EFFECTIVENESS OF TAX DISPUTE RESOLUTION MECHANISMS – THE IMPACT OF THE EUROPEAN LEGAL FRAMEWORK ON NATIONAL JURISDICTION

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ABSTRACT

The search for a more effective resolution of cross-border tax disputes provokes the general question of the effectiveness of tax dispute resolution mechanisms. In recent years or even decades, a cross-border tax dispute settlement within the European Union (EU) internal market has engendered several issues and perspectives. With an overview of the Croatian tax dispute environment, there is a short analysis of alternative dispute resolution mechanisms with a basic description and a short practical evaluation. The tax dispute environment in Croatia shows that a vast majority of tax disputes therein originate from audits. This paper provides an outline of the principal issues arising from the Europeanisation of tax disputes and probably national tax procedural rules. The landscape for tax dispute resolution is changing dramatically at the EU level. Pre-litigation tax instruments and settlements have become extremely important and developed. Tax dispute judicial settlements still have a lot of relevance and are seen as a possible object of such efforts to move towards the creation of European fundamental principles and rights for taxpayers in that area. This paper aims to analyse the effectiveness of alternative dispute resolution mechanisms in the context of tax disputes in Croatia. By examining the tax dispute environment and evaluating various mechanisms, we can gain insights into the challenges and potential solutions for resolving these disputes.

KEYWORDS

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1. Introduction

The last few decades have revealed that attention has shifted away from the negative taxation phenomenon. This is to say that the focus is not on the issue of tax evasion and abuse of different national tax laws of the Member States and intensive activities at the European and international levels that combat such harmful practices. Fiscal jurisdiction and tax sovereignty remained in the exclusive competence of the Member States, but notwithstanding this fact, such sovereignty was, and still is, nevertheless limited, at least by the fundamental freedoms of the European Union (EU). In addition, the EU has repeatedly tried to introduce some form of common European tax, and this attempt has lasted to this day.[2]

Noticing the differentiation between direct and indirect taxes, it can be easily determined that the development of the latter was the first on the harmonisation agenda. On the one hand, the harmonisation of value added tax has been done fairly well and comprehensively. On the other hand, the harmonisation of direct taxes was delayed due to questions about EU competence. However, the active role of the Court of Justice of the EU (CJEU) has resolved this dilemma by interpreting that it has jurisdiction to interpret direct taxes. Positive and negative integration are traditionally seen as vehicles of Europeanisation in the field of taxation.[3] Positive integration refers to the harmonisation of rules at the EU level through tax measures based on proposals for EU action, as well as by measures resulting from the EU harmonisation policy.[4] Such integration encourages the elimination of tax obstacles for the functioning of the internal market. This integration is 'from above' and ever more influences the objectives of national tax policies.[5] However, the negative integration of tax legislation is mostly used for the case law of the CJEU (hereinafter: CJEU or Court)[6] on the incompatibility of national tax measures with EU fundamental freedoms and European rules.[7] It is important to note that this integration has changed the national tax rules concerning direct taxes the most. Mention should be made for the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)[8], in whose legal tradition the Court of Justice develops basic EU principles for the functioning of the internal market, such as principles for the protection of the fundamental

2 | Examples are 1992 CO2/Energy Tax proposal, see more: Klok, 2005; Hentze, 2019; Lips, 2020, pp. 975–990.
3 | Augenstein, 2012, pp. 99–112.
4 | Helminem, 2018. Lang et. al., 2010.
5 | Blauberger, 2008.
6 | Preliminary ruling proceedings – recommendations to national courts [Online]. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=legissum:l14552 (Accessed: 24 September 2023). The Court of Justice of the European Union [Online]. Available at: https://curia.europa.eu/jcms/jcms/j_6/en/ (Accessed: 24 September 2023).
7 | Wattel, Marres and Vermeulen, 2018, p. 4.
8 | European Convention for the Protection of Human Rights and Fundamental Freedoms [Online]. Available at: https://ec.europa.eu/digital-single-market/sites/digital-agenda/files/Convention_ENG.pdf (Accessed: 24 September 2023).

freedoms of the EU. The CJEU must also consider the constitutional acts of the EU Member States when deciding on such integration, as well as the principles contained in the ECHR, such as the principle of *lex certa*, the principle of mutual and equal hearing of parties, the principle of the right to defence and 'equality of arms in competition (fine) cases', the principles of respect for family life in cases of freedom of movement.[9] To create a 'single' internal market out of 'diverse' national markets, a common market, the EU Treaties pursue a dual strategy: negative and positive integration.[10]

This paper shows the way positive and negative integration in the field of tax dispute settlement procedures and mechanisms have taken place and are reflected in the national tax legislation of Member States. This is reflected in some amendments to Croatian national tax legislation, especially procedural legislation.

In recent decades, an increasing number of people have been talking about the difficulties and problems that arise during the implementation of the tax procedure. Such difficulties and problems most often appear in the form of a lengthy procedure, as well as increased costs of conducting the procedure and the impossibility of collecting claims from the competent tax authorities. After trying to identify the causes of such difficulties and problems, the search for possible solutions was started, which would constitute a quality answer to the existing open questions. The simplest way to initiate such complex research would be to analyse models for improving the efficiency and increasing the economy of the procedures of other branches of law, especially those belonging to private law. In this case, an analysis of civil law dispute resolution mechanisms was undertaken and, in particular, an analysis of alternative mechanisms used by traders in the domain of commercial law.

