations could be fiscal harmonization (Tofan, 2019), but this is still perceived as a limitation of the fiscal sovereignty of member states. In these circumstances, specific instruments such as bilateral double taxation avoidance agreements are still used, although they have proven to be of limited effectiveness and somewhat cumbersome or inflexible. Therefore, the European Union has intervened through a European directive to provide member states with a common legislative framework, so that they can subsequently regulate procedures for resolving cross-border tax disputes.

Within this framework, on August 22, 2019, the Government of Romania adopted Ordinance No. 19/2019 for the amendment and completion of the Fiscal Procedure Code, which was later consolidated by the adoption of Law No. 127/2021. Both legal acts are reflected in the content of Title IX "Settlement of tax disputes arising from the interpretation and application of agreements and conventions for the avoidance/elimination of double taxation", Chapter II of the Fiscal Procedure Code, which regulates an amicable procedure for the avoidance/elimination of double taxation. In this way, Romania ensured the transposition into national legislation of Council Directive (EU) No. 1852/2017 on tax dispute resolution mechanisms in the European Union, which was required to be implemented by June 30, 2019. The European legal act states in Article 23 that it entered into force on the twentieth day following its publication in the Official Journal of the European Union and applies to any complaint submitted from July 1, 2019, regarding disputes related to income or capital earned in a financial year starting on or after January 1, 2018, but leaves member states free to extend these provisions to earlier financial years. Romania limited the scope of application of these provisions to income or capital earned as of January 1, 2018, and added the condition that the National Agency for Fiscal Administration and

the competent authorities of the concerned member states must agree on this matter.

It is important to mention that the provisions of Council Directive (EU) No. 1852/2017 are supplemented by the provisions of its Implementing Regulation (EU) No. 652/2019 of the Commission of April 24, 2019, establishing the standard rules of operation for the advisory commission or the alternative dispute resolution commission.

To obtain the most relevant conclusions, we consider it useful to compare the approaches of the two regulations, namely the European and the national ones. Thus, according to the title of Council Directive No. 1852/2017, it establishes mechanisms for resolving tax disputes in the European Union, while the Romanian Fiscal Procedure Code refers to an amicable procedure for avoiding/eliminating double taxation. This is not merely an analysis of the titles of the two legal acts, but an attempt to determine the legal nature of this procedure so that any subsequent analysis can be carried out based on this reality.

## **2. PRESENTATION OF THE PROCEDURE**

The procedure under analysis here represents a logical and chronological sequence of acts and operations which, in the end, should lead to the fairest possible resolution for the taxpayer who considers themselves wronged by the fact that their assets or income have been subject to multiple taxation under the fiscal regulations of several EU Member States.

### **2.1. Initiation of the procedure. The complaint – the act of notification to the competent tax authorities**

According to Article 283<sup>3</sup> of the Fiscal Procedure Code, a person affected by a tax assessment decision that results in a situation of double or multiple taxation may submit a complaint to the National Agency for Fiscal Administration (ANAF) regarding this situation. According to Romanian legislation, this is considered a “dispute” whose resolution falls under the responsibility of this Romanian authority.

First, attention is drawn to the term “dispute”. It is the term used by the Romanian legislator to implement Council Directive (EU) No. 1852/2017 on tax dispute resolution mechanisms in the European Union. As can be seen, the European document uses the expression “mechanism for resolving tax disputes.” The object of the dispute concerns the determination of the applicable law in specific tax-relevant situations, in order to eliminate unjust cases of multiple taxation of the same tax base. The “dispute” arises between the national tax administrations of two or more Member States, but the entity responsible for initiating the “dispute resolution mechanism” is the “affected person.”

It must be noted that the person in question must be a tax resident in Romania, meaning they are subject to Romanian tax law and are liable to fiscal obligations

arising under Romanian law. If this condition is not met, the person does not have standing to be involved in resolving such a “dispute.”

