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GUIDANCE

on

the Application of the Mutual Agreement Procedure under

the Double Taxation Conventions and

**the Convention on the Elimination of Double Taxation in connection with
the Adjustment of Profits of Associated Enterprises 90/436/EEC**



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Abbreviations

HQ of NRA – Headquarters of the National Revenue Agency

DTC(s) – Double Taxation Convention(s)

OECD – Organization for Economic Cooperation and Development

EU – European Union



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1. Introduction

Double Taxation Conventions ('DTCs') are concluded to promote economic relations between countries and avoid double taxation on income and capital without creating opportunities for tax evasion or avoidance. As the provisions of DTCs are unable to provide a direct answer to every possible case, tax disputes may arise between States and taxpayers. For example, the risk of double taxation exists in cases where the Contracting States interpret differently the provisions of the respective DTC or establish the facts of the case differently. To resolve such disputes in tax matters, the DTCs provide for arrangements enabling Contracting States' competent authorities to establish direct contact with each other for the purpose of settling the dispute by means of mutual agreement, without at the same time binding them with an obligation to achieve such agreement.

Bulgaria has 68 DTCs in force with 69¹ countries. All DTCs concluded by Bulgaria contain provisions on the mutual agreement procedure. These provisions are based on the OECD Model DTC² with some deviations from this Model in a limited number of agreements. The agreements concluded by Bulgaria are available on the Internet at:

<http://www.nap.bg/page?id=427> (in Bulgarian) and <http://www.nap.bg/en/page?id=530> (in English).

Another legal instrument aimed at settling tax disputes is the Convention on the Elimination of Double Taxation in connection with the Adjustment of Profits of Associated Enterprises 90/436/EEC ("the Arbitration Convention"). The Arbitration Convention is applied to avoid double taxation where, as a result of a transfer pricing adjustment, profits included in the profits of an enterprise of a Contracting State are also included or are likely to be included in the profits of an enterprise of another Contracting State. This Convention also applies to the attribution of profits to permanent establishments.

The purpose of this Guidance is to clarify the mutual agreement procedure, which can be initiated at the request of a taxpayer (individual or legal person), when the actions of one or both Contracting States have resulted or will result in taxation not in accordance with the

¹ The DTC with the Federal Republic of Yugoslavia (Prom. SG. 58/18 18 July 2000, in force since 10 Jan 2000) is applied in relation to two countries – the Republic of Serbia and Montenegro.

² OECD Model Tax Convention on Income and Capital, as it read before 2017.



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provisions of a DTC. The Guidance includes a review of the legal framework and practical aspects of the mutual agreement procedure in Bulgaria and provides clarification and guidance to taxpayers on the process and actions to be taken with a view to resolving disputes resulting from taxation, inconsistent with the DTCs concluded by Bulgaria and/or the Arbitration Convention.

The EU has adopted Council Directive (EU) 2017/1852 of 10 October 2017 on tax dispute resolution mechanisms in the European Union, establishing effective mechanisms for resolving tax disputes between Member States concerning the interpretation and application of DTCs and the Arbitration Convention. The Directive should be transposed into a national law no later than 30 June 2019. Once the Directive is transposed in Bulgaria, this Guidance will be complemented, in due course, with the new rules.

2. General information on the mutual agreement procedure under DTCs

The mutual agreement procedure ensures:

- equal treatment of taxpayers caught in identical situations from a factual and legal perspective, and consistent interpretation and application of the provisions of a specific DTC in both countries concerned;
- an opportunity, other than those provided for by domestic laws of the States, to protect the interests of taxpayers in case of incorrect application of a specific DTC;
- a legal possibility and a simplified procedure for the competent authorities of both countries to resolve, through direct communication, disputes relating to differences in the interpretation of DTCs that would lead to an undesirable effect in the application of a DTC, namely double taxation.

The mutual agreement procedure is governed by the provisions of DTCs similar to Article 25 of the OECD Model DTC.