The possibility of administrative and judicial supervision of tax authorities' decisions is generally guaranteed. However, this administrative and judicial inquiry should not be reduced to a mere evaluation of the legality of the decisions made but should also focus on the verification and adherence to constitutional and conventional rights. Equally, the provision concerning the right to a fair trial (Art. 6, para. 1) from the ECHR is applicable and should be observed in administrative and judicial proceedings. From Croatian legal practice, it is to be mentioned that the right to a fair trial within a reasonable time is frequently violated.

The opportunity to prevent the occurrence of tax disputes is often considered in discussions on the mechanisms that would resolve tax disputes. Abandoning the old or traditional paradigm of the relationship between taxpayers and tax authorities, a considerable place is left for the development of other principles such as reciprocity, fair play, and protection of taxpayers' rights.[11] Such a change in the activities of the tax authorities follows logically after the prediction of new tax instruments which seek to enable the revitalisation of a whole new legal concept, which implies increased bona fide cooperation between tax authorities and taxpayers and includes the active role of taxpayers in that cooperation. In

9 | Flattery, 2010, pp. 53–81.
10 | Pistone, 2020.
11 | Žunić, 2017, pp. 78–91; Gadžo, 2017, pp. 177–189.

a moment where disputes between tax authorities and taxpayers have already arisen, it is necessary to focus on all the mechanisms that have the aim and purpose of speeding up the finding of solutions, reducing costs, and increasing efficiency. Therefore, at this stage, for the aforementioned reasons, they try to detect and use all those mechanisms that would often bypass long, expensive administrative and court proceedings. In this context, the so-called alternative mechanisms or ways of resolving disputes (alternative dispute resolution—ADR) are becoming current. This way of resolving disputed tax issues emphasises the will of both parties to solve their dispute in this alternative way.[12] Therefore, it is generally a matter of voluntary consensus between both parties—the taxpayer and the tax authority. Notably, ADR can also be defined as 'a kind of umbrella term for all out-of-court forms of dispute resolution in which an independent person helps the parties to the dispute to resolve controversial issues'. There are several mechanisms that are systematised, such as international and national law, judicial and non-judicial, voluntary and mandatory, and so on.[13] Those in national law are differentiated into those in a narrower sense as traditional forms or mechanisms: early neutral evaluation, mediation, and conciliation, and those in a broader sense that include 'special tax-legal institutes'.[14] This emphasises that alternative concepts of resolving tax disputes are in the framework of a new tax law, implemented from the common law countries and tradition.[15] It should also be noted that this idea was developed based on the model of civil law instruments and mechanisms, which by their nature are extrajudicial but give the parties in a dispute the opportunity to find a mutually acceptable solution. Given the civil law basis of this concept, terms such as 'civilising tax procedure' can be found in the literature.[16]

The present paper will emphasise two phases in finding solutions for avoiding disputed tax situations. Thus, the causes are still considered, and the phase of avoiding the occurrence of disputes will be studied using the Croatian and comparative positive legal framework. Special review will be given regarding two important tools: advance rulings and the granting of a special status to taxpayers. Thereafter, alternative ways of resolving tax disputes will be analysed, and along with the analysis of civil law and tax law models, special emphasis will be placed on tax arbitration and the arbitrability of tax disputes. Finally, the influences of European legislation on the creation of national tax rules for resolving tax disputes in an alternative way will be presented.

12 | Žunić, 2016, pp. 279–295.
13 | Knudsen, 2011, pp. 350–358.
14 | Rogić, Lugarić and Yasin, 2016, p. 28.
15 | Rogić, Lugarić and Čičin-Šain, 2014, p. 349.
16 | Lederman, 1996, pp. 183–245.

2. Influence of positive and negative integration on national tax law and on tax dispute resolution mechanisms

With the introduction of common customs rules, it can be said that the era of enhanced positive integration when it comes to indirect taxation was initiated. Limited positive integration occurs in the direct taxation field, more precisely, when it comes to corporate taxation with Parent Subsidiary Directive (hereinafter: PSD),[17] Mergers Directive (hereinafter: MD),[18] Interest and Royalties Directive (hereinafter: IRD),[19] Arbitration Convention,[20] but pending positive integration of direct taxation includes DAC amendments, cross-border administrative cooperation, and anti-abuse legislation with anti-tax avoidance legislation. Positive integration has continued in the recent period with the adoption of the Anti-Tax Avoidance Directive (hereinafter: ATAD),[21] which directly affects the functioning of the internal market. Notably, ATAD confirms the European commitment to implementing policies that could prevent the fragmentation of the internal market and preserve fair competition.[22] Therefore, ATAD laid down rules for combating tax avoidance practices. ATAD introduced four Specific Anti-Tax Avoidance Rules (SAARs) and one General Anti-Tax Avoidance Rule (GAAR).[23] Thus, the EU expanded the range of possible responses to tax evasion phenomena in relation to the BEPS Action Plan.[24] With regard to direct taxation, this Directive aims to fill legal gaps that arise or, rather, are abused in business that transcends the borders of a Member State, thus seeking to preserve the integrity of the internal market by preventing the abuse of rights and benefits granted by the provisions of European law.

