Piazza F. Meda, 5
20121 Milano
T. +39 02.776931
F. +39 02.77693300
milano@maisto.it

Piazza D'Aracoeli, 1
00186 Roma
T. +39 06.45441410
F. +39 06.45441411
roma@maisto.it

2, Throgmorton Avenue
London EC2N 2DG
T. +44 (0)20.73740299
F. +44 (0)20.73740129
london@maisto.it

MAISTO E ASSOCIATI

www.maisto.it

9 May 2016

Dear Sirs,

European Commission: Consultation on Improving Double Taxation Dispute Resolution Mechanisms

We refer to the Consultation on Improving Double Taxation Dispute Resolution Mechanisms published on 12 February 2016, on which contributions are expected by 10 May 2016.

It is with particular pleasure that we would like to bring to your attention our suggestions, based on our experience on the effective functioning of disputes resolution mechanisms under Article 25 of OECD Model Convention-based DTCs (Double Tax Conventions) and the AC (Convention 90/436/EEC on the elimination of double taxation in connection with the adjustment of profits of associated enterprises).

1. In general

With reference to DTCs, the absence of an obligation to resolve an Article 25(1) MAP case is itself an obstacle to the resolution of treaty-related disputes through the MAP. Since legal certainty on disputes resolutions is a key element for taxpayers operating in an international setting, we strongly support the view that an effective mandatory binding MAP arbitration is needed in order to guarantee legal certainty and boost cross-border economic relations within the Internal Market.

In our experience, the sole competent authority procedures that have effectively worked so far are those activated on the basis of the AC, which already provides for a mandatory binding arbitration phase. The effectiveness of the AC is based both on the fact that (i) the arbitration phase under the AC can *per se* ensure the

resolution of disputes and on the fact that (ii) competent authorities are more committed to find an agreement between themselves in the initial mutual agreement procedure phase, rather than leaving decisional power to arbitrators. Thus, we believe that DTCs should include a similar mechanism of arbitration clause.

However, the AC also has several shortcomings that make it not fully effective and efficient in the chase for legal certainty and the elimination of international double taxation. First, its scope of application is extremely limited, both from a subjective and an objective perspective. Second, although it provides for a mandatory binding arbitration phase, the potential inaction of Member States in appointing the arbitration committee (hereafter also "advisory commission") makes it, *de facto*, ineffective. Third, the interaction between the MAP and the legal remedies available at the domestic level often creates sever barriers to an effective and efficient access to the MAP.

For these reasons, the following steps should be taken in order to make double taxation dispute resolution effective within the Internal Market.

2. DTCs

The EU should encourage Member States to adopt or revise the mechanisms for double taxation dispute resolution in their DTCs, especially those concluded with third countries, in accordance with the conclusions reached at the level of the EU Joint Transfer Pricing Forum and the OECD BEPS Action 14. In particular, Member States' DTCs should incorporate a mandatory binding arbitration clause in art. 25.

3. Scope of application of the AC

The AC should be amended with a view to broaden its scope of application.

With regard to its subjective scope, the AC should apply in respect of the taxation of any person, other than individuals not carrying on a business activity.

With regard to its objective scope of application, the latter should be broaden as much as possible, and it should cover at least the followings:

- the determination of tax residence for DTC purposes (as provided by OECD (2015), *Preventing the Granting of Treaty Benefits in Inappropriate Circumstances, Action 6 – 2015 Final Report*, OECD/G20 Base Erosion and Profit Shifting Project);

- the assessment regarding the existence of a permanent establishment under DTCs;

- the establishment of the beneficial owner for the purpose of applying DTCs;

- the application of limitation on benefits clauses and (general and specific) anti-abuse/avoidance clauses under DTCs;

- the application of EU direct tax directives, i.e. the Parent-Subsidiary directive, the Interest and Royalty directive, the Merger directive, as well as any other forthcoming directive that could have a direct impact on the taxation of persons covered by the AC (including whether a permanent establishment exists, and what company should be regarded as the beneficial owner of the payment, for the purpose of applying the relevant directive);

- any instance of double taxation deriving from the inclusion by one Member State in the profits of a person (or permanent establishment, or head office) of items already included by another Member State in the profits of another person (or permanent establishment, or head office).

For the purpose of the last indent, double taxation is that deriving from the application of any domestic law rule or principle (including the principle of corporate benefit, the principles of effectiveness of deductible costs, and the like), either alone or in combination with any DTC, EU Directive, EU primary law, or the AC. In this respect, it should be clarified that the AC covers as well instances of double taxation stemming from "secondary adjustments" and from the recovery of taxes under EU State Aid procedures.