If a taxpayer considers that the action of one or both Contracting States result or will result in taxation not in accordance with the DTC provisions, they may request the initiation of a mutual agreement procedure. The purpose of this type of procedure is to resolve the problem



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by mutual agreement between tax administrations, thus avoiding or eliminating taxation, which is not in line with a DTC in a particular case.

The mutual agreement procedure also applies to double taxation resulting from transfer pricing adjustments made to profits of an enterprise in the cases covered by the provisions of the DTCs concluded by Bulgaria, similar to Article 9 of the OECD Model DTC.

The mutual agreement procedure is carried out directly between the competent authorities of both Contracting States. Taxpayers are not part of the procedure, even if it is initiated upon their request.

While the competent authorities should endeavor to reach an agreement, they are not obliged to achieve a result eliminating double taxation or taxation, which is not in accordance with the DTC. This means that the procedure does not guarantee in any case that the competent authorities will arrive at a satisfactory solution regarding the taxpayer's tax situation.

3. Competent authority

In Bulgaria, the Minister of Finance or an authorised person are the competent authority with regard to the mutual agreement procedures covered by the concluded DTCs.

The Director of the Tax Treaties Directorate at NRA's HQ is authorised to review taxpayers' requests, as well as to initiate, conduct and complete mutual agreement procedures.

More information on mutual agreement procedures and other countries' competent authorities is available at <http://www.oecd.org/tax/dispute/country-map-profiles.htm>.

4. Initiating a mutual agreement procedure

The Bulgarian competent authority initiates a mutual agreement procedure with the competent authority of another country with which a DTA has been concluded, based on a request from the taxpayer concerned.



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In Bulgaria, a request to initiate a mutual agreement procedure may be made irrespective of the legal remedies available under the national laws of the States, i.e. irrespective of any administrative or judicial appeal proceedings against an assessment.

In general, the request should be submitted to the competent authority of the State in which the taxpayer is resident for tax purposes within the meaning of the specific DTC. Some DTCs allow the taxpayer to choose to which competent authority the request is to be made: the competent authority of the State of which such persons is a resident or the competent authority of the other State.

Where the taxpayer claims a breach of the principle of equal treatment (non-discrimination) under the provisions of Article 24 (1) of the OECD Model DTC, the request can be made to the competent authority of the country where the taxpayer is a national (i.e. citizen).

It is also possible to present a request to more than one competent authority. In this case, it is appropriate that the request, intended for either of them, contains the same information and is presented to all competent authorities at the same time. In addition, the taxpayer must inform all competent authorities of the simultaneous submission of the request, with a view for the competent authorities to apply a coordinated approach when resolving the case.

In case more than one taxpayer is affected (for example, in case of transfer pricing adjustments to profits), each of the persons concerned may request initiation of a mutual agreement procedure before the competent authority of the Contracting State where the person is resident for tax purposes.

The initiation of a mutual agreement procedure may be requested, even if, following an audit, the taxpayer accepts taxation and does not appeal the tax assessment notice.



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5. Form and content of the taxpayer's request

The request to initiate a mutual agreement procedure is submitted by the taxpayer in writing. There is no specific template or form for the submission of the request. The request should be accompanied by all relevant documents and information on the case.

The request shall contain the following minimum information and annexes:

- taxpayer identification (name, address, personal identification number or other tax number);
- identification of other persons concerned by the request (including related companies);
- power of attorney, if lodged by an authorised person;
- the other country/countries concerned;
- description of facts and circumstances of the case (including the amount of tax covered by the request in BGN and the other foreign currency; details of any relationships between the requesting taxpayer and other persons directly involved; annual financial statements for the fiscal periods to which it refers, where applicable);
- the fiscal periods for which double taxation or taxation not in accordance with the provisions of a DTC has occurred;
- copy of the act on the basis of which double taxation or taxation not in accordance with the provisions of a DTC occurs or will occur, if any;
- reasons for which the person considers that one or both of the Contracting States' actions result or would result in taxation which is not in accordance with the provisions of a DTC;
- detailed information on any action taken to avoid double taxation in Bulgaria or in the other State (correspondence with the tax authorities, objections, etc.), including when the request to initiate a mutual agreement procedure has been submitted to the competent authorities of the other State (indicate the date of the request, name of the person who lodged it and the body to which it has been submitted);
- detailed information on any remedy sought in Bulgaria or in the other State, if used;
- where applicable, evidence that the matter in question, in connection with which the request for the initiation of the mutual agreement procedure has been made, has been