Negative integration is another important factor that affects the conversion of EU tax law into domestic tax law. This is mostly the case law of the CJEU on the incompatibility of national tax measures with EU fundamental freedoms.[25] The

17 | Council Directive 90/435/EEC of 23 July 1990 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States, *Official Journal L 225, 20/08/1990, pp. 6–9.*
18 | Council Directive 2009/133/EC of 19 October 2009 on the common system of taxation applicable to mergers, divisions, partial divisions, transfers of assets and exchanges of shares concerning companies of different Member States and to the transfer of the registered office of an SE or SCE between Member States, OJ L 310, 25.11.2009, pp. 34–46.
19 | Council Directive 2003/49/EC of 3 June 2003 on a common system of taxation applicable to interest and royalty payments made between associated companies of different Member States, OJ L 157, 26.6.2003, pp. 49–54.
20 | Convention on the elimination of double taxation in connection with the adjustment of profits of associated enterprises, 90/463/EEC.
21 | Council Directive (EU) 2016/1164 of 12 July 2016 laying down rules against tax avoidance practices that directly affect the functioning of the internal market, OJ L 193, 19.7.2016, pp. 1–14.
22 | Soom, 2020, pp. 273–285.
23 | Gadžo and Klemenčić, 2014, pp. 277–302.
24 | OECD, 2013.
25 | Pistone, 2018b.

CJEU's activities were primarily focused on determining its jurisdiction and the EU's jurisdiction in tax matters. The CJEU 'assesses' European law regularly in the preliminary proceedings in relation to the disputed issue in a specific case. Depending on the circumstances of the case, the CJEU's given opinion may differ from one case to another. However, to resolve any disputed tax issue, it can be concluded from the case law that the Court adheres consistently to the mechanisms and methods for resolving them, as well as that these mechanisms and methods originally belong to international tax law.[26] In the Damseaux[27] and Block cases,[28] for example, the CJEU takes the position that it leaves the prevention of double taxation, although this is the biggest obstacle to freedom of movement to the Member States.[29] Furthermore, in the CIBA case,[30] the Court explicitly accepted the principle of worldwide taxation of the country of residence. In the SGI case,[31] the Court concluded that the source principle should be applied, according to which the source state has the right to tax only the income derived from its territory, meaning defining the limits of fiscal jurisdiction. In the Hilten-van der Heijden case, the Court accepts nationality taxation regardless of source or residence,[32] while in the Lidl Belgium case,[33] it agrees to take territoriality of taxation, meaning that the taxpayer's home country also applies the source principle to its residents. Although the CJEU has explicitly accepted the fact in Damseaux and Block[34] that the parallel exercise of tax jurisdiction by two states can lead to double taxation, which is in no way compatible with freedom of movement, the Court is quite reluctant to accept the fact that the exercise of tax jurisdiction by two states may result in a double non-deduction of fees or losses.

Evidently, there are limitations to the CJEU's jurisdiction and instruments in resolving tax issues. Even though the Court appears to be making efforts to eliminate double taxation for taxpayers operating across borders within the EU, the CJEU appears to be slower to realise that it has no legal instruments and jurisdiction for such efforts, just as it neither does nor does not have the instruments and competencies to consider all these taxpayer benefits and losses, such as the personal and family circumstances of individuals, and to have the said benefits and losses paid taken into account somewhere in the internal market for tax purposes.

2.1. A gradual integration process on the tax procedural law and tax dispute issues

In addition to the above-mentioned, we should look at the ECHR's influence in resolving controversial tax issues. The ECHR, as an international document dating back to the middle of the last century, lays down its principles that have become

26 | Pistone, 2009, pp. 1–23.
27 | Case C 128/08.
28 | Case C 67/08.
29 | Cerioni, 2009, pp. 542–556.
30 | Case C 96/08. See more, Wattel, 2017, pp. 319–349.
31 | Case C 311/08, See, Jonsson, 2011.
32 | van den Broek and Wildeboer, 2007.
33 | Leclercq and Trédaniel, 2009.
34 | Cerioni, 2009, pp. 542–556.

part of the legal tradition through the principle of general acceptance of the document and the case law of the European Court of Human Rights (hereinafter: ECtHR).[35] Consequently, it should be emphasised that such a legal tradition of the EU Member States also appears as a basis for the interpretation of European law.

However, the formal recognition of human rights enshrined by the ECHR was by EU Member States at the Nice Summit in 2000, proclaiming the EU Charter of Fundamental Rights (hereinafter: Charter).[36] The 2009 Lisbon Treaty equates the Charter of Fundamental Rights of the European Union with the Treaty on the Functioning of the European Union Art. 6 (1) (hereinafter: TFEU)[37] with the founding treaties, making it explicitly part of EU primary law.[38] Therefore, the CJEU, in resolving preliminary issues at the request of the national courts of the EU Member States or interpreting EU law, is obliged to ensure the protection of the fundamental principles of human rights contained in the ECHR.

