

Università Carlo Cattaneo – LIUC

International Tax Law a.a.2017/2018

- *Article 25 OECD MC*
- Multilateral Convention to Implement Tax Treaty Related Measures to Prevent BEPS
- «Ecofin» Directive

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Castellanza, December 1, 2017

Article 25 of the OECD Model Convention

Art. 25 of the OECD MC

1. Where a person considers that the actions of one or both of the Contracting States result or will result for him in taxation not in accordance with the provisions of this Convention, he may, irrespective of the remedies provided by the domestic law of those States, present his case to the competent authority of the Contracting State of which he is a resident or, if his case comes under paragraph 1 of Article 24, to that of the Contracting State of which he is a national. The case must be presented within three years from the first notification of the action resulting in taxation not in accordance with the provisions of the Convention.

2. The competent authority shall endeavour, if the objection appears to it to be justified and if it is not itself able to arrive at a satisfactory solution, to resolve the case by mutual agreement with the competent authority of the other Contracting State, with a view to the avoidance of taxation which is not in accordance with the Convention. Any agreement reached shall be implemented notwithstanding any time limits in the domestic law of the Contracting States.

3. The competent authorities of the Contracting States shall endeavour to resolve by mutual agreement any difficulties or doubts arising as to the interpretation or application of the Convention. They may also consult together for the elimination of double taxation in cases not provided for in the Convention.

4. The competent authorities of the Contracting States may communicate with each other directly, including through a joint commission consisting of themselves or their representatives, for the purpose of reaching an agreement in the sense of the preceding paragraphs.

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5. Where,

- a) under paragraph 1, a person has presented a case to the competent authority of a Contracting State on the basis that the actions of one or both of the Contracting States have resulted for that person in taxation not in accordance with the provisions of this Convention, and
- b) the competent authorities are unable to reach an agreement to resolve that case pursuant to paragraph 2 within two years from the presentation of the case to the competent authority of the other Contracting State,

any unresolved issues arising from the case shall be submitted to arbitration if the person so requests. These unresolved issues shall not, however, be submitted to arbitration if a decision on these issues has already been rendered by a court or administrative tribunal of either State. Unless a person directly affected by the case does not accept the mutual agreement that implements the arbitration decision, that decision shall be binding on both Contracting States and shall be implemented notwithstanding any time limits in the domestic laws of these States. The competent authorities of the Contracting States shall by mutual agreement settle the mode of application of this paragraph.¹

¹ In some States, national law, policy or administrative considerations may not allow or justify the type of dispute resolution envisaged under this paragraph. In addition, some States may only wish to include this paragraph in treaties with certain States. For these reasons, the paragraph should only be included in the Convention where each State concludes that it would be appropriate to do so based on the factors described in paragraph 65 of the Commentary on the paragraph. As mentioned in paragraph 74 of that Commentary, however, other States may be able to agree to remove from the paragraph the condition that issues may not be submitted to arbitration if a decision on these issues has already been rendered by one of their courts or administrative tribunals

Article 25 of the OECD Model Convention

Art. 25 of the OECD MC

- The *Mutual Agreement Procedure (MAP)* provided by the OECD MC is a tool for the resolution of international tax disputes.
- The MAP provides for a direct consultation between the Tax Administrations of the contracting Parties, which, by means of the respective «Competent Authorities» (e.g. for Italy, the Office for Advance Agreements and International Controversies, within the Tax Agency and the Office for International Relations, under the Ministry of Finance), set up a dialogue aimed at the resolution of an international tax dispute (e.g.: double taxation cases, correct interpretation / application of a Double Tax Treaty);
- A MAP is usually initiated by a taxpayer, however it can also be started by the initiative of the Competent Authorities themselves, in order to resolve by mutual agreement, difficulties or doubts relevant to the interpretation and/or the implementation of a Double Tax Treaty;
- Besides the **Commentary to Article 25** (made of 101 paragraphs), included in the full version of the OECD Model Convention (together with the Annex: “Sample Mutual Agreement on Arbitration”), the “**Manual on Effective Mutual Agreement Procedures (MEMAP)**” provides to both tax administrations and taxpayers basic information and useful hints on how the procedure should work, indicating best practices which contracting Countries tax authorities should adopt.

