

HELLENIC REPUBLIC

National and Kapodistrian  
University of Athens

EST. 1837

# Taxpayers and their Rights in Alternative Dispute Resolution

Dr. Katerina Perrou  
25 March 2021

Alternative Dispute Resolution in International Taxation  
University of Luxembourg | Online Conference

# Taxpayers and their Rights in Alternative Dispute Resolution: Agenda

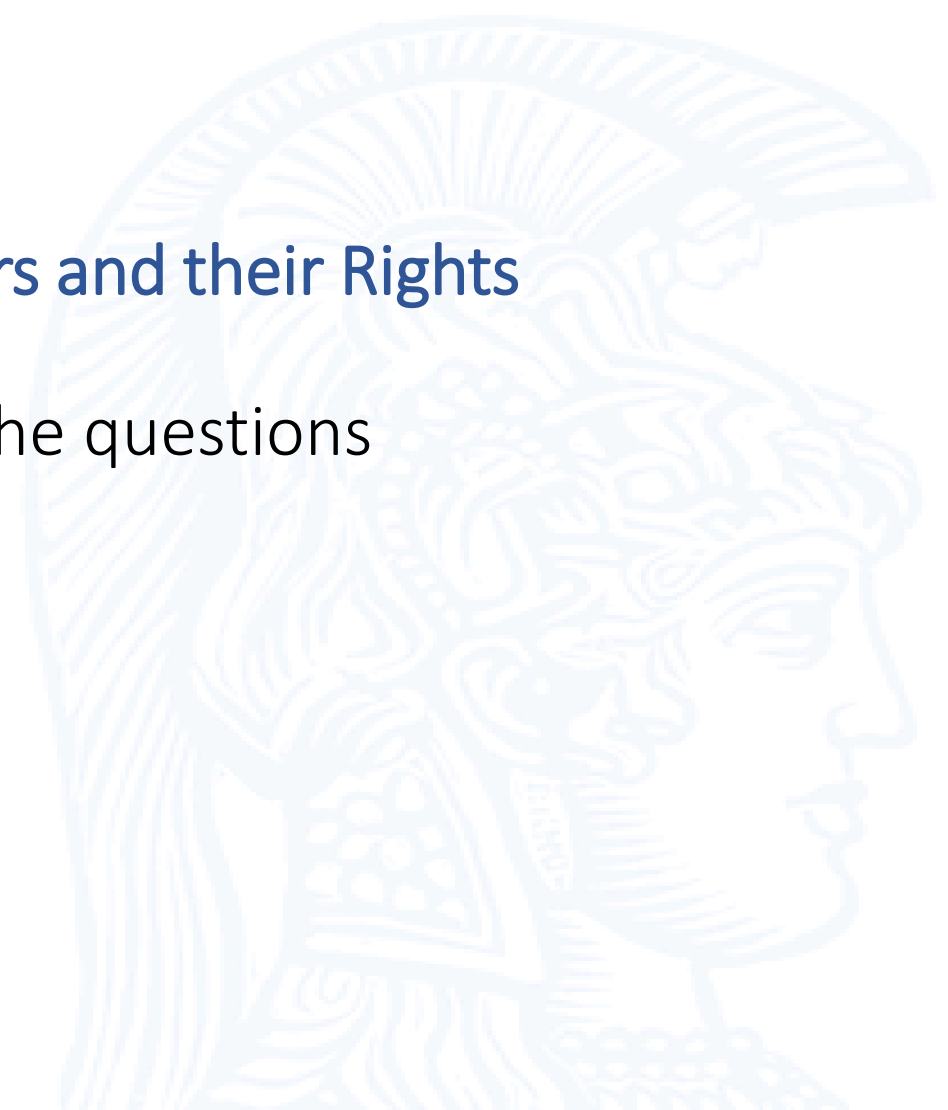
## Agenda

- I. The questions
- II. OECD MAP/Arbitration and taxpayer rights
- III. An assessment of the EU Dispute Resolution Directive
- IV. What to expect

# Taxpayers and their Rights in Alternative Dispute Resolution: I. The Questions

## Taxpayers and their Rights

### I. The questions



# Taxpayers and their Rights in Alternative Dispute Resolution: I. The Questions

## The Questions

- *Do* taxpayers have rights in MAP / Arbitration procedures?
- *Should* taxpayers have rights in Alternative Dispute Resolution in International Taxation?