A second very important aspect refers to the fact that initiating this procedure also implies that any previously initiated amicable procedure is legally terminated (i.e., by the effect of the law, under Article 283<sup>1</sup>, paragraph (2) of the Fiscal Procedure Code).

The complaint must be submitted within 3 years from the date the tax assessment decision is communicated, a decision which results or will result in a dispute (i.e., double taxation), regardless of whether the affected person has used available administrative or judicial remedies under applicable laws – meaning, regardless of whether they accessed the regular administrative-tax litigation procedures. This complaint must be submitted simultaneously (and containing the same information) to each competent authority in each Member State involved in the dispute (i.e., the case of double or multiple taxation), within the same timeframe. Naturally, the complainant must also indicate in the complaint all the Member States involved in the situation.

As stipulated, this appears to be a forfeiture deadline-failure to observe it extinguishes the complainant’s right to submit a complaint under this procedure and regarding this subject. Of course, this is valid from the perspective of the Romanian tax authority. If another Member State’s national tax law provides otherwise and is more favorable, we believe the procedure may still be initiated beyond this period, by notifying the competent tax authority of the Member State whose legislation allows it. In such cases, if the procedure is validly initiated in that state, ANAF cannot refuse participation in the procedure, which is regulated by a European directive that Romania has adopted.

According to the provisions of Article 283<sup>2</sup>, paragraph (6) of the Fiscal Procedure Code, the complaint filed by the affected person must include detailed information about the taxpayer, the taxable matter under analysis, the tax periods in question, and especially the legal provisions on which the situation is based. Additionally, the complaint must be accompanied by thorough and relevant data, information, and documents that support the claim of double taxation.

Analyzing these provisions leads to two observations. On one hand, this procedure does not interfere with ordinary litigation procedures initiated by the affected party. On the other hand, the legislator emphasizes that the party must cease any similar amicable procedures already underway. Although a previous article states that “the submission of a complaint terminates any other amicable or dispute resolution procedure conducted under other legal instruments such as double taxation agreements or conventions to which Romania is a party,” the Romanian legislator also requires a written declaration from the affected party to this effect. However, we consider that the phrase “terminates” could also be interpreted to mean “suspends” such procedures, not necessarily “ends” them-if this is allowed under the relevant procedures-so that after a final solution is

reached under the current procedure, the affected party might still pursue the other amicable procedures already initiated or those whose deadlines and procedural steps can still be met. Of course, all such procedures must be established by agreements or conventions for the avoidance of double taxation to which Romania is a party.

On the other hand, an affected person who wishes to withdraw a complaint must simultaneously send a written withdrawal notice to each competent authority of the concerned Member States. This notification immediately terminates all procedures carried out under the regulations being analyzed. At the same time, if ANAF receives such a notification, it must promptly inform the other competent authorities of the Member States involved about the termination of the procedures. Therefore, the affected person may withdraw their complaint before a mutual agreement is reached or before a final decision is issued by the competent authorities involved.

If, for any reason, the dispute ceases to exist, all procedures are closed, and ANAF must promptly inform the affected person of the factual and legal reasons for the termination of the procedures.

## **2.2. Decision of the competent authority regarding the complaint**

According to Article 283<sup>4</sup> of the Fiscal Procedure Code, within 180 days from the receipt of the complaint-or within 180 days from the receipt of any additional information and documents requested from the complainant, if that date is later-ANAF must decide whether to:

- accept the complaint and initiate the mutual agreement procedure provided under Article 283<sup>5</sup> of the Fiscal Procedure Code;
- accept the complaint and resolve the disputed matter unilaterally, without involving the other competent authorities;
- reject the complaint.

Naturally, ANAF is required to promptly notify both the affected person and the competent authorities of the Member States involved about the decision taken.

If ANAF decides to resolve the disputed matter unilaterally, the mutual agreement procedure in question is terminated.

However, if ANAF fails to make a decision regarding the complaint within the aforementioned 180-day period, the complaint is considered accepted, and the procedure is deemed to have been initiated.