The enormous influence of the ECHR in resolving tax issues is discussed in the tax community and academia, providing more context and examples of the case law of the ECtHR. In that context, it may be relevant to the CJEU with regard to the interpretation of ECHR principles.[39] Recent ECtHR cases raised the issue of the possible spread of established legal principles to legal instruments provided as an answer by the EU to the BEPS Action Plan. [40] Considering the Sopropé case, the CJEU discussed whether a Portuguese company had been given sufficient time by the Portuguese Customs Administration to be heard on a certain fact during the tax procedure as an administrative proceeding. This case concerned the principle of right to defence[41] and the implementation of the *audi alteram partem* principle as obligatory for the tax administration. This principle is confirmed as a part of the general frameworks of EU law that protect the right to defence under the provisions of the Charter.[42] One more case that is important and interesting in this context is the famous Ferrazzini case[43] concerning the right to an effective remedy and the right to a fair trial. In this case, the ECtHR ruled on the application of Art. 6 of the ECHR on the requirement of a fair hearing, laid down in Art. 47 of the Charter. This case is important because it abolishes the absolute ban on the application of Art. 6 of the ECHR in tax disputes, both in those relating to fundamental freedoms and in those relating to EU secondary law. More significantly, the CJEU

35 | Kofler, Maduro and Pistone, 2011.
36 | Charter of Fundamental Rights of the European Union (2012) *OJ C 326, pp. 391–407.*
37 | Consolidated version of the Treaty on the Functioning of the European Union, (2012) OJ C 326, pp. 47–390.
38 | Para. 2 of the same article stipulates that the EU will be present regarding the accession of new member states; that is, that upon accession of new member states to the EU it will request the signing and ratification of the ECHR if it has not already done so. Para. 3 of that article clearly stipulates that the principles of the ECHR constitute a de facto tradition of the EU Member States and that they are therefore general principles of EU law.
39 | Pistone, 2018a, pp. 91–94.
40 | Attard, 2020, pp. 137–140.
41 | Case C-349/07, Soprope, EU:C:2008:746.
42 | Art. 47 of the Charter.
43 | EctHR, more to see in Baker, 2001, pp. 205–211; Endresen, 2017, p. 508.

has thus become competent in deciding on the fairness of national tax proceedings in which taxpayers rely on the rule of European law.[44]

A new European rule on tax dispute resolution mechanisms has been in effect since 2019 as a result of BEPS and EU policy. Notably, BEPS is mostly about a stronger fight against aggressive tax planning and international tax avoidance with stronger international tax coordination, bringing more complexity to international taxation. But, these all engender more disputes, making cross-border tax dispute settlement more important than ever with BEPS 14. Although settling tax disputes at the international level is a qualitatively better option than doing that in every single jurisdiction, there are many dilemmas: settling tax disputes or preventing them, how much can we rely on the mutual agreement procedure (MAP) and should we rely on settling tax disputes through tax or no-tax dispute settlement instruments?[45] They are laid down in the Directive on Tax Dispute Resolution Mechanisms (hereinafter: TDRD),[46] which brings significant improvements to resolving tax disputes. These rules ensure that taxpayers will resolve disputes related to the interpretation and application of tax provisions more promptly and effectively. There is, in this Directive, an explicit acknowledgement of taxpayer rights, such as the right to a fair trial or the right to conduct business.[47] The new rules cover issues related to double taxation, which occurs when two or more countries claim the right to tax the same income or profit. This can happen, for example, due to a mismatch in national rules or different interpretations of the transfer pricing rules in a bilateral tax treaty.[48] TDRD enhances legal certainty when it comes to seeking a solution in cross-border tax disputes, especially as a wide range of cases is covered, and Member States have to comply with clear deadlines to agree on a binding solution for taxpayers' timely decisions. Accordingly, TDRD prescribes the MAP as an administrative procedure between the competent authorities of Member States involved in a tax dispute.[49] In the MAP, the competent authorities try to resolve the dispute. The time limit of the Directive for MAP is two years, or three years if this is extended on a justified request by a competent authority. In case the dispute is not resolved with a MAP between competent authorities, then the taxpayer can request to set up an advisory commission comprising the competent authorities of the Member States in dispute and three independent persons.[50] The competent authorities in the aforementioned Advisory Commission have to agree on rules of functioning

44 | Pistone, 2018a, p. 93.
45 | Pistone, 30 April 2021, Rijeka Tax Law Day Conference.
46 | Council Directive (EU) 2017/1852 of 10 October 2017 on tax dispute resolution mechanisms in the European Union, *OJ L 265, 14.10.2017.*
47 | Perrou, 2019, p. 715.
48 | It is worth mentioning that there are currently around 900 double taxation disputes in the EU and they are estimated to be worth €10.5 billion; see more Wiséen, 2019.
49 | Nobrega and Silva, 2009, pp. 529–544.
50 | These persons are drawn from a purpose-compiled list to which they get nominated by Member States in accordance with the Directive.