Requires exploration of one fundamental issue →

# Taxpayers and their Rights in Alternative Dispute Resolution: I. The Questions

## The Questions

- **WHAT** is the exact nature of the MAP?
- is it really an **inter-governmental negotiation**, where a government can take a position that may be completely different to one that it would take in domestic litigation? **OR**
- is it **effectively a dispute-resolution procedure**, which should be transparent, and where the taxpayer should have full opportunities to participate?

# Taxpayers and their Rights in Alternative Dispute Resolution: I. The Questions

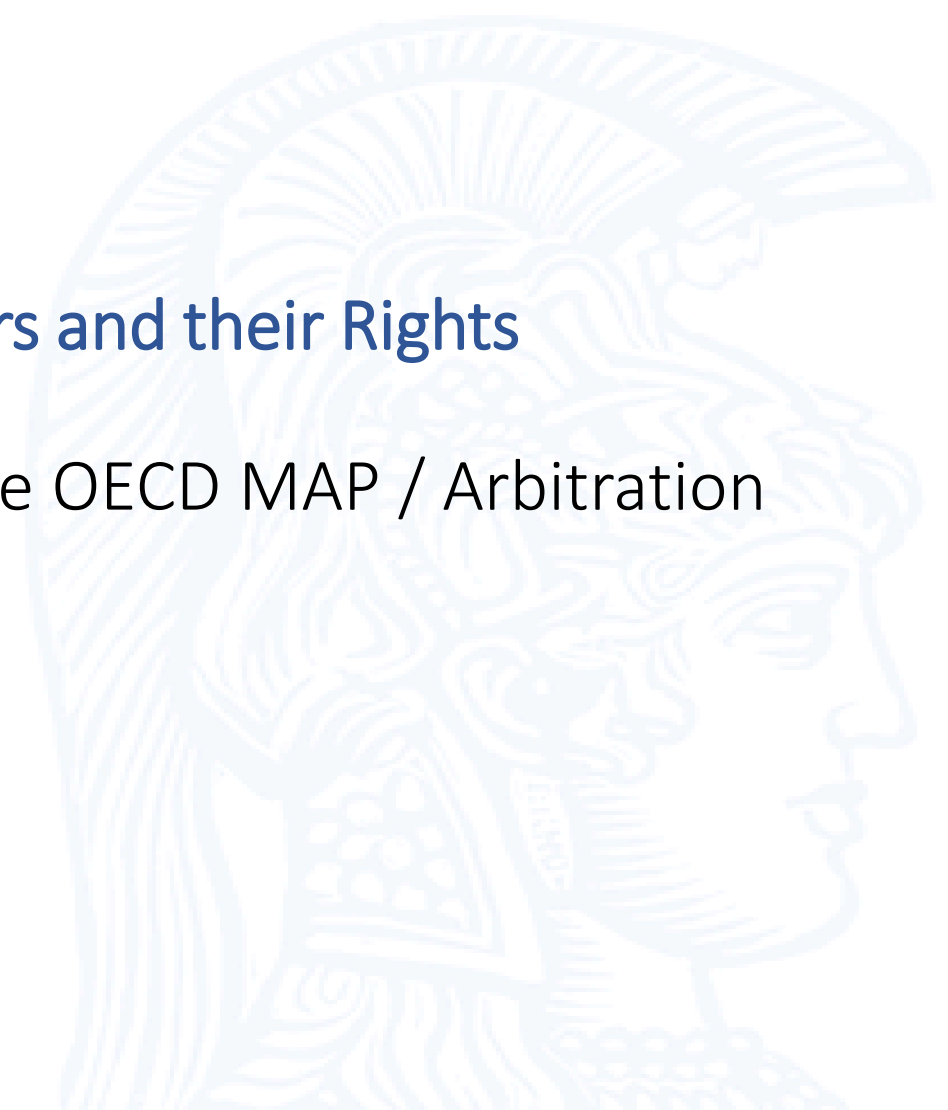
## The Questions

- How to answer **WHAT** is the exact nature of the **MAP**?
- look at how MAP is *designed*;
- Look at what MAP *serves* in reality; what is its *function* in a legal system