ANAF may reject the complaint in the following situations:

- if the complaint does not contain the necessary information and documentation as previously outlined;
- if the affected person fails to provide additional information and documents requested by ANAF, in its role as the competent authority for conducting the mutual agreement procedure;
- if no dispute actually exists;

- if the complaint was not submitted within the 3-year deadline, which, as previously mentioned, is considered a statute of limitation.

Of course, in the case where ANAF rejects the complaint, the notification sent to the affected person must include both the factual and legal reasons on which the rejection decision is based.

In turn, if the complaint is rejected, the affected person may proceed as follows:

- if the complaint is rejected by all the competent authorities involved, the affected person may contest ANAF's rejection decision, by way of derogation from the provisions of Article 7 of Law no. 554/2004 on administrative litigation, directly before the competent court, within 30 days of receiving the notification;
- if the complaint is rejected by at least one, but not all of the competent authorities involved, the affected person may submit a request to ANAF to establish an Advisory Commission.

If the complaint is rejected by all the competent authorities involved, the affected person who exercises their right to such a legal remedy may not request that the dispute be resolved by the Advisory Commission if:

- the decision rejecting the complaint is still subject to judicial appeal under applicable legal provisions;
- the decision rejecting the complaint may still be appealed in accordance with the legal remedies available in the other Member States involved;
- the rejection decision has been upheld through judicial review, and the ruling of the competent court or other relevant judicial authority in any of the Member States involved can no longer be overturned.

In the case where a legal remedy has been exercised, the decision of the relevant court or other relevant judicial authority is taken into account.

### **2.3. The actual mutual agreement procedure**

We refer to the "actual mutual agreement procedure" as the process that takes place when ANAF accepts the complaint submitted by a person affected by a case of double or multiple taxation.

Thus, according to Article 283<sup>5</sup> of the Fiscal Procedure Code, if ANAF and the other competent authorities of the concerned Member States accept the complaint, the national tax authority is responsible for making all necessary efforts to resolve the disputed matter through the mutual agreement procedure within a period of 2 years. This period begins from the date of the latest notification of acceptance of the complaint by one of the competent authorities of the Member States involved.

This period may be extended only in duly justified cases, by up to one additional year, at the request of ANAF or any of the other competent authorities involved. The request must be addressed to all the other authorities participating

in the procedure. If the extension is accepted by all national tax authorities involved, ANAF must notify the affected person who submitted the complaint.

However, if ANAF reaches an agreement with the competent authorities of the concerned Member States on how to resolve the dispute within the 2-year period, it shall issue a decision to conclude the mutual agreement procedure, which shall be immediately communicated to the affected person. This decision is formalized through an order issued by the President of ANAF.

The decision becomes binding and enforceable, provided the affected person accepts it and waives the right to pursue any other remedies, whether administrative or judicial. If other remedies are already in progress, the decision becomes binding and enforceable only after the affected person presents proof to ANAF that appropriate steps have been taken to terminate such actions. These proofs must be submitted within 60 days from the date the decision was communicated to the affected person.

The decision reached through the mutual agreement procedure is implemented immediately, regardless of any statute of limitations provided by applicable legal norms.

Finally, it is possible that ANAF and the competent authorities of the concerned Member States do not reach an agreement on how to resolve the dispute – neither within the initial 2-year term nor during the one-year extension. In such cases, ANAF shall notify the affected person, stating the factual and legal reasons why no agreement was reached.

#### **2.4. Procedure for dispute resolution by the advisory commission**

A new step that can be taken to amicably resolve a dispute concerning the double taxation of a person involves the establishment of an advisory commission. Thus, according to Article 283<sup>6</sup> of the Fiscal Procedure Code, if the affected person submits a request to ANAF and to the other competent authorities of the Member States involved, these authorities will proceed with the establishment of an advisory commission in one of the following scenarios:

- if the complaint submitted by the affected person is rejected by at least one of the competent authorities of the Member States involved, but not by all;
- if ANAF together with the other competent authorities of the Member States involved have accepted the complaint filed by the affected person, but have not reached an agreement on the amicable resolution of the dispute within 2 years (possibly extended by another year, as previously mentioned).