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- A MAP can be activated to address events triggering a double taxation, both a personal and an economic one, affecting individuals of legal entities, as well as to all other entities to which a Double Tax Treaty may apply;
- Hence, essentially, the following situations can lead to initiating a MAP:
 - (deemed) violation of Double Tax Treaty's provision in the application of a certain tax or withholding tax at source to a person;
 - **tax adjustments performed by a contracting Country's tax administration following tax audits relevant to the transfer pricing between associated enterprises.**

The latter case is by far the most frequent one.

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A MAP application is filed with the CA of the Country in which the event triggering a potential double taxation occurred and should include the following information:

- Taxpayer identification and contact details;
- Address where the CA should send its communications/correspondence;
- A clear description of the facts and circumstances of the case, with an indication of the tax periods in which a double taxation has occurred or could occur;
- A description of any other administrative or legal remedy already adopted to solve the case “domestically” or in the other contracting State to avoid the double taxation;
- Copy of the tax acts (typically tax auditors reports and/or tax assessment notices) which have triggered or may trigger a taxation in contrast with Treaty’s provisions;
- Any other document or information suitable to facilitate the examination of the case by the CAs involved.

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Usually a MAP shall be filed within 2 years (this term may vary from Treaty to Treaty and should always be carefully checked) from the date in which the event triggering a double taxation occurred:

- CA should reply within 2 months, accepting or rejecting the application (it may also request additional information: in such a case, the deadline is postponed by another 2 months);
- If the application is accepted, the CA should try and solve the dispute unilaterally;
- Should no unilateral solution be reachable, then the first CA should get in touch with the other one, informing the latter of the initiated case and asking to start a negotiation;
- The CAs shall then ENDEAVOUR to reach an agreement to eliminate the double taxation



IMPORTANT: A MAP DOES NOT PROVIDE FOR ANY OBLIGATION OF THE CAs TO SOLVE THE DISPUTE!

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In order to try and avoid reaching to an *impasse*, Art.25 was amended, June 25, 2008, in order to introduce a binding arbitration procedure (see paragraph 5) which:

- Allows taxpayers to get to an effective elimination of any double taxation covered by the Tax Treaties;
- Can be requested by MAP applicants in case CAs proved unable to reach any settlement after 2 years from the acceptance of the MAP application;
- Shall be binding for the CAs, yet not for taxpayers.

Unfortunately, the above provision was frequently implemented in such a way as to require the prior consent of both CAs, making it a not very effective tool, in practice, to accelerate double tax disputes resolutions.

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Considering the uncertainty of its outcome, together with a MAP, it is often advisable to start a litigation, in order to secure a “way out”, in case the CAs do not reach any settlement or their negotiation drag for too long; however, the following *caveats* should be considered:

- In certain jurisdictions, tax authorities can not abide from a judicial decision (i.e. a tax court’s decision), meaning that, should that happen, the MAP will have *de facto* to come to an end;
- Should the Law so provide, a suspension of the litigation process should be rather sought, in order to allow for the MAP negotiation to proceed, without any risk that a decision is made meanwhile by the tax court;
- A litigation, even suspended, should also ensure that the time limits usually provided under the domestic Law to get a tax refund do not expire while the MAP negotiation goes on;
- Only an ongoing litigation allows the taxpayer to continue its defense, also after a possible failure of the MAP.



















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WEAK POINTS

- No mandatory outcome (i.e. dispute may not be settled);
- In practice, need to also initiate a contemporaneous litigation, to be suspended in order not to jeopardize the MAP;
- Lack of any *ad hoc* administrative tool to obtain a tax collection suspension during the MAP;
- Poor communication to the taxpayers, which are usually contacted only in case they need to provide further documents/information and then left with no updates until the outcome of the negotiation is eventually communicated;
- CAs may artificially postpone the acceptance of a MAP application, indeed the official start of the negotiation, by requesting additional information.
- In principle, no agreement shall include interests and penalties.
- Clear tendency to a relevant time of case resolution.


