# Taxpayers and their Rights in Alternative Dispute Resolution: II. OECD MAP

## Taxpayers and their Rights

### II. The case of the OECD MAP / Arbitration





# Taxpayers and their Rights in Alternative Dispute Resolution: II. OECD MAP

## ➤ 2007 OECD MEMAP:

- MAP discussions between competent authorities are a **government-to-government process** in which there is generally no direct taxpayer involvement
- taxpayer involvement in the MAP is generally limited to **presenting the taxpayer's views** and **assisting in the fact-finding** without participating in the competent authority-to-competent authority **discussions**



# Taxpayers and their Rights in Alternative Dispute Resolution: II. OECD MAP

- **2012 UN Guide to MAP under Tax Treaties:**
  - Essentially: the negotiation of an agreement pursuant to the MAP is a government-to-government process
- **2019 UN Handbook on Dispute Avoidance and Resolution (proposed):**
  - the MAP is a **government-to-government process** through which issues related to the interpretation and application of tax treaties may be discussed and resolved between the competent authorities, which are the two parties involved.
  - the taxpayer is involved only in certain parts of the process

# Taxpayers and their Rights in Alternative Dispute Resolution: II. OECD MAP

## ➤ 2017 OECD Model – Commentary on Article 25

- in view of the **special nature** of the procedure, disclosure to the taxpayer or his representatives of the papers in the case does not seem to be warranted
- **BUT** also → **duty** of the CAs to provide **certain essential guarantees to taxpayers**; consensus among states: taxpayers have **the right to** and CAs have the corresponding **duty to guarantee** for them:
  - the right to make representations in writing or orally, either in person or through a representative;
  - the right to be assisted by counsel

# Taxpayers and their Rights in Alternative Dispute Resolution: III. The DRD

## Taxpayers and their Rights

III. The case of Council **Directive (EU) 2017/1852**  
of **10 October 2017** on tax dispute resolution  
mechanisms in the European Union

# Taxpayers and their Rights in Alternative Dispute Resolution: III. The DRD

## The case of DRD – preliminary issues

- Intra EU tax disputes take place in an entirely different environment than OECD MAP → higher level of integration among MS
- The need for effective dispute resolution mechanisms → linked to the elimination of serious tax obstacles for businesses operating across borders that are caused by the divergent interpretation of international tax rules

# Taxpayers and their Rights in Alternative Dispute Resolution: III. The DRD

## Compliance with fair trial guarantees

- **Recital (9):** This Directive respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union. In particular, this Directive seeks to ensure full respect for the right to a fair trial and the freedom to conduct a business.
- **Right to a fair trial → Article 47 EU Charter :** Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.

# Taxpayers and their Rights in Alternative Dispute Resolution: III. The DRD

## Compliance with fair trial guarantees

- **Taxpayer participation:** the affected person can have significant control over the progress procedure;
  - Submit a complaint (Art. 3)
  - If all CAs reject the complaint → recourse to national courts (Art. 5(3))
  - Request to set up the Advisory Commission in case the complaint is rejected by at least one but not all CAs OR in case of no agreement during MAP (Art. 6)
  - If no AC is set up → recourse to domestic courts or appointing authority (Art.7)



# Taxpayers and their Rights in Alternative Dispute Resolution: III. The DRD

## Compliance with fair trial guarantees

### ➤ Taxpayer participation:

- Implementation of Rules of Functioning → recourse to domestic courts in order to obtain an order for the implementation (Art. 11(4))
- They **may appear or be represented** before the AC or the ADR Commission (Art. 13(2))
- Implementation of final decision → recourse to domestic courts (Art. 15(4))