4. Appointment of the arbitration committee under the AC

To be more effective, the AC should include a new binding mechanism ensuring that an opinion will be delivered by the arbitration committee in due time, where the competent authorities fail to reach a mutual agreement. The main problem, in this respect, is that it is actually difficult for the taxpayers to enforce the obligation to set up an advisory commission imposed on the competent authorities of the Member States by art. 7 of the AC. We believe that such obstacle could be overcome by either:

- providing that, if the competent authorities concerned fail to set up the advisory commission within six months from the end of the two years

period starting from the date on which the case was first submitted to one of them in accordance with art. 6(1) of the AC, the taxpayer has the right (expiring after two years) to ask the European Commission to set up the arbitration committee; in that case, the Commission would appoint the arbitration committee within three months from the notification of the request; or

- providing that, if the competent authorities concerned fail to set up the advisory commission within six months from the end of the two years period starting from the date on which the case was first submitted to one of them in accordance with art. 6(1) of the AC, the Member States will be bound to refer the case to the CJEU for arbitration, pursuant to article 273 TFEU, if requested by the taxpayer (see the action brought before the CJEU on 3 December 2015 — Republic of Austria v Federal Republic of Germany, Case C-648/15, under article 25(5) of the Austria-Germany DTC).

5. Relation between MAP and domestic litigation

The uncertainty deriving from the interaction between domestic law remedies and MAPs represents one of the most significant obstacles to the effective functioning of the MAPs under DTCs and the AC. In this respect, in some countries specific changes to the internal legislation are necessary to eliminate this uncertainty. Such changes should be imposed by means of an *ad hoc* EU Directive.

For instance, in some countries, if a taxpayer decides to apply for a MAP it is nevertheless obliged to initiate domestic tax litigation. Indeed, the taxpayer cannot take the risk of remaining without remedies where an agreement is not reached between competent authorities. Furthermore, the legislative framework of some countries is such that in case a final judgment is delivered, competent authorities cannot derogate from such decision. A MAP might therefore only be effective if the case is resolved before a final decision of the judicial proceeding. As tax court decisions are delivered more rapidly compared to a decision under a MAP, there is a distinct need for the taxpayer to obtain a suspension of the court proceedings to permit the MAP to come to a conclusion prior to the delivery of a tax court decision. In some countries, domestic legislation does not provide for the taxpayer's right to obtain a suspension of the court proceedings. Similarly, domestic legislation frequently does not entitle the court to suspend the proceedings when a MAP is pending.

In this respect, we believe that the domestic laws of Member States should be amended (where necessary) by means of a Directive providing for an obligation to suspend the proceedings once a MAP is opened. In the absence of clear-cut

domestic provisions governing suspension of domestic tax court proceedings in the presence of a MAP, guidance by tax authorities is unable to achieve the desired result because tax courts may disregard the view taken by the tax authorities.

A further issue is that notices of assessment may have multiple contents with different claims; however, only some of the tax claims raised could concern cross-border tax issues, while others could regard purely domestic issues. The domestic provisions of several countries do not allow domestic courts to deliver a partial decision, i.e. to split the claims contained in the notice of assessment in a way that litigation goes ahead for those not affected by a MAP, while for those affected by a MAP claims suspension is provided. We believe that the domestic laws of such Member States should be amended by means of a Directive providing for the right of the taxpayer to ask for a split of the claims, so that litigation goes ahead for those not affected by the MAP, while for those affected by the MAP suspension is provided.

Similar issues concern the suspension of tax collection that may sometimes be granted solely at the discretion of the relevant revenue agency. Also in this case, the domestic laws of the Member States should be amended (where needed) by means of a Directive providing for the compulsory suspension of the tax collection, where requested by the taxpayer throughout the period of the pending MAP.

Finally, the AC should be amended in order to impose, on all competent authorities of the Member States involved in the requested MAP, the obligation to notify the taxpayer a notice of admission to the MAP within:

- 30 days from the date on which the case was first submitted, for the competent authority to which the case was first submitted in accordance with art. 6(1) of the AC;
- 30 days from the date on which the above-mentioned competent authority informed the other relevant competent authorities that a MAP has been requested (the first-mentioned competent authorities should inform the other competent authorities within 30 days from the date on which the case was first submitted by the taxpayer pursuant to art. 6(1) of the AC), for the latter competent authorities.

6. Audit settlements as an obstacle to MAP access

Audit settlements may sometimes indirectly prevent the application for MAP. In this respect, there can be a preference for unilateral settlement procedures where

the latter trigger a substantial reduction of penalties, whereas the same reduction of penalties does not take place in the case of MAP.

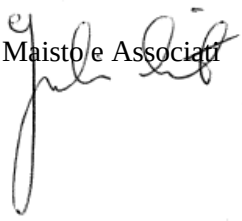
Thus, it would seem desirable that the domestic laws of the Member States were amended (where needed) by means of a Directive providing that taxpayers applying for a MAP must have access to the same penalties reduction provided for domestic settlement procedures.

7. Transparency of the MAP

Where MAPs are not transparent, taxpayers can forego the process and suffer unrelieved double taxation or be improperly denied treaty benefits. In this respect, the publication of competent authorities' agreements and arbitral decisions could be particularly important.

Publication accomplishes two relevant goals. First, the most effective way to ensure that the number of conflicts decreases over time is to provide reference materials to be used by the interested parties in order to determine what standards and interpretations have been applied in the past to similar cases. Second, publication dissuades competent authorities from basing decisions on subjective factors, or factors that have not been given significant weight in previous agreements and decisions.

Best regards,



Maisto e Associati