EUROPEAN COMMISSION
DIRECTORATE-GENERAL
TAXATION AND CUSTOMS UNION
Direct taxation, Tax Coordination, Economic Analysis and Evaluation
Direct Tax Policy & Cooperation

Brussels, 10.04.2014

PUBLIC CONSULTATION PAPER

Consultation on cross-border inheritance tax problems within the EU

Period of consultation: From **10/04/2014 to 03/07/2014**

Note: The European Commission (Directorate General for Taxation and the Customs Union) has launched this public consultation in order to collect information on the progress made in EU Countries in tackling cross-border inheritance tax problems since the Commission's adoption of a Communication and Recommendation on the subject on 15 December 2011. The Commission services would like to obtain stakeholders' feedback on current problems with inheritance taxes in cross-border situations and on the solutions included in its 2011 initiative and, if appropriate, suggestions for any other feasible solutions to improve the current situation or to remedy the current problems.

Important notice: this document is a staff working paper of D.G. Taxation and Customs for discussion and consultation purposes. This document does not necessarily reflect the views of the European Commission and should not be interpreted as a commitment by the Commission to any official initiative in this area.

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QUESTIONNAIRE

I. General identification of the stakeholder

Name of organisation: Maisto e Associati

State of residence/establishment: Italy

Are you:

- An individual ☐
- Tax administration of a Member State ☐
- Expert/tax adviser/tax practitioner/lawyer ☒
- An interest representative (association/professional organisation/trade unions) ☐
- An academic ☐
- Other (please specify what is your interest in this matter): ☐

Do you agree to the publication of your response?

Yes ☒

No ☐

Do you agree to the publication of your name and other personal data?

Yes ☒

No ☐

1. Cross-border bequests within the EU and taxation issues encountered

a) Have you yourself encountered or are you aware of any specific problems resulting in cross-border double taxation of inheritances or donations in the EU in recent years?

Yes ☐

No ☒

b) Have you encountered or are you aware of any specific problems of discrimination experienced by somebody who has received a bequest within the EU in recent years (through a donation or an inheritance) with a cross-border element (i.e. liquid assets invested abroad, real estate abroad, a person who is resident or domiciled in one country receiving a donation or inheritance from another country)?

Yes ☒

No ☐

Our experience on specific problems of discrimination in cross-border bequests as a consequence of an inheritance or a donation is limited to the application of Italian domestic legislation. In general, potential conflicts with EU law have been identified in domestic provisions concerning (i) the determination of the value of the assets and (ii) the scope of application of provisions providing for exemptions from inheritance tax. These potential conflicts have in part been reported by the draft Commission Staff Working Paper "Impact Assessment" published in relation to the Commission Recommendation regarding relief for double taxation of inheritances. This being said, we would like to provide further details to the conflicts listed therein and illustrate further conflicts that have not been identified in the above-mentioned draft:

i. The criteria for the computation of the value of immovable property located in Italy for inheritance tax purposes determines the application of the so-called "cadastral value", which is a value resulting from the land registry and is far lower than the market value. The non-applicability of this rule to immovable property located in other EU Member States or EEA Member States providing adequate exchange of information with Italy, which is by contrast taken at market value, may be contrary to EU law.

ii. Italian public debt securities are exempted from inheritance tax. The non-applicability of the exemption to public debt securities issued by other EU Member States or EEA Member States providing adequate exchange of information with Italy infringes EU law. Article 13(1)(b) of a legislative draft published in March 2013 – containing provisions for compliance with the obligations required of Italy as an EU Member State (so-called *Legge Europea* 2013) – proposed widening the scope of such exemption to public debt securities issued by all EU Member States or EEA Member States providing adequate exchange of information with Italy. The proposed amendment has not been converted into law, however. The same amendment has been proposed again by a legislative draft (Article 6 of *Legge Europea-bis* 2013) published on 27 November 2013 and currently in course of approval.