# Taxpayers and their Rights in Alternative Dispute Resolution: III. The DRD

## Compliance with fair trial guarantees

- **Reasonable time of the proceedings**
  - There is a certain time limit provided for every step
  - Overall the conclusion of the procedure is foreseeable (delays may be observed)
- **Final and binding decision**
- **Implemented irrespective of domestic time limits** → see article 4(2) on MAP and 15(4) on the Final Decision after the AC or the ADR Commission procedure
- **Overall: An effective remedy**

# Taxpayers and their Rights in Alternative Dispute Resolution: III. The DRD

## Compliance with fair trial guarantees

- Guarantees of **independence and impartiality** of the DR bodies
  - MAP (Art. 4) → no such guarantees
  - List of independent persons of standing → drafted according to Art. 9
  - Advisory Commission (Art. 6) → **independent** persons of standing are included in its composition, as per. Art. 8(1)(c). **BUT: WHAT** if CAs deviate?
- **RISK!** No real guarantee of independence and impartiality; depends on the circumstances

# Taxpayers and their Rights in Alternative Dispute Resolution: III. The DRD

## Compliance with fair trial guarantees

- **Fairness and transparency of the procedure**
- Competent authorities must always keep the taxpayer informed
  - Art. 3(2): timely acknowledge the receipt of the complaint
  - Art. 3(5) decision accepting or rejecting the complaint must be communicated to the taxpayer
  - Art. 4(3): give reasons why MAP was not reached
  - Art. 5: provide reasons why complaint was rejected
  - **Art. 18: Publicity → publication of the final result**

# Taxpayers and their Rights in Alternative Dispute Resolution: III. The DRD

## Compliance with fair trial guarantees – Two Challenges

### 1. The possible use of the **baseball arbitration**

- Does Baseball Arbitration satisfy fair-trial guarantees?
  - No requirement / obligation to give a Reasoned Opinion
  - No publication of the position papers
  - Limits the power of the independent persons
  - Allows choice of only one of two proposed solutions
    - What if neither of the proposed solutions is compatible with the relevant DTC rules ? Or with the domestic law of the MS that has to implement?
- Concerns may be addressed if → reasoned baseball arbitration (moving closer to: reasoned opinion arbitration?)

# Taxpayers and their Rights in Alternative Dispute Resolution: III. The DRD

## Compliance with fair trial guarantees – Two Challenges

### 2. (Lack of) Supervision by the Court of Justice

- [\*Slovak Republic v. Achmea B.V.\*](#) (2018)
  - BIT arbitration clauses **incompatible** with EU law
  - BITs' arbitration clauses **remove disputes** involving the interpretation or application of EU law from the mechanism of judicial review provided for by the EU legal framework, **depriving the effective supervision by the CJEU** (267 TFEU on preliminary rulings); [*§59: the autonomy*]



# Taxpayers and their Rights in Alternative Dispute Resolution: III. The DRD

The (possible) impact of *Achmea* on the DRD

- The jurisdiction of the CJEU is, potentially, limited, *unless* the arbitration body in the MAP and arbitration procedure of the DRD can qualify as a court or tribunal of a Member State, in the context of Article 267 TFEU.

→ it cannot, as it stands!

→ Possible infringement of Articles 267 and 344 TFEU?