In the first scenario, the affected person may submit a request for the establishment of the advisory commission if no judicial remedy can be exercised against the decision to reject the complaint, or if no such remedy is ongoing, or if

the person has formally waived their right to such remedy. The request must include a written declaration to that effect.

The affected person must submit the written request to establish the advisory commission within a maximum of 50 days from the date of:

- receiving notification that the complaint was rejected by at least one national tax authority involved in the case;
- receiving notification that the complaint was accepted, but no agreement was reached on its resolution;
- issuance of the decision of rejection by the administrative court.

The advisory commission must be established within no more than 120 days from receipt of the request, and the president of the advisory commission must notify the affected person without delay.

According to Article 283<sup>7</sup> of the Fiscal Procedure Code, if the advisory commission is not established within this timeframe, the affected person may submit a request for its establishment (within 30 days) to a competent court or to any other national body authorized to make appointments from the Member States involved.

Thus, if ANAF has not appointed at least one independent person and their alternate to the advisory commission, the affected person may submit a request to the national body authorized to make appointments, in order to carry out the necessary appointments from a list of independent persons who may later be authorized to participate in such advisory commissions.

In Romania, the national body authorized to make such appointments is the Ministry of Finance. Therefore, if neither ANAF nor the other competent authorities of the Member States involved have appointed at least one independent person and their alternate to the advisory commission, the affected person may submit a request to the Ministry of Finance, as well as to the competent courts or national appointment bodies from the other Member States, to appoint two independent persons from the official list established under Council Directive (EU) 2017/1852 on tax dispute resolution mechanisms in the European Union.

If the affected person's complaint is rejected by at least one national authority, the advisory commission adopts a decision to accept or reject the complaint within 180 days from its establishment, and notifies its decision to the competent authorities within 30 days of adoption.

If the advisory commission accepts the complaint, at the request of ANAF or any of the other competent authorities of the Member States involved, the actual amicable procedure is initiated. The competent authority requesting the initiation of the amicable procedure must notify the advisory commission, the other competent authorities of the Member States involved, and the affected person. The 2-year term (possibly extended by another year) for the amicable resolution of the affected person's complaint starts from the date of notification of the advisory commission's decision to accept the complaint.



However, if neither ANAF nor the other competent authorities involved request the initiation of the amicable procedure within 60 days of the advisory commission's notification of its acceptance decision, the advisory commission issues an opinion on how to resolve the dispute. In this case, the 180-day term provided under Article 283<sup>14</sup> paragraph (1) starts from the expiry of the 60-day period.

If the advisory commission issues a decision to reject the complaint, the procedures for amicable resolution of the dispute come to an end.

Finally, if ANAF together with the other competent authorities of the Member States involved have accepted the complaint filed by the affected person but have not reached an agreement on the amicable resolution of the dispute, the advisory commission issues an opinion on the resolution of the matter.

Regarding the creation of the list of independent persons in each state, according to Article 283<sup>9</sup> of the Fiscal Procedure Code, it is based on nominations made by the Member States. In Romania, ANAF is responsible for nominating, for a 4-year term, at least 3 persons with proven economic or legal expertise, demonstrated by a high level of professional qualifications and experience in the field, who do not fall under any of the disqualifying situations provided in Directive (EU) 2017/1852, and against whom objections may be raised due to potential conflicts affecting objectivity. Failure to meet these objectivity requirements during the term results in removal from the list of independent persons.

ANAF notifies the European Commission of the names of the nominated independent persons. It also provides the Commission with complete and up-to-date information regarding their professional and academic background, their expertise and experience, as well as any potential conflicts of interest. ANAF may indicate which of the nominated persons may serve as president. Additionally, ANAF promptly informs the European Commission of any changes to the list. If ANAF has valid reasons to object to the inclusion of an independent person on the list due to lack of independence, it informs the European Commission, providing adequate supporting evidence. The Member State that nominated the person is also informed via the European Commission.