iii. An exemption from inheritance tax (and from cadastral and mortgage taxes) applies to transfers of a business or a shareholding in companies by which control is acquired by the spouse or descendants if certain conditions are met. The provision providing for the exemption literally refers only to businesses located in Italy and to shareholdings in Italian resident companies. A denial of such exemption in relation to the transfer of businesses located in other EU Member States or EEA Member States providing adequate exchange of information with Italy and in relation to the transfer of controlling shareholdings in companies resident in other EU Member States or EEA Member States providing adequate exchange of information with Italy would conflict with EU law (ECJ, judgment of 25 October 2007, Case C-464/05, Maria Geurts). In this regard, on 2 August 2011, the Internal Revenue Agency (the Lombardy Regional Direction) confirmed the applicability of such exemption to businesses located in other EU Member States as well as to shareholdings in companies resident in other EU Member States. Such interpretation, however, was given in response to a ruling application submitted by a private organization (Ruling protocol No. 904-86017/2011) and has not been officially published. The ruling should be officially published in order to clarify the interpretative issue raised by scholars and officially extend such interpretation to all taxpayers.

iv. Assets of cultural value that have been recognized as such by the Italian competent authorities prior to the death of the individual are exempt from inheritance tax. The denial of the full or partial exemption to assets of cultural value situated in other EU Member States or EEA Member States providing adequate exchange of information with Italy may conflict with EU law (See ECJ, judgment of 17 January 2008, Case C-256/06, Jäger, paragraphs 49 to 52).

v. Italian law provides for an exemption from inheritance and gift tax to transfers in favour of not-for-profit and charitable bodies when certain conditions are met. The first (and most comprehensive) hypothesis is that addressed to Italian public entities or legally recognised foundations or associations having *as exclusive* statutory purpose (or object) to pursue a public benefit activities (i.e. assistance, study, scientific research, education, instruction or any other purpose of public benefit). The second hypothesis also refers to Italian public entities and legally recognised foundations and associations, but the exemption also applies if such entities do not pursue exclusively the activities mentioned above, as long as it is proved that the gift or bequeath is addressed and subsequently used for those activities. Lastly, these exemption provisions are also extended to foreign entities upon the fact that the State where the foreign beneficiary entity is established would allow, under the same circumstances, a comparable exemption to Italian not-for-profit bodies or entities (reciprocity). If the reciprocity issue is examined under EU law, such requirement would result contrary to the principles as resulting from the case law of the ECJ, since reciprocity may not be invoked under EU law to justify discrimination (consider the potential conflict with EU law in the case in which inheritance tax is charged, but the law of the foreign State does not provide for analogous exemptions, not even for domestic entities). Article 13(1)(a) of the above-mentioned *Legge Europea* 2013 proposed to avoid any distinction between Italian public entities, foundations and associations and those of other EU Member States or EEA Member States providing adequate exchange of information with Italy. The same draft legislation proposed to maintain the reciprocity clause with entities of third States. However, the proposed amendment has not been converted into law. The same amendment has been proposed again by a legislative draft (Article 6 of *Legge Europea-bis* 2013) published on 27 November 2013 and is currently in course of approval.

vi. As a general rule, debts that form part of the estate are deductible by the taxable basis for inheritance tax purposes. However, in case of a non-resident deceased, territoriality rules limit the scope of Italian inheritance tax to "properties and rights situated in Italy" (*situs*). If, together with the asset, a debt owing on such asset is also transmitted, no indications are provided for. The denial of deductibility from inheritance tax of debts incurred by a deceased resident of another EU Member State or EEA Member State providing adequate exchange of information with Italy would infringe EU law, which requires that debts directly linked to property and rights situated in Italy are deductible (ECJ, judgments of 11 September 2008, Case C-11/07, Eckelkamp, of 11 December 2003, Case C-364/01, Barbier and of 11 September 2008, Case C-43/07, Arens-Sikken). We are not aware of any specific case in which the deductibility of debts incurred by non-resident *de cuius* in relation to Italian *situs* assets has been denied. However, given that scholars have raised such interpretative issue, it would be better that the Internal Revenue Agency officially confirms the deductibility from inheritance tax of foreign debts incurred by a deceased resident of another EU Member State, to the extent that those debts are directly linked to Italian *situs* assets.

