

THE VISION OF HARMONIZED TAXATION WITHIN THE EU

3. CROSS BORDER DISPUTE RESOLUTION AND THE RISK OF DOUBLE TAXATION

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Introduction

- In the context of recent years' fight against tax avoidance and the strengthening of tax audits within Member States, there has been an increased need for the prevention of taxpayers' double taxations
- Dispute resolution tools, such as the Arbitration Convention, the Directive on dispute resolution, or mandatory binding mutual agreement procedures under double tax treaties, are a means to achieve this goal
- In parallel, coordinated audit procedures involving two or more tax administrations, such as simultaneous audits or joint audits, have been developing

Dispute resolution instruments



Dispute resolution – Existing instruments (1/6)

- Three instruments available now within the EU
 - Mandatory binding MAP arbitration
 - Arbitration Convention (“AC”)
 - EU directive

- To date, only Arbitration Convention and a few mandatory binding MAP clauses provided in DTCs are applicable
 - AC: Issues relating to transfer pricing and the attribution of profits to PEs
 - Mandatory binding MAP arbitration clause: all issues arising from the application of a DTC

- Statistics (EU JTPF on the AC):
 - 547 cases initiated in 2017 – Ending inventory on 31/12/2017: 1907 cases
 - Average cycle time for completion of a MAP case: 2 to 3 years
 - In practice, only a few cases referred to arbitration

Dispute resolution – AC statistics (2/6)

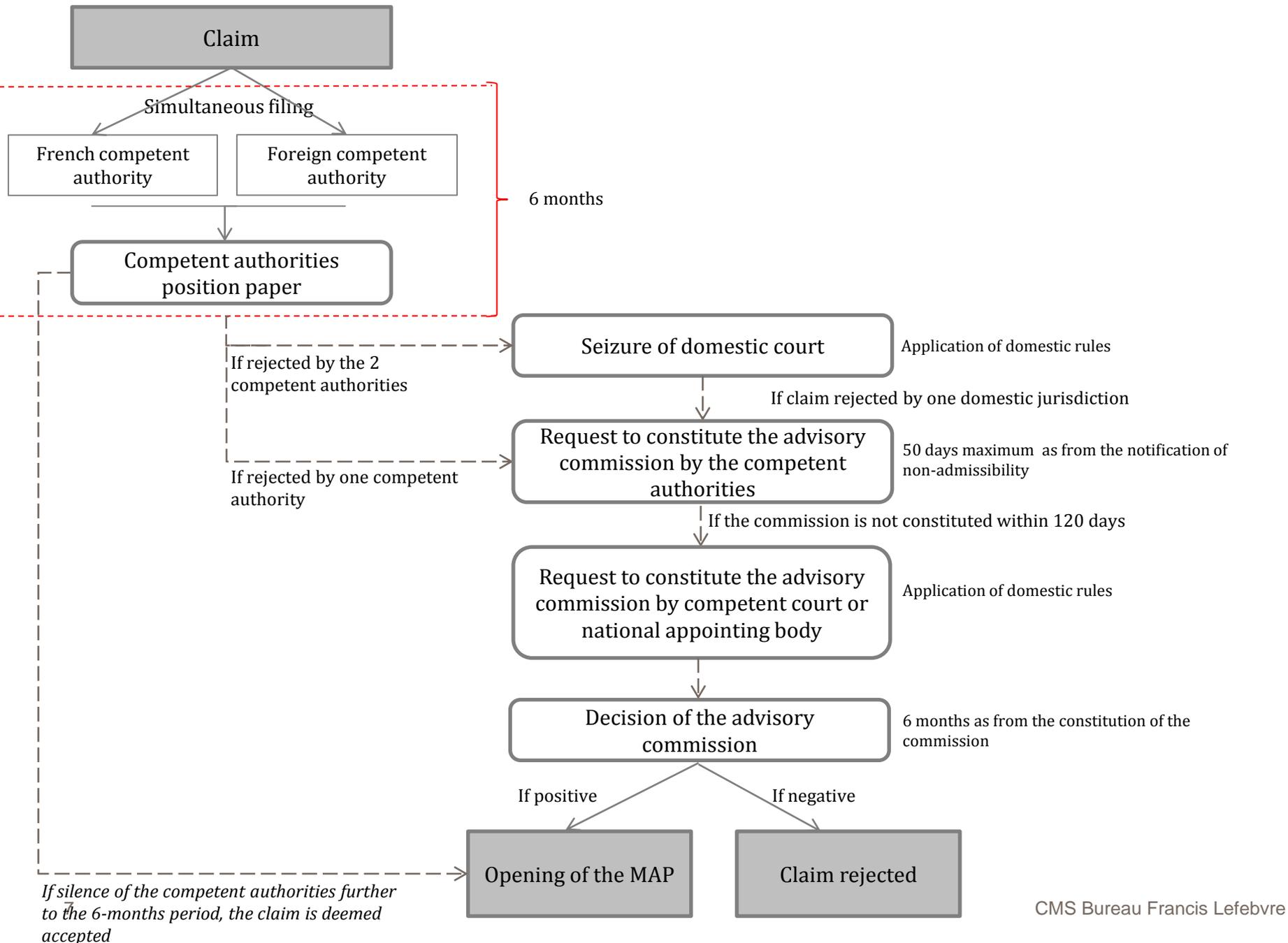
Member State	Opening inventory on 01/01/2017	Cases initiated in 2017	Cases completed in 2017	Ending inventory on 31/12/2017	Average cycle time for cases completed in 2017 (in months)
	B	C	D	E	F
BE	71	31	29	73	31
BG	2	0	1	1	
CZ	17	5	4	13	25
DK	58	29	19	68	26
DE	398	103	112	389	
EE	0	0	0	0	
IE	6	5	1	10	8
EL	10	1	2	9	55
ES	162	59	68	153	33
FR	277	43	81	239	
IT	453	94	79	468	
CY	0	2	0	2	
LV	1	-	0	1	-
LT	2	1	1	2	
LU	14	5	3	16	25
HR	0	0	0	0	
HU	12	1	2	11	
MT	0	0	0	0	
NL	77	25	27	75	30
AT	50	18	7	61	31
PL	11	6	5	12	
PT	28	10	11	27	
RO	3	1	0	4	N/A
SI	7	3	1	9	
SK	8	1	2	7	9
FI	58	12	26	44	32
SE	64	19	14	69	
UK	110	73	39	144	23
TOTAL	1899	547	534	1907	