that provide details on the procedure.[51] In case the rules of functioning are not notified to the taxpayer or are notified incompletely, the members shall use the standard.[52] Once set up, this advisory body has to deliver its opinion within six months. After the advisory commission delivers its opinion, the opinion is notified to the competent authorities. Accordingly, the competent authorities of the Member States concerned make a final decision. If they do not manage to agree on a final decision and on time, the opinion becomes binding on the competent authorities. Details of the decisions will be published online.[53]

The EU Tax Dispute Settlement Directive goes beyond mere implementation of BEPS 14 in the EU as EU secondary law brings CJEU jurisdiction. There is protection of the rights of the affected persons under EU law from MAP throughout tax arbitration and an idea of prevention before settlement through mediation. Notably, it has a visible impact on non-EU law cross-border tax dispute settlement instruments, as it is the EU Arbitration Convention with tax treaty dispute settlement procedures. [54] Still, there are open issues about the involvement of taxpayers in cross-border tax dispute settlement: Is there a sufficient degree of transparency in mutual agreement procedures? Additionally, we can present the issue of discretionary powers within the framework of the mutual agreement procedures and comply with the rule of law. All these issues and questions underline the principles of equivalence and effectiveness in tax dispute resolution mechanisms.

2.1.1. Gradual Europeanisation of tax disputes preventing and resolution rules

Since 2015, it has been possible to determine a sort of a slow moving from the traditional paradigm of tax law attitude towards the so-called cooperative compliance model.[55] Croatian tax law has recently introduced some new instruments, including advance rulings, advance pricing agreements, procedure of granting special status to taxpayers, and so on.[56] Although many criticisms still remain on the practice of the application of such instruments, there is a place to say that this is a way of Europeanisation of Croatian tax law, mostly a procedural part of tax law and, more precisely, the Europeanisation of tax disputes preventing and resolution rules.[57]

The criticism is more pronounced when we come to the mechanisms of the resolution of tax disputes relative to the prevention mechanisms. A multistage scheme of dispute settlement might be seen as more effective and successive in stage 0 than the stage where the dispute has already arisen. It is reasonable to try to gain some benefits from TDRD implementation at the national level of

51 | Commission Implementing Regulation (EU) 2019/652 of 24 April 2019 laying down standard Rules of Functioning for the Advisory Commission or Alternative Dispute Resolution Commission and a standard form for the communication of information concerning publicity of the final decision in accordance with Council Directive (EU) 2017/1852.
52 | TDRD, Rules of Functioning are prescribed in Annex I, Part I.
53 | Pit, 2019, pp. 745–759.
54 | Pistone, 2021.
55 | Terra and Wattel, 2012.
56 | Čičin-Šain, 2016, pp. 847–866.
57 | Gadžo, 2020, pp. 373–406.

the tax dispute resolution system, considering specific objectives defined in the Directive's preamble: broadening the scope of application of the Arbitration Convention to all disputes concerning the application and interpretation of tax treaties between Member States, ensuring legal certainty for taxpayers, ensuring effectiveness, efficiency and ensuring transparency. Subsequently, TDRD *ratione materiae* applies to disputes related to the application of the tax treaties between EU Member States, and it is interesting to mention according to TDRD provisions that, the standards of dispute resolution mechanisms are mandatory nature of dispute settlement mechanisms, time limits for dispute settlement, and obligation to achieve resolution. As stated above, Croatian tax law has recently developed a legal framework of alternative dispute resolution with instruments that prevent disputes. Such instruments in the dispute avoidance level as advance rulings are still not sufficiently recognised in practice. There is a need for stronger dialogue and cooperation in the tax administrative procedure stage especially. In the Croatian academic literature[58] and in practice, as previously mentioned, problems have been identified in the second instance of administrative tax dispute resolution that raises questions about changing the institutional framework and strengthening ADR mechanisms for tax disputes in Croatia. There are numerous advantages of the 'neutral early evaluation'[59] mechanism and preventing dispute mechanisms in this stage of taxation. It is vital to underline the mentioned European standard for tax dispute resolution regarding time limits, as in national tax disputes, it is also of huge importance and influence on taxpayer's fundamental rights. That is to conclude that the adoption of international and European standards for tax dispute resolution at the national level may lead to changes in the national taxation system and bring benefits for the taxpayers and tax administration, making national tax dispute mechanisms more efficient.

Previously mentioned MAPs are still opening the issue of the relations between MAPs and tax arbitration, with the need for assessing the effectiveness of MAPs, specifically in the light of taxpayers' rights: the question of the right of access to MAP documents, the right of being heard, and right of defence. There is also a vital issue of the right to fair administrative and judicial tax procedures, as there is an important perspective on tax arbitration as an administrative, and not a quasi-judicial, form of arbitration.[60] Several countries are against it, not only

58 | This paper rather builds on previous discussions, including Kovacevic, 2021, pp. 203–214.

59 | Thuronyi, 2013; Schön, 2015, pp. 271–293.