The abovementioned issues of compatibility of domestic tax law rules may also apply to third countries, to the extent that the standstill clause laid down by Article 64 TFEU does not apply.

2. Efficiency of EU countries' existing tax relief measures and implementation of the principle of the 2011 Commission's Recommendation on relief for double taxation of inheritances

a) Have the tax rules on cross-border inheritances been amended in your country (-ies) since 15 December 2011 when the Commission Recommendation on relief for double taxation of inheritances was adopted?

Yes ☐

No ☒

b) Do the amendments of the cross-border inheritance tax rules in your country in any way follow the principles of the Commission's Recommendation on relief for double taxation of inheritances?

No amendments have been issued since the publication of the Commission Recommendation on relief for double taxation.

c) Are you aware of any plans in your country to amend its rules on the taxation of cross-border inheritances?

☒ Yes

☐ No

Article 6 of a draft law published on 27 November 2013 (*Legge Europea-bis* 2013) and currently in course of approval provides for certain amendments (see Art. 6(b)(ii) and (v) above for more details).

3. Your views on the principles included in the 2011 Recommendation regarding relief for double taxation of inheritances

a) Do you consider the Commission's recommendation to EU countries to give up or reduce inheritance tax if the inheritance is more closely connected with another country is a proportionate and sufficient solution?

Yes ☒

No ☐

We provide hereinafter some comments related to the approach of the Commission. In principle, we agree with the rules on the order of priority of taxing rights introduced by the 2011 Recommendation. As for priority of *situs* for immovable property, it should be considered that rules on location of immovable assets may vary in some EU Member States (e.g. real estate companies and other structures). Guidance should be provided on the rules of *situs* of immovable assets.

With reference to movable property, we agree as well with the exclusive taxing right to the State of personal link. This resolves the issues deriving from conflicting *situs* rules on movable property.

b) Do you agree with the use of the tie breaker rule proposed by the Commission to establish which personal link is closer and thus to determine the country having priority right to tax (Art. 4.4 of the 2011 Recommendation)?

Yes ☒

No ☐

We agree with the introduction of a tiebreaker rule to establish the State with "closer personal link" that has the priority right to tax and the requirement to grant a tax credit on foreign inheritance taxes. However, in some circumstances the definition of "closer personal link" may raise certain interpretative issues (i.e. the meaning of "center of vital interest") faced by tax administrations and courts. Due to the difficulties concerning the meaning of "closer personal link", as specified below, it could be provided for an automatic mechanism of prevalence of one country, fixing the closest link to an easily ascertainable element, e.g. citizenship (See question No. 3(d)).

c) Do you agree with the period of ten years as the time for using a possible tax credit as proposed in Article 5 of the 2011 Recommendation?

Yes ☒

No ☐

Ten years may be considered a period of reasonable length. However, this still might prove insufficient under certain circumstances, e.g. in cases of litigation that extend for a longer period. The main issue in fact is the date from which the ten-year period begins to run. The Recommendation considers the date of payment of the tax. Italian domestic legislation may be taken as an example of legislation that is able to contrast potential mismatches without a proper time limit. In particular, under Italian domestic law, the foreign tax credit is conditioned to the "payment" of the foreign tax. However, if the foreign tax is paid after the filing of the Italian inheritance tax return (in which the foreign tax has to be declared), a refund of the Italian inheritance tax previously paid is granted. Such refund shall be requested not later than three years from the day on which the foreign tax is paid.

d) In your opinion, does your country need to change its national legislation to grant relief from double taxation on inheritances in the way set out in the 2011 Recommendation or would it be sufficient to change its administrative practices or interpret existing relief provisions in a more flexible way?

Italian domestic legislation already follows some of the principles laid down by the Commissions' Recommendation. Please note that such domestic rules apply regardless of the fact that the cross-border issues concern an EU Member State or a third-country State.
We analyse hereinafter the compatibility of Italian domestic legislation with regard to the principles set out by the Recommendation. Specific reference is made where domestic

legislation may be aligned to the Recommendation simply by way of a more flexible interpretation or by a change of administrative practices.