If ANAF is informed by the European Commission of objections and evidence regarding the lack of independence of a nominated person, it must take appropriate measures within 180 days from notification to assess the objections and decide whether to retain or remove the person from the list. ANAF then informs the European Commission of its decision.

The independent persons listed may select a president by drawing lots, and any of them may be designated in this role.

Regarding the composition of the advisory commission, according to Article 283<sup>8</sup> of the Fiscal Procedure Code, it consists of:

- a) president;

- b) one representative from each competent authority of the Member States involved. If the authorities agree, the number of representatives may increase to two per competent authority;
- c) one independent person appointed by each competent authority from the Member States involved from the list mentioned in Article 283<sup>9</sup>.

If the competent authorities agree, the number of appointed independent persons may increase to two per competent authority.

The rules on appointing independent persons are set by mutual agreement between the competent authorities of the Member States involved. After appointing the independent persons, each must also have an alternate, in case any member is unable to perform their duties. If no appointment rules are agreed upon, the appointments are made by drawing lots.

ANAF or any competent authority from a Member State involved may object to the appointment of any independent person to the advisory commission, unless the person was appointed by a competent court or national appointment body of the Member States involved. Objections may be raised based on pre-agreed reasons or on the following:

- the person is or has been within the last 3 years a member of or acting on behalf of a tax authority of any of the Member States involved;
- the person has or had a significant shareholding or voting right in any of the affected persons or was, within the past 5 years, employed by or served as a consultant to them;
- the person does not provide sufficient assurance of objectivity for resolving the dispute(s);
- the person is or has been, within the last 3 years, employed by a tax consultancy or otherwise professionally engaged in tax advisory services.

ANAF or any competent authority of a Member State involved may request that an independent person or their alternate disclose any interest, relationship, or other circumstance that may affect their independence or impartiality, or that may reasonably give the appearance of bias in the proceedings.

As a general rule, for a period of 12 months from the date the advisory commission issues its decision, an independent person who was part of that commission should not find themselves in any situation that would have justified an objection by ANAF or another competent authority if such situation had existed at the time of their appointment.

The representatives of each competent authority and the appointed independent persons elect a president from the list. Unless agreed otherwise, the president must be a judge.

## **2.5. Procedure carried out by the alternative dispute resolution commission**

If A.N.A.F. together with the other competent authorities of the member states concerned have accepted the complaint filed by the affected person but have

not reached an agreement on the amicable settlement of the disputed issue, they may agree, according to art. 283<sup>10</sup> of the Fiscal Procedure Code, to establish:

- a) either an advisory commission;
- b) or an alternative dispute resolution commission, hereinafter referred to as the alternative dispute resolution commission, instead of an advisory commission, which shall issue an opinion regarding the manner of resolving the disputed issue according to art. 283<sup>14</sup>;
- c) or, exceptionally, an alternative dispute resolution commission in the form of a committee with a permanent nature, hereinafter referred to as the permanent committee.

As a result, the alternative dispute resolution commissions may apply, as the case may be, any dispute resolution procedure to resolve the disputed issue with binding effect. As an alternative to the type of dispute resolution procedure applied by the advisory commission, namely the independent opinion procedure, any other type of dispute resolution procedure, including the final offer arbitration procedure, may be agreed upon by the competent authorities of the member states concerned and applied by the alternative dispute resolution commission.

## **2.6. Opinion of the advisory commission or the alternative dispute resolution commission**

The activity of the advisory commissions and the alternative commissions results in an opinion which represents a professional and impartial point of view on the fiscal issue in dispute.

According to art. 283<sup>14</sup> of the Fiscal Procedure Code, the opinion must be notified to the competent authorities of the member states concerned within 180 days from the date it was established. If the advisory commission or the alternative dispute resolution commission considers that, given the nature of the disputed issue, more than 180 days are necessary to issue an opinion, this period may be extended by an additional 90 days. The advisory commission or the alternative dispute resolution commission shall inform the competent authorities of the member states concerned and the affected persons about the extension.