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addressed in an advance tax ruling, advance pricing arrangement or judgment as well as copies of the relevant decisions;

- information whether the request is the so-called “protective request”³ to launch a mutual agreement procedure;
- any other information that would help resolve the case;
- statement confirming that all information and documents in the mutual agreement procedure are correct and that the taxpayer will assist the competent authority by providing any other information or documents requested by the competent authority.

The taxpayer has to clarify all facts and circumstances relevant to the case, provide all relevant data required for the conduct of the mutual agreement procedure and provide other evidence, if necessary.

6. Place and time limit for submitting the request

The request to initiate the mutual agreement procedure is to be submitted in Bulgarian language at the NRA’s HQ and should be addressed to the Director of the Tax Treaties Directorate.

The address for correspondence is as follows:

- HQ of NRA, 52 “Knyaz Dondukov” Blvd., 1000 Sofia – for on-site submission and by ordinary mail; or
- nap@nra.bg – for electronic filing, using an electronic signature.

The request to the competent authority must be submitted within 3 years from the first notification of the action, which will result in taxation that is not in accordance with a DTC in force. Calculation of this period is interpreted in a way that is most beneficial to the taxpayer. DTCs set out the final point at which a request to initiate a mutual agreement procedure may

³ ‘Protective request’ is a request made solely to ensure that the time limit laid down in a DTC is met when the taxpayer has expressly specified or agreed with the competent authority that the request should not be examined until a notification by the taxpayer to that effect is sent. Since it is unlikely that a taxpayer making a ‘protective request’ can provide all the necessary information normally required, the minimum information required in a presentation for a protective request is:

- identification of the taxpayer and the other parties concerned;
- tax period(s) in the scope of the request, and
- brief description of the action resulting or expected to result in taxation, which is not in accordance with the DTC provisions.

The submission of a ‘protective request’ is not taken into account in the calculation of the start date of the mutual agreement procedure.



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be made, leaving flexibility as regards the starting point after which such a request can be made. For example, if a Bulgarian taxpayer is in possession of information, such as a foreign administration opinion/ruling, which shows that the action of that administration may lead to incorrect taxation in the foreign country, the person, having become aware of those intentions, may now refer the matter to the competent authority of Bulgaria, asking for the case to be dealt with, including through initiation of a mutual agreement procedure. Therefore, the person has the right to refer the matter to the competent authority of their country before the above three-year period starts. The three-year period, however, starts from the moment the foreign administration has materialised its taxation intention into a tax notice, tax or audit report, or any other act issued in accordance with its legislation and has informed the taxpayer thereof under the procedure provided for in its law. The rules for calculating this period are to be interpreted in favor of the taxpayer in order to allow a wider use of the procedure as an additional protection mechanism against the unlawful application of DTCs.

When the action leading to taxation not in accordance with the DTC was carried out by a revenue authority in Bulgaria (for example, in the case of profit adjustment for transfer pricing purposes), the three-year period starts to run from the time the Bulgarian revenue administration materialised its intention to tax (generally with a tax assessment notice).

It should be noted that not all DTCs concluded by Bulgaria provide for a period of three years for the submission of the taxpayer's request. For example, in DTCs with Italy, Canada and Indonesia the limitation period is two years⁴ from the first notification of the action that has resulted or will result in taxation, which is not in accordance with the DTC in force. Therefore, it is appropriate for every taxpayer to consult the texts of the specific DTC before initiating a mutual agreement procedure.