Article 4.1(a) Tax relief in respect of immovable property situated in another Member State: The domestic legislation is in line with such principle.

Article 4.1(b) Tax relief in respect of movable property of a permanent establishment: The domestic legislation does not seem in line with such principle. Article 26(b) of the Italian Inheritance and Gift Tax Act (hereinafter "**IGTA**") provides for a tax credit only with regard to movable assets located abroad. By contrast, no tax relief is granted if the movable property is located in Italy, even if such movable property is a business property of a permanent establishment situated in another State. A tax credit in such case is provided for only under certain bilateral conventions concluded by Italy with certain EU Member States (e.g. France and Sweden) and third-country States.

In principle, it could prove sufficient to enlarge the interpretation of Article 2 IGTA so that movable property is considered to be located abroad if connected with a foreign permanent establishment. However, since Article 2 has been interpreted differently for decades, a specification through the wording of the provision would prove useful.

Article 4.2. Tax relief in respect of other kinds of movable property: The domestic legislation does not seem in line with such principle. Pursuant to Article 2 IGTA, Italian *situs* movable property is always subject to inheritance tax irrespective of the residence of the deceased or of the heir.

Article 4.3. Tax relief in cases where the deceased had a personal link to a Member State other than that to which the heir has a personal link: The domestic legislation is in line with such principle. Under Article 2 IGTA, no relevance is given to the residence of the heir.

Article 4.4. Tax relief in cases of multiple personal links of a single person: The domestic legislation is not in line with such principle.

No mutual agreement procedure is laid down by the Italian domestic legislation. Bilateral conventions concluded by Italy with several EU Member States (France, the United Kingdom, Sweden, Denmark and Greece) and third-country States in principle give the taxing right to the State in which the deceased has a closer personal link, in line with the Recommendation's principle. Indeed, in order to determine in which State the deceased had its domicile (and thus the State that in principle has the taxing right), reference is made to the criterion listed at Article 4.4.1. of the Recommendation. A mutual agreement is provided for under such conventions in case such criteria are not sufficient in order to determine the State of domicile.

Article 5. Timing of application of the tax relief: The Italian domestic legislation seems to be in line with such principle. See paragraph 3(c) above for more details.

Article 6. Mutual agreement procedure: The Italian domestic legislation is not in line with such principle. Mutual agreement procedures with other Member States to deal with disputes connected with double taxation are provided for only under the bilateral conventions regarding inheritance tax signed by Italy with a few Member States (France, the United Kingdom, Sweden, Denmark and Greece) and third-country States.

As a general comment, however, Mutual agreement procedure may prove an inappropriate or disproportionate measure in the field of inheritance and gift taxation. Countries obtain in general a limited amount of sources from such taxes and may therefore be reluctant to make the efforts which are required for the arrangement of such type of procedures. It could therefore be suggested: (i) a simplified form of mutual agreement procedure (if compared to the procedure generally adopted for income tax purposes); (ii) the availability of such procedure only above a certain amount of potential tax debt; finally (iii) for smaller cases it could be provided for an automatic mechanism of prevalence of one country, fixing the closest link to an easily ascertainable element, e.g. citizenship (indeed, practice in the field of mutual agreement procedure for direct taxation shows that countries find difficult in agreeing with other connecting factors and generally end up relying on the only objective element, i.e. citizenship).

4. Other possible solutions to the problems related to property donated or inherited across borders within the EU

a) Would you like to propose further possible solutions to the tax problems involving property donated or inherited across borders within the EU?

☐ Yes

☒ No

b) How should your suggested solution(s) be implemented e.g. by EU legislation or by changes in national laws by each EU country? (please limit your answer to max. 500 words):

In order to guarantee consistent application of the provisions, the Commission may want to draft model provisions that the Member States would adopt. In order to incentivise the States to adopt such provisions, the latter may be subject to a reciprocity condition. On the basis of such reciprocity principle, a Member State would apply the relief provision to residents of certain Member States and deny the same to residents of other Member States. The differentiation between non-resident persons would be tantamount to horizontal discrimination, which is currently not forbidden in the case law of the Court of Justice of the European Union.