# Taxpayers and their Rights in Alternative Dispute Resolution: III. The DRD

## The (possible) impact of *Achmea* on the DRD

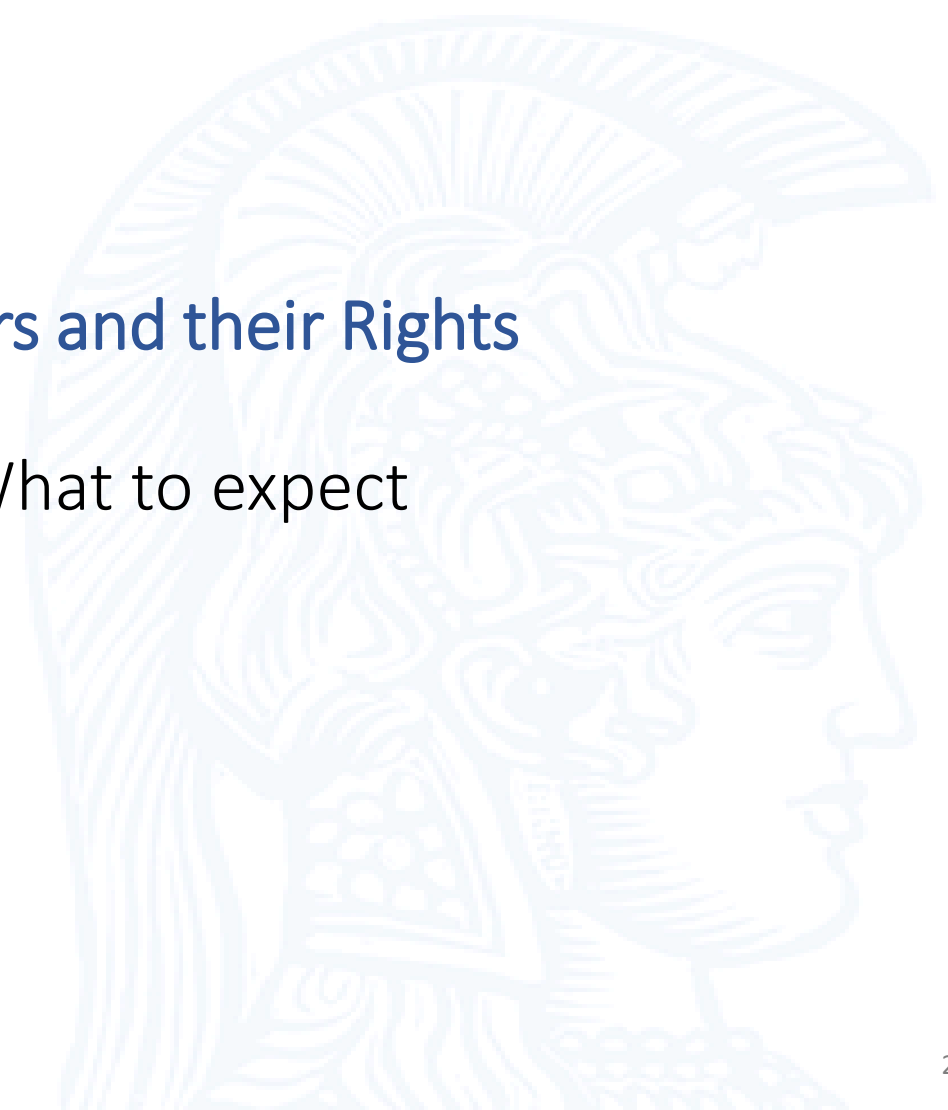
- The Standing Committee potentially has to apply EU law (e.g. State aid law, fundamental freedoms)
- **Q: Is the Standing Committee a court or tribunal?**
  - *'[...] a number of factors must be taken into account, such as whether the body is **established by law**, whether it is **permanent**, whether its jurisdiction is **compulsory**, whether its procedure is **inter partes**, whether it **applies rules of law** and whether it is **independent**.'*



Taxpayers and  
their Rights in  
Alternative  
Dispute  
Resolution:  
IV. What to  
expect

Taxpayers and their Rights

IV. What to expect



# Taxpayers and their Rights in Alternative Dispute Resolution: IV. What to expect

## Taxpayers and their Rights - What to expect

### ➤ Future (possible) developments:

- **EU level** → Unavoidably: **procedure creates substance**; common procedure leads to common treatment of similar issues; leads to convergence of laws; DRD moving away from intergovernmental procedure and shifting towards a judicial procedure; greater role of the taxpayer
- **Global level** → the more intensive the cooperation of CAs, the more complex the rules become, the greater the need for expanding taxpayer rights, also in DR

### ➤ How are we doing so far?

- How do courts **actually deal** with taxpayer rights in MAP?