Where a specific DTC does not provide for a time limit after which a request to initiate a procedure should not be examined⁵, the Bulgarian competent authority applies the period of three years set out in Article 25 (1), second sentence of the OECD Model DTC.

⁴ With the entry into force of the provisions of the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (BEPS), signed by Bulgaria on 7 June 2017, with regard to the DTCs concluded by Bulgaria, the relevant provisions therein relating to the mutual agreement procedure will be modified so that the deadline for submitting the request by the taxpayer will be set at three years.

⁵ Such DTCs include the ones with the USA, Turkey and Malta.



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7. Admissibility of the request to initiate a mutual agreement procedure

When the competent authority receives a request to start a mutual agreement procedure, it verifies whether the request is admissible and the taxpayer's objections are justified.

The request made by the taxpayer is admissible where:

- the request has been filed within the time limit laid down in the specific DTC;
- the request has been made by a person authorised to do so;
- the request has been filed with the relevant competent authority;
- the request has been filed for (a) fiscal period(s) for which the respective DTC was in force.

The taxpayer's objection is justified where:

- the taxpayer has provided the necessary information to allow the competent authority to assess whether taxation in one or both states is contrary to the provisions of the respective DTC;
- the request by the taxpayer concerns matters relating to the application or interpretation of the provisions of the specific DTC;
- the specific requirements of the provisions of the specific DTC are met, for example the DTC requires the cumulative existence of double taxation and taxation that is not in accordance with the DTC, and the taxpayer only objects to taxation that is not in accordance with the DTC;
- the taxpayer has managed to justify his position so that, based on the evidence presented, it can be established that taxation has occurred or will occur that is not in accordance with the provisions of the specific DTC.

The request is examined within two months of its receipt. Within this time limit, the competent authority informs the taxpayer whether the request is admissible and the objection is justified. The competent authority may also request further information on the case, where necessary.



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8. Initiation of a mutual agreement procedure

The competent authority initiates the mutual agreement procedure where the following conditions are met:

- the request made by the taxpayer is admissible;
- the objection of the taxpayer is justified;
- the competent authority cannot unilaterally remove taxation that is not in accordance with the DTC.

The competent authority informs the taxpayer of the unilateral actions, if any, taken to eliminate the taxation, which is not in accordance with the provisions of the DTC or of the launching of a mutual agreement procedure with the competent authority of the other State. Correspondence between the competent authorities of the countries concerned is confidential and not shared with the taxpayer.

If a mutual agreement procedure is initiated by the competent authority of another country, the competent authority of Bulgaria examines the request to initiate the procedure to verify if the requirements for its initiation have been met. After this verification, it informs the competent authority of the other State in writing of Bulgaria's position on the matter, as soon as possible.

8.1 General principles of the procedure

The competent authority conducts a mutual agreement procedure directly with the competent authority of the other State concerned.

The mutual agreement procedure is started by means of a letter to the competent authority of the other country, party to the DTC. This letter describes the case, the actions of the tax administration, which have led to taxation contrary to the provisions of the DTC, and the arguments used by the tax administration of the person concerned to contest the decision, action or act of the relevant foreign tax administration. The dispute between the two countries may be held either by means of correspondence or through (a) meeting(s) between



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representatives of the competent authorities of the two countries. During the procedure both parties defend their positions with a view to reach an agreement on the specific taxation.

All information collected by the competent authority within the mutual agreement procedure is subject to the rules on confidentiality as laid down in the provision on exchange of information provided for in the respective DTC.

8.2 Taxpayer's rights

The mutual agreement procedure constitutes proceedings between the Contracting States in which the taxpayer is not directly involved.

The taxpayer is entitled to request the initiation of the procedure, to present its position on the case, and to make comments on the relevant facts and legal issues relating to the procedure itself and to the outcome thereof, either in writing or orally.