This opinion must be based on the provisions of the applicable agreements or conventions, as well as any applicable legal norms in force.

The opinion is issued by the simple majority vote of the members of the advisory commission or the alternative commission, as applicable. If a majority cannot be reached, the president's vote is decisive for the final opinion. The president communicates the opinion of the advisory commission or the alternative dispute resolution commission to the competent authorities.

## **2.7. Final decision**

The entire procedure described above is regulated by the European normative act and transposed into our national legislation by the Romanian legislator in order to provide national authorities with strong arguments on which to base their final decision.

According to art. 283<sup>15</sup> of the Fiscal Procedure Code, within 180 days from the notification of the opinion of the advisory commission or the alternative dispute resolution commission, A.N.A.F. together with the competent authorities of the member states concerned shall proceed as follows:

- a) agree on the manner of resolving the disputed issue and issue a final decision respecting the opinion of the advisory commission or the alternative dispute resolution commission;
- b) agree on the manner of resolving the disputed issue and issue a final decision without respecting the opinion of the advisory commission or the alternative dispute resolution commission;
- c) do not agree on the manner of resolving the disputed issue and issue a final decision respecting the opinion of the advisory commission or the alternative dispute resolution commission.

If the affected person is a tax resident in Romania, A.N.A.F. shall immediately notify the affected person of the final decision regarding the disputed issue. In the absence of such notification within 30 days from the date of the decision, the affected person may address the competent court to obtain the decision.

The final decision is binding for the member states concerned and does not constitute a precedent. The final decision is implemented on the condition that the affected person accepts it and waives the right to exercise any national appeal within 60 days from the date of notification of the decision. As a result, A.N.A.F. will implement the final decision by adjusting taxation, regardless of the limitation periods provided by the applicable legal norms.

If the final decision is not implemented by A.N.A.F., the affected person may submit a complaint to the Bucharest Court of Appeal to request enforcement of the final decision.

By exception to the above rule, the final decision is not implemented by A.N.A.F. if the Bucharest Court of Appeal rules that, according to the applicable legal norms regarding appeals and applying the legal criteria presented in this work, there was a lack of independence of the independent persons appointed by A.N.A.F. to the advisory commission.

## **2.8. Interaction with national procedures and derogations**

Since this procedure is a transposition of a European directive, the Romanian legislator has identified and established a series of rules to harmonize it with the existing national fiscal procedural provisions.

Thus, according to art. 283<sup>16</sup> of the Fiscal Procedure Code, the affected person may resort to amicable settlement procedures for interactions of tax laws of the member states, even if the tax assessment decision generating the disputed issue has become final within the national appeal systems. Submitting the disputed issue for resolution by applying the amicable procedure or the dispute resolution procedure does not prevent the initiation or continuation, in Romania, of judicial procedures or procedures related to administrative and criminal sanctions concerning the same aspects.

Also, affected persons may use the appeals available to them under the applicable legal norms. However, when the affected person has initiated procedures to introduce such an appeal, the deadlines mentioned in art. 283<sup>4</sup> para. (1) of the Fiscal Procedure Code, and art. 283<sup>5</sup> para. (1) and (2) begin to run from the date on which a decision issued within those procedures becomes final or on which those procedures have been definitively concluded in another way or suspended.

If a final decision regarding a disputed issue was issued by the competent court in Romania before the competent authorities of the member states concerned reached an agreement under the amicable procedure, A.N.A.F. notifies the final court decision to the other competent authorities of the member states concerned, and that procedure is closed from the date of that notification.

The dispute resolution procedure is terminated if the final court decision was issued at any time after an affected person made such a request, but before the advisory commission or alternative dispute resolution commission issued its opinion to the competent authorities of the member states concerned, in which case A.N.A.F. informs the other competent authorities of the member states concerned and the advisory or alternative commission about the effect of this court decision.