# Taxpayers and their Rights in Alternative Dispute Resolution: *Access to file*

## *McCabe v Revenue and Customs Commissioners* (2019)

- Art 25 of the UK-Belgium DTC; the MAP concluded that the taxpayer had been resident in the UK.
- The taxpayer did not agree; applied for disclosure of the information and representations exchanged during the MAP. The taxpayer argued that transparency was required, as per OECD MEMAP para. 3.7.1 and Best Practice No 17.

# Taxpayers and their Rights in Alternative Dispute Resolution: *Access to file*

## *McCabe v Revenue and Customs Commissioners*

The Court held (dismissing): The documents requested **would shed no light on those facts** but only include views on the primary facts that the tax authorities expressed some ten years after the years in dispute.

- Transparency did not require that all documents exchanged during MAP had to be disclosed to the taxpayer

# Taxpayers and their Rights in Alternative Dispute Resolution: *Access to file*

## *McCabe v Revenue and Customs Commissioners*

- A degree of confidentiality was important to the proper functioning of the MAP; without such confidentiality co-operation between tax authorities might suffer
- The judgment **leaves open** the possibility that, in appropriate circumstance, **access may be granted to documents used in MAP.**

# Taxpayers and their Rights in Alternative Dispute Resolution: *Access to file*

## *McCabe v Revenue and Customs Commissioners*

- Small irony in the fact that the **taxpayer was accused of carrying out a 'fishing expedition'**
- The **appeal** submitted by the taxpayer was **dismissed**
- **HOWEVER** , in another court, in another country....



# Taxpayers and their Rights in Alternative Dispute Resolution: *Access to file*

## *Conseil d'État, X v. Belgium (2020)*

- The taxpayer [McCabe] sought to annul the refusal also in Belgium; he appealed against the decision of the Belgian Tax Authority to refuse granting him access to the file of the MAP.
- the Belgian court nullified a decision of the Belgian Tax Authority to refuse disclosure of the correspondence with and the administrative file regarding the mutual consultation procedure with the United Kingdom to the taxpayer [X].



# Taxpayers and their Rights in Alternative Dispute Resolution: *Access to file*

Earlier case law in Belgium:

➤ *SA Garlon v. Belgian State* (2013).

➤ The Belgian Supreme Court had already held that the taxpayer should have access to the MAP file and the tax authority erred in denying access without justification

→ So, where does that leave us?

*[Bonus point: Divergent decisions by domestic courts on the same issue is an argument in favour of MAP becoming the only remedy]*

# Taxpayers and their Rights in Alternative Dispute Resolution: IV. What to expect

## *Taxpayers and their Rights in Alternative Dispute Resolution – What to expect*

- The difficulty is the **exact nature of the MAP**:
  - is it really an **inter-governmental negotiation**, where a government can take a position that may be completely **different** or even **contrary** to one that it would take in domestic litigation? **OR**
  - is it effectively a **dispute-resolution procedure**, which should be transparent, and where the **taxpayer** should have full opportunities to **participate**?

# Taxpayers and their Rights in Alternative Dispute Resolution: IV. What to expect

## *Taxpayers and their Rights in Alternative Dispute Resolution – What to expect*

- The McCabe decisions, both in the UK and in Belgium, seem to place the MAP **somewhere** between the two extremes

(cf Philip Baker, Editor's Note in the *McCabe v HMRC* case, 21 ITLR 0783)

Taxpayers and  
their Rights in  
Alternative  
Dispute  
Resolution:  
IV. What to  
expect

*Thank you!*

Dr. Katerina Perrou

Post-doctoral Researcher & Assistant Lecturer in Tax Law

University of Athens Law School

kperrou@law.uoa.gr