The competent authorities of the countries concerned are under an obligation to inform the taxpayer of the status, development and outcome of the procedure.

8.3 Agreement

As a rule, the mutual agreement procedure is conducted and completed in writing, by means of an exchange of positions, and a final confirmation of the agreement reached by the competent authorities of Bulgaria and the other State concerned. In order for the outcome of the procedure to be effective, the taxpayer should accept the agreement reached and refrain from taking any future legal action, or should terminate any administrative or judicial proceedings already initiated.

The competent authority informs the taxpayer of the outcome of the procedure and the actions to take, as soon as it is completed.

If no rejection to the outcome is made within 30 days, the agreement is assumed to be approved by the taxpayer.



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9. Implementation of the agreement

9.1 Information about the outcome

The competent authority notifies the Territorial Directorate of the NRA where the taxpayer is registered of the outcome of the mutual agreement procedure, providing the necessary evidence and information on the case. In addition, the competent authority gives instructions on the action to be taken by revenue authorities, where necessary.

The competent Territorial Directorate of the NRA is responsible for the implementation/enforcement of the agreement reached by Bulgaria.

Before implementing the agreement, the taxpayer may state in writing that they accept the agreement reached and its implementation, that they have terminated all initiated legal procedures and that they will refrain from any subsequent legal action, provided the agreement reached would be implemented correctly.

9.2 Procedural aspects of implementation

The agreement reached between the competent authorities has effect in the two States, irrespective of the limitation periods set by their internal legislation. Notwithstanding that the limitation periods in one or in both States may have expired before the agreement is reached, the agreement between the two competent authorities should be implemented and the State which, as a result of the agreement, will have to refund tax, may not refuse to do so by referring to the expired limitation period.

It should be noted that some of the DTCs concluded by Bulgaria do not contain any provision to ensure that the agreement reached will be implemented irrespective of the periods of limitation provided for in the internal legislation of the countries concerned. For example, DTCs with Italy, Denmark, Belgium and Luxembourg do not contain such a rule⁶. The

⁶ With the entry into operation of the provisions of the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (BEPS), signed by Bulgaria on 7 June 2017, with regard to the DTCs concluded by Bulgaria, the relevant provisions therein relating to the mutual agreement procedure will be modified so that any agreement reached will be implemented irrespective of the time limits provided for in national laws.



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consequences of this are that in these cases there are procedural restrictions on the implementation of the agreement reached.

9.3 The mutual agreement procedure and other proceedings

The request to initiate a mutual agreement procedure may be submitted independently of the remedies provided by the internal legislations of the two countries. The submission of a request for such a procedure does not preclude the opportunity for the person to benefit from any other legal remedies, e.g. appeal against acts and actions of the administrations, which the two States' domestic laws provide in order to ensure protection against unlawful income taxation. This means that, if the person has appealed against an act or actions of the Bulgarian or a foreign revenue administration, there are no obstacles to make a request to initiate a mutual agreement procedure, even if the appeals procedure against the act or action has ended.

In the case of Bulgaria, the above applies only to the administrative appeal of acts and actions of the Bulgarian revenue administration. In Bulgaria, as in many other countries, court decisions are binding on the revenue administration and after the entry into force of such a decision, the administration cannot reach an agreement with another tax administration on taxation that is not in accordance with the decision, even where such taxation is more favorable to the taxpayer.

The fact that a Bulgarian court has ruled on the case to which the request for initiation of a mutual agreement procedure relates, does not itself prevent from the initiation of such procedure. However, for the above reasons, the Bulgarian competent authority cannot hold a different position and apply an agreement, which deviates from the Bulgarian court decision that has entered into force.

9.4 Consequences when the mutual agreement procedure is not successful

If the competent authorities cannot reach an agreement, the procedure will not be successful. In such a case, the taxpayer concerned will be informed that no agreement has been reached.



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9.5 Costs of the mutual agreement procedure

The States involved in the procedure bear the costs incurred in carrying out the procedure. The costs incurred by the taxpayer, such as charges, fees and any payments for tax advice, translations, issuance of documents, etc., are at their own expense.