60 | Pistone, 2020. Especially important in a light of the tax arbitration system that was introduced in Portugal with the aim of improving speed and flexibility in the resolution of disputes between taxpayers and the tax authority. Tax arbitration has been implemented in Portugal since 2011, following several years of discussion among scholars and legislative bodies about its accordance with the Portuguese constitution. As it is recognised (Rogério M. Fernandes Ferreira of RFF & Associados) the most conservative legal voices considered the implementation of this mechanism with some initial concern and scepticism, arguing that the resolution of disputes between taxpayers and the tax authorities was not compatible with the institution of arbitration as a private dispute resolution mechanism. Notwithstanding, those arguments were rebutted and the possibility to commit tax disputes to arbitration was introduced. See, more: Fernandes Ferreira, 2020.

because of factual disputes but also because they conclude that it is not the solution to all problems, especially based on the non-final surrender of jurisdiction under tax arbitration. There is a proposal for a two-tier procedure with the involvement of taxpayers that can solve some issues of motivation.[61]

3. Prevention of tax disputes as an instrument of effectiveness

When finding new solutions for resolving disputes, the focus should be on defining the cause of tax disputes. The reasons for which tax disputes may arise are diverse, and they concern disputes over the determination of key elements of taxation, that is, facts legally relevant for determining and allocating taxes. The goal of the new instruments intended for use in the dispute prevention phase is actually the determination of these essential elements and the classification of transactions *pro futuro*, while those mechanisms in the phase wherein the dispute has already occurred are aimed at determining all these elements as quickly as possible so that the dispute can be promptly resolved. In the context of the causes of disputes, it is necessary to look at some of the phenomena that are directly or indirectly related to the appearance and incidence of disputes. Tax disputes can be caused by taxpayers and tax authorities. Enhanced administrative cooperation and exchange of information, at the EU level and legislation, mostly as an automatic exchange of information, a major area of focus today, brings to the tax authorities the possibility to duly utilise the vast exchange of information network. This puts pressure on taxpayers and tax courts, as tax authorities tend to accept any information received from a foreign tax authority as truthful. Although most information is exchanged automatically and in bulk, with little to no human interference, it will inevitably augment the risk of errors and inaccuracies that may turn into a big risk for taxpayers and new sources of disputes.[62]

Preventing the occurrence of tax disputes constitutes the first or zero phase, which effectively seeks to increase the effectiveness of taxation and suppress resistance to paying taxes and tax evasion. The new mechanisms that should be effective at this stage should be aimed at forming better cooperation and strengthening mutual trust between tax authorities and taxpayers. One of these mechanisms is realised through the instrument of advance rulings. Within the

61 | Baker and Pistone, 2016, pp. 335–345. See, Pistone, 2021. More: Council of Europe Committee of Ministers Rec (2001)9 on Alternatives to Litigation between Adm. Authorities and Private Parties; Dragos and Neamtu, 2014; Interview (4.4.) & Reports, available at: http://www.fu.gov.si/o_financni_upravi/ (Accessed: 25 September 2023). Fronda, 2014; van Hout, 2018, pp. 43–97; Jerovšek et al., 2008; Klun and Slabe-Erker, 2009, pp. 529–548; Kovač, 2012, pp. 395–416.
62 | Ramos and Matos, 2022, pp. 229–240.

framework of these, with advance rulings as binding tax opinions,[63] it can be said that transfer pricing agreements have also been developed, which are based on the positive identification of the arm's length principle.[64]

In Croatian practice, the so-called granting of special status to taxpayers or horizontal monitoring becomes important. Furthermore, there are instruments in Croatian practice to prevent the occurrence of tax disputes in the form of a final discussion in tax audit procedure with the possibility of achieving tax settlement and the mandatory engagement of an independent expert, lawyer, or legal adviser in the tax audit procedure.

4. Alternative methods of resolving tax disputes

From the definition of alternative dispute resolution, it is important to analyse the way in which they have developed[65] and to differentiate among them some basic types. The roots of alternative dispute resolution methods are found in private or civil law. Notably, ADR is often an umbrella term for all out-of-court

63 | As a special administrative act, a tax act passed by a tax authority and which is binding for the tax authority in the application of tax regulations to transactions, business and other tax-relevant facts of the taxpayer.

64 | Advance pricing agreement (APA) could be defined as an 'agreement between a group of companies or related companies as a taxpayer and a tax authority, on the criteria by which transfer pricing rules will be applied, especially to transactions within a group of companies as a taxpayer'.

65 | The first attempt to affirm and promote alternative ways of resolving disputes can be found in the form of mediation present in the first days of civilisation. In this context, historians often cite examples of mediation in commercial disputes among the Phoenicians and Babylonians, and such a practice developed in ancient Greece, where in disputes that were not marital or family, there was a so-called proxenatas (institute of mediators). When the ancient Romans are mentioned, it is important to note that they also knew about a certain institution of mediation and that notes on the peaceful resolution of disputes can be found in Justinian's Digests from 530–533. Later, that is, whether there was first a court and then extrajudicial mechanisms, as well as whether there was first conciliation and only then arbitration. Although these questions cannot be answered with certainty, especially the question of whether conciliation is historically older than arbitration, it must be concluded that it is still more likely that judicial ones developed from a certain type of out-of-court dispute resolution. However, it can also be linked to some peculiarities that adorned such procedures at that time. For example, the mediator could only be a person who was considered a holy person, a person who deserves special respect; it was about individuals who, due to their characteristics and/or position in society, had the a priori trust of the members of society, including the person in dispute. In addition, the concept of the so-called Schiedsgerichtstheorie, the theory according to which arbitration is the primary form of civil process, has been subjected to the following criticisms: 1. Schiedsgerichtstheorie is rationalistic speculation without any real basis in historical events, and 2. Romans and others resolved their disputes by invoking supernatural forces and/or deities in proceedings guided by priests or prophets. Finally, the so-called Leiden peacemakers who appeared in the 16th century and who were presented by Voltaire as Bureaux de Paix and Juges de Paix in France and the Netherlands, and because of their actions, they were considered the forerunners of the peaceful settlement of disputes. See, Chretien, 1951, p. 509.