Dispute resolution – New instruments (3/6)

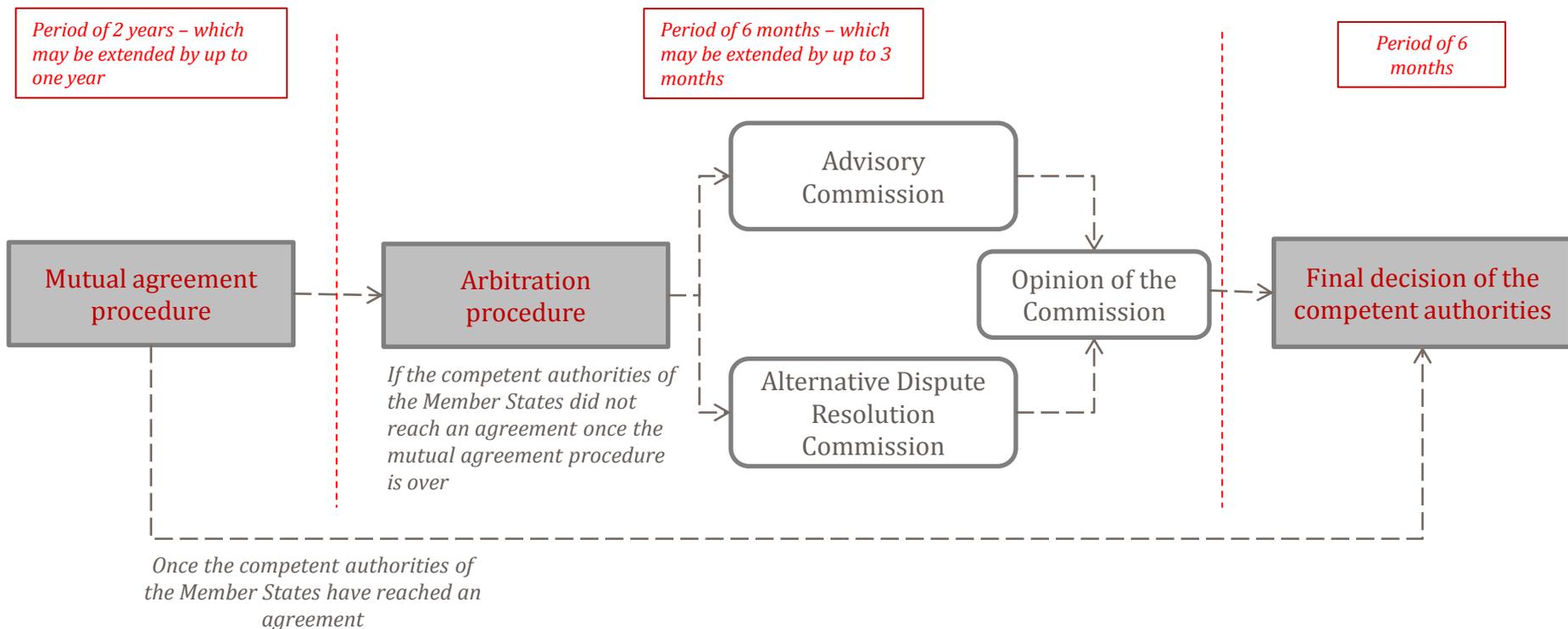
- Introduction of mandatory binding MAP arbitration clause in approx. 150 DTCs further to the implementation of the OECD Multilateral Instrument (“MLI”)
 - Applicable at the earliest on 1 July 2018, and then depending on the date of ratification of the countries
 - France opted for an extended 3-year Mutual Agreement Procedure (“MAP”) phase and baseball arbitration

- EU directive to supplement the AC
 - Applicable as from 1 July 2019
 - Issues relating to the interpretation and application of DTCs => Scope is wider than the AC
 - Particularity of the instrument: binding effect within Member States + domestic legal remedies available at each stage of the procedure starting from the opening of the procedure (cf. following slides)

Directive / Procedure: introduction of the claim (4/6)



Directive / Procedure: Mutual agreement procedure and arbitration procedure (5/6)



Dispute resolution – Interactions between instruments (6/6)

- Mandatory binding MAP arbitration clause and the AC: taxpayers' practice is generally to initiate the procedures under the AC and DTCs at the same time

- Directive and other dispute resolution instruments:
 - Under the directive, the opening of a procedure will prevent the application of equivalent conventional mechanisms
 - In practice, taxpayers in the EU will most probably choose only to open a procedure under the directive due to its binding effect

- The interaction of the three instruments in the context of the BREXIT will also be of interest

Simultaneous and joint audits



Simultaneous audits (1/2)

- Legal framework: article 12 of directive 2011/16/EU (direct taxes)
- Definition: Investigations performed by tax administrations on their territories and sharing of information resulting from the audit, while each tax administration remains the master of its decisions and thus of its tax reassessments
- In France, simultaneous audits introduced as from 2005 and experience developed by French tax administrations since then

Joint audits (2/2)

- No EU legal framework

- Joint audits require more cooperation among tax administrations than simultaneous audits: Investigations performed jointly by tax administrations result in consistent tax reassessments

- Recent developments
 - VAT package introducing joint audits for VAT (proposal dated 30 November 2017)
 - EU JTPF Report on a coordinated approach to transfer pricing controls within the EU (October 2018)
 - OECD Joint audits report (2019)

- Experience developed by Germany with the Netherlands, Italy and recently with France
 - In France (as from 2014): joint investigations (joint examination of the file, assistance for procedures and questions to the taxpayer)

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