10. Mutual agreement procedure under Convention 90/436/EEC (the Arbitration Convention)⁷

The rules as described in paragraphs 1 to 9 above will also apply to the mutual agreement procedures launched under the Arbitration Convention.

10.1 Scope in relation to the States

The Arbitration Convention only applies to EU Member States.

10.2 Objective of the Arbitration Convention

The main purpose of the Arbitration Convention is to provide a legal possibility to avoid double taxation in cases of transfer pricing adjustments, where profits included in the taxable profit of an enterprise have been or are likely to be included in the taxable profit of a related enterprise.

10.3 Fundamental principle in the mutual agreement procedure under the Arbitration Convention

The principle to be followed under the procedure by the States is governed by Article 4 of the Arbitration Convention. This rule reproduces the arm's length principle maintained by the OECD and governed by Article 9 of the OECD Model DTC.

⁷ This section is not intended to provide guidance on the second phase under the Arbitration Convention, namely the examination of the case by an independent advisory commission (arbitration).



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10.4 Grounds for initiating the procedure

The mutual agreement procedure is initiated based on Article 6 (1) of the Arbitration Convention.

10.5 Request and conditions for submitting the request

A mutual agreement procedure is initiated on request by the taxpayer concerned.

The taxpayer's request is submitted to the competent authority of the Contracting State of which the taxpayer is a resident or in which his permanent establishment is situated. The request may be submitted, irrespective of the remedies provided for by the domestic legislation of Bulgaria and the other State concerned.

The taxpayer notifies the competent authority whether or not other countries would be interested in the case.

10.6 Form and content of the request

The request to initiate a mutual agreement procedure is submitted in writing. There is no specific template or form for the submission of the request.

The request needs to contain the following minimum information and annexes:

- identification details (name, address, tax number) of the requesting taxpayer and of the other persons involved in the transactions;
- power of attorney if lodged by an authorised person;
- the other country/countries concerned;
- detailed description of the relevant facts and circumstances of the case and details of the relationship among the persons involved in the transactions;
- indication of the fiscal periods covered by the request;
- copy of the tax assessment notice or an equivalent act, based on which the double taxation claimed by the taxpayer arises;



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- data on any judicial or administrative appeal procedure initiated by the taxpayer or the other persons involved in the transactions, as well as any court decision on the case;
- explanation by the taxpayer as to why he considers that the principle laid down in Article 4 of the Arbitration Convention has not been respected by the States concerned;
- declaration of commitment by the taxpayer that they will provide complete and timely information on all reasonable and justified requests for information from the competent authority and provide the necessary documentation to the competent authorities.

The competent authority may request any additional information of relevance to the case.

10.7 Time limit for the submission of a request

The request to the competent authority must be submitted within three years from the first notification of the action, which will result in taxation, inconsistent with the principle of Article 4 of the Arbitration Convention.

It is accepted among EU Member States that the starting date of the three-year period is the date of the first tax assessment notice or its equivalent, which leads to double taxation as a result of a transfer pricing adjustment.

10.8 Consequences of a failed mutual agreement procedure

Where competent authorities cannot reach an agreement within two years from the day on which the case was first referred to one of them in accordance with Article 6 of the Arbitration Convention, they set up an advisory commission responsible for issuing an opinion on the elimination of the double taxation. In this case, the competent authority notifies the taxpayer concerned that no agreement has been reached and proceeds to setting up an advisory commission.



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10.9 Starting date of the two-year period

The two-year period referred to in paragraph 10.8 starts on the later of the following dates:

- the date of the tax assessment notice, i.e. the final decision of the tax administration for establishing additional tax, or its equivalent; or
- the date on which the competent authority receives the request and the additional information referred to in paragraph 10.6 above.

Competent authorities may, by mutual agreement and in agreement with the taxpayers concerned, deviate from this period, and agree to extend it.