procedures used to resolve disputes, separate from the judicial system, and a voluntary procedure that requires the consent of both parties. Owing to the nature of alternative methods of dispute resolution, it is often pointed out that they have or are of a private law character, and this is because they have developed from private law, and they are not a binding method of dispute resolution. In the public law area, the use of alternative ways of resolving disputes might be highlighted as a problem, considering the issue of arbitrability of such disputes. It is noteworthy that ADR often implies the existence of a third neutral person, although this does not have to be the case, for example, in the case of negotiations. All of these are common features of ADR methods; however, all listed general characteristics may differ depending on the ADR form and national or international regulations. The most common forms of ADR are arbitration, mediation, conciliation, negotiation, private judging, neutral expert, or fact-finding by experts, mini-trial, and ombudsman.

Arbitration is the most frequently mentioned mechanism of ADR, as voluntary with the ruling that is binding and with a limited possibility of revision. The third-party arbitrator chosen from the parties in dispute makes the decision, usually an expert with specialisation in the area to be decided. The formality of the procedure is reduced, as the parties can agree on procedural rules and material law, with each party having the possibility of presenting evidence for the claims made. The legal ruling sometimes contains an explanation (depending on which arbitration is in question), and in private law relations, there is no possibility of requesting a judicial review.

Mediation is voluntary, although in some countries, it is binding for certain types of disputes. When an agreement is reached in a mediation, it is enforceable like a contract, and the mediator is chosen by the parties in dispute. It is informal and unstructured, and there is a non-binding presentation of evidence, claims, and interests, while the result of successful mediation is a mutually binding agreement and is possible in private law. Conciliation is voluntary/mandatory (depending on the legal issue and state regulation), and the parties are helped to reach a settlement without imposing a binding solution. The third party is called the conciliator, and impartiality, equality, and fairness must be respected, as there is confidentiality in the procedure, which is characterised by informality, flexibility, and elasticity. Furthermore, there is an interest orientation and an integral view of the relationship as characteristics, non-commitment in the sense of consensual dispute resolution, and the greatest advantage of conciliation is the speed of dispute resolution and low costs.

Negotiation is voluntary, and if an agreement is reached, it is enforceable like a contract; there is no third party; it is informal and unstructured; the presentation of evidence, claims, and interests is non-binding; the result of successful negotiations is a mutually binding agreement; and it is possible in private law relationships.

Private litigation, impartial determination of the facts by experts, mini-trials, and abbreviated court proceedings are alternative ways of resolving disputes immanent in the American or Anglo-Saxon legal system.[66]

Finally, the parties can decide on an ombudsman voluntarily; it is not binding, the third party is institutionally determined, there is a lot of informality, there is an investigative nature of the procedure, the decision is made in the form of a report, and it is most often possible in private law relationships.

It is necessary to consider which of these models are suitable and usable for modernising the resolution of disputes in the field of tax law. It seems that arbitration may be the most useful in reducing costs, increasing efficiency, and speeding up the procedure for resolving tax disputes. Mediation as an alternative way of resolving disputes would be applicable, but in Croatia, Art. 3 of the Conciliation Act of 2011 defines conciliation as 'any procedure, regardless of whether it is carried out in a court, a conciliation institution or outside of them, in which the parties seek to resolve the dispute by agreement with the help of one or more conciliators which help the parties reach a settlement, without the power to impose a binding solution on them'. However, when it comes to this regulation, according to Art. 1, it is stated that it 'regulates conciliation in civil, commercial, labour, and other disputes about rights that the parties can freely dispose of'. In other words, it primarily entails resolving private law disputes, while the mentioned regulation would not be applicable to tax disputes. Put differently, there are obstacles regarding arbitrability as we look at the expression 'and other disputes about rights that the parties can freely dispose of'. Comparative experiences speak in favour of conciliation in tax disputes. Moreover, it can be seen that the tax ombudsman is a potential form of alternative resolution of tax disputes. Studying comparative solutions, one can