Last but not least, according to the law, A.N.A.F. may refuse access to the dispute resolution procedure in the following cases:

- when sanctions have been applied in Romania related to the adjusted income or capital for tax evasion offenses, including related offenses. If judicial or administrative procedures which may lead to such sanctions are ongoing simultaneously with any amicable procedures covered by this analysis, A.N.A.F. may suspend these procedures from the date of complaint acceptance until the final result of those procedures;
- when the disputed issue does not concern double taxation. In such case, A.N.A.F. informs the affected person and the competent authorities of the member states concerned without delay.

### 3. CONCLUSIONS

Analyzing the amicable procedure for resolving disputes regarding multiple taxation of a taxpayer within the Union territory, we draw a series of final

observations which we consider relevant and useful to correctly determine the legal nature of these procedures for solving fiscal disputes.

Council Directive (EU) No. 1852/2017 establishes mechanisms for resolving tax disputes within the European Union, while the (Romanian) Fiscal Procedure Code refers to an amicable procedure for avoiding/eliminating double/multiple taxation.

Although considered an “amicable” procedure, its results become binding for the national tax authorities involved. Only the affected party has the option to accept or reject the outcome of the procedure. Therefore, no appeal procedure against the final decision is required, as the affected party may simply refuse to implement the decision.

The “amicable” nature derives only from the fact that the final solution is decisively influenced by the opinion (advice) of a committee composed of experts in the fiscal field who are previously nominated on a public list of such experts and who, for these reasons, enjoy a presumption of independence and objectivity in the cases submitted to their analysis.

National tax authorities can be “forced” to participate in these procedures, even if one of them rejects the request filed by the affected party.

Moreover, national tax authorities can be “forced” to implement the final decision.

Last but not least, initiating this procedure and issuing a final decision does not prevent other contentious or different procedures before national judicial authorities.

In conclusion, we consider that we are dealing with a *sui generis* procedure for resolving conflicts through negotiation and arbitration that may arise between the tax legislations of Member States.

We emphasize that negotiation takes place between the national tax authorities, while arbitration is performed by a committee of independent experts proposed by the national authorities. We also mention that this procedure is initiated by the taxpayer affected by a double or multiple taxation situation, but the taxpayer remains effectively uninvolved in the conduct of this procedure. Thus, although this procedure concerns the taxpayer to the highest degree since they are (or consider themselves) harmed by bearing multiple tax burdens simultaneously on the same taxable base and for the same time period, they cannot influence the course of this procedure in any way. The person who considers themselves harmed can only initiate this procedure with the consent of the national tax authorities, but the latter bear no responsibility for the attitude they display during the procedure. By “attitude,” we mean both the manner in which the tax authority performs the procedural acts incumbent upon it according to the provisions of the European directive and national tax legislation, as well as its “willingness” to resolve the request as favorably as possible for the taxpayer truly affected by multiple taxation.

Therefore, we consider that this procedure is not an administrative jurisdiction, even though the final decision is binding for the national tax authorities involved. We believe this for two reasons.

Firstly, the national tax authority is not liable for the non-performance or defective performance of procedural acts incumbent upon it, and consequently, not liable for damages suffered by the affected party due to this non-compliant conduct of the tax authority. However, we consider that the general rules on liability might apply in this matter, namely Articles 573 and following of the Administrative Code regarding patrimonial administrative liability.

Secondly, the fact that the final decision is not binding on the affected party means there is no open path to ordinary jurisdictional procedures. It is natural that the affected party should not be obliged to accept the result of a procedure in which they do not participate, but they also cannot access a jurisdictional procedure where they could have an active role.

Thus, since the affected party (i.e., the taxpayer/payer) can only initiate this procedure and refuse the final decision, having no involvement in the negotiation between the national tax authorities of the Member States, we consider that this procedure is not a typical form of arbitration.

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- 8) Tofan, M. (2019). *European Financial Law*. Universul Juridic Publishing House.