66 | Private litigation is voluntary, and the binding decision is subject to appeal. The third party that makes the decision is chosen by the parties (must be a judge or lawyer by profession), the procedure is determined by law (more flexible in terms of time, place and procedures), there is a possibility to present evidence and claims, the principled decision is sometimes supported in the process of finding facts and conclusions based on the law, and occurs in private law relationships without the possibility of demanding judicial execution of the decision (enforcement). Impartial fact-finding by experts is voluntary/obligatory (depending on the legal issue and state regulation), the decision is non-binding, there is a third neutral party with specialisation in the subject of expertise, and it can be chosen by the parties to the dispute, it is carried out informally, there is a research nature of the procedure, the decision is made in the form of a report or 'testimony', and it also occurs in private legal relations until a court proceeding has been opened. Furthermore, the mini-trial is voluntary; if an agreement is reached, it is enforceable like a contract. The third party is a neutral advisor, sometimes with specialisation in the subject of expertise, and is less formal than a classic trial. The rules can be set by the parties in dispute, and there is the possibility of an abbreviated presentation of evidence and claims; the result should represent a mutually acceptable agreement, which most often occurs in private law relationships. Finally, the abbreviated court procedure is voluntary/mandatory (depending on the legal issue and state regulation); if an agreement is reached, it is enforceable like a contract, the panel/jury is chosen by the court, the procedure is predetermined (however, there is less formality than a classic trial), there is a possibility of abbreviated presentation of evidence and claims, the decision (verdict) is advisory in order to facilitate reaching an agreement, and the procedure is public. Weil, Lentz and Hoffman, 2012.

come across mediation and early neutral valuation as alternative ways of resolving tax disputes.

5. Concluding remarks

The impact of the European legal framework on national Croatian jurisdiction might be followed throughout the reviewed Europeanisation of tax disputes and search for solutions in the form of ADR in connection to tax disputes. The introduction of the new rules regarding tax dispute resolution serves to improve the efficacy and efficiency of the dispute resolution processes as a step forward for the legal certainty of taxpayers operating in an uncertain post-BEPS tax environment. The new European rules provide taxpayers with a legal course of action at each stage of the process and, therefore, the confidence that their dispute will be resolved. This rule provides better guidance through the process of dispute resolution and helps parties to better understand it. In combination with the increased scope of tax disputes covered, implementing standards into national tax dispute regulations means that the dispute resolution process should become much more accessible and efficient for taxpayers. Although we currently have a negative integration of tax procedural and dispute regulation issues, in terms of a kind of prohibition on inefficient tax procedures and disputes, TDRD has raised questions about whether we need positive integration in this segment of taxation. In anticipation of such a step, standards and solutions in the new mechanisms for resolving European disputes should be taken over into national tax systems. The timeliness and quality of tax dispute resolution by tax authorities have a direct impact on the rule of law enforcement. There is a significant impact on not only the rights of taxpayers but also the efficiency of tax authorities, as well as an overall evaluation of the tax business environment. These are some of the important factors in measuring the mechanism of tax dispute resolution efficiency. Following defined criteria, we can mark indicators and help taxpayers and tax authorities develop important dispute resolution mechanisms in the light of positive European and international experiences.

Conclusions can be made on the potential Europeanisation of tax disputes and the search for effective ADR methods in tax disputes. European tax law is a component of a broader set of regulations and plays a role in shaping international tax regulations. International tax law has a significant impact on the interpretations and functions of the CJEU through its regulations, systems, approaches, and tools. Therefore, a reciprocal connection exists between the evolution of tax regulations and procedural regulations, which encompasses regulations pertaining to tax disputes. This link entails a nearly symmetrical connection and a significant impact on the formulation of national tax legislation. At the European level, there is a strong emphasis on the significance of positive integration as the preferred approach for ensuring legal clarity. While it is beneficial to promote the creation of tax regulations through positive integration, it is important to acknowledge the highly theoretical nature of certain provisions in positive integration instruments.

There is also concern that extensive regulation may undermine the primary advantage of the internal market. The reintroduction of excessive regulation could once again engender uncertainty for both the taxpayers and the tax administration. Simply put, achieving a harmonious equilibrium in positive tax integration is essential. This emphasises the need for negative integration as a crucial element in addressing any unanswered topic without regulation. The CJEU guarantees the uniformity of the internal market and the coherence of European tax law. The ECtHR plays an indirectly significant role in tax matters as well.

The implementation of the new regulations pertaining to tax dispute resolution aims to enhance the effectiveness and efficiency of the dispute resolution procedures, thereby advancing the legal assurance for taxpayers operating in an ambiguous post-BEPS tax landscape. The new European regulations offer taxpayers a clear and legally binding procedure at every step of the process, ensuring that their issue will be effectively addressed. This rule enhances the clarity and effectiveness of the dispute resolution process, facilitating a better understanding for all parties involved. By incorporating standards into national tax dispute legislation, the resolution process for taxpayers is expected to become more accessible and efficient, especially due to the expanded coverage of tax disputes. Despite the existing lack of effective coordination between tax procedural and dispute regulatory matters, there is a growing concern regarding the necessity of implementing proactive measures to address inefficient tax procedures and conflicts in the field of taxes. Prior to implementing this measure, it is advisable to incorporate the standards and solutions from the new procedures for resolving European disputes into national tax systems. The promptness and excellence of tax dispute settlement by tax authorities directly influence the implementation of the rule of law. The impact of taxpayer's rights, the efficiency of tax authorities, and the overall evaluation of the tax business climate are all highly significant factors. Several crucial aspects contribute to the measurement of tax dispute settlement efficiency. By adhering to specific criteria, we may identify signs and assist taxpayers and tax authorities in establishing effective dispute resolution systems, drawing from successful European and worldwide practices.

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