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OECD Statistics (2006-2015): new applications

		2006	2007	2008	2009	2010	2011	2012	2013	2014	2015
	Australia	9	13	8	19	21	10	10	8	10	14
	Austria	29	26	36	30	38	35	61	41	49	43
	Belgium	31	30	71	213	120	120	151	124	205	428
	Canada	76	70	85	103	101	94	87	127	127	130
	Chile	0	0	0	0	0	0	0	0	0	0
	Czech Republic	5	10	5	6	8	12	13	7	12	11
	Denmark	15	18	21	22	20	24	24	22	43	52
	Estonia	--	--	--	--	--	0	0	0	1	2
	Finland	1	11	8	5	11	13	14	56	49	20
	France	104	100	154	169	135	173	181	216	201	173
	Germany	212	186	177	177	150	306	277	267	374	363
	Greece	1	2	--	--	--	5	3	3*	4	6
	Hungary	4	3	1	2	1	0	1	2	4	4
	Iceland	1	0	0	0	0	1	2	1	4	1
	Ireland	3	3	2	6	7	6	12	12	5	13
	Israel	--	--	--	--	4	9	5	3	3	2
	Italy	14	20	14	31	22	41	45	52	89	80
	Japan	37	49	40	44	34	22	31	36	45	38



















Article 25 of the OECD Model Convention

OECD Statistics (2006-2015): new applications

		2006	2007	2008	2009	2010	2011	2012	2013	2014	2015
	Korea	8	9	13	25	13	24	22	23	33	42
	Latvia†	--	--	--	--	--	--	--	0	0*	3
	Luxembourg	22	31	31	25	35	75	39	45	116	212
	Mexico	14	11	5	10	4	5	17	12	4	3
	Netherlands	80	57	--	64	51	34	83	75	87	128
	New Zealand	4	5	2	6	4	4	3	14	28	7
	Norway	15	21	30	21	16	7	10	26	18	33
	Poland	11	7	19	14	7	9	5	19	18	6
	Portugal	10	7	5	14	17	15	17	6	11	11
	Slovak Republic	0	--	1	1	3	4	1	2	2	3
	Slovenia	--	--	3	0	2	2	3	6	11	5
	Spain	18	67	24	24	24	18	36	25	33	30
	Sweden	72	61	104	64	104	111	100	65	91	92
	Switzerland	--	45	99	119	65	112	120	131	109	148
	Turkey	0	2	1	3	4	0	0	2	2	2
	United Kingdom	--	55	44	56	68	54	69	79	117	115
	United States	240	257	308	326	252	279	236	403	354	289
	TOTAL	1036	1176	1311	1599	1341	1624	1678	1910	2259	2509


















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OECD Statistics (2006-2015): pending cases

		2006	2007	2008	2009	2010	2011	2012	2013	2014	2015
	Australia	16	23	22	23	27	21	21	23	18	22
	Austria	144	152	105	120	106	110	137	156	180	185
	Belgium	81	95	152	265	142	241	305	317	492	632
	Canada	134	153	186	206	225	225	222	235	257	272
	Chile	0	0	0	0	0	0	0	0	0	0
	Czech Republic	13	13	4	8	13	14	16	21	26	33
	Denmark	82	82	79	86	67	57	55	57	72	148
	Estonia	--	--	--	--	--	0	0	0	1	1
	Finland	12	22	20	22	32	37	50	103	109	95
	France	254	233	328	427	490	539	551	618	549	566
	Germany	476	527	519	543	484	702	787	858	1029	1147
	Greece	4	5	5*	5*	5*	27	30	30*	35	28
	Hungary	12	9	10	7	8	4	2	4	8	11
	Iceland	1	1	0	0	0	1	1	0	1	0
	Ireland	4	6	7	13	16	17	22	26	25	28
	Israel	--	--	--	13	13	14	17	18	17	17
	Italy	52	63	56	67	80	102	130	174	250	319
	Japan	67	85	82	90	75	61	70	65	77	95

Article 25 of the OECD Model Convention

OECD Statistics (2006-2015): pending cases

		2006	2007	2008	2009	2010	2011	2012	2013	2014	2015
	Korea	28	30	30	47	44	59	65	80	98	139
	Latvia[†]	--	--	--	--	--	--	0	0*	0*	1
	Luxembourg	31	34	35	38	59	109	76	72	123	137
	Mexico	26	23	14	18	12	11	19	14	16	15
	Netherlands	120	151	127	118	97	99	140	123	198	259
	New Zealand	2	4	1	3	1	1	3	13	18	7
	Norway	25	32	42	51	52	44	36	49	48	68
	Poland	26	25	33	32	26	28	29	44	40	42
	Portugal	43	45	47	47	41	42	47	27	27	31
	Slovak Republic	1	4	5	6	7	9	9	15	14	21
	Slovenia	--	--	3	1	2	4	4	10	16	12
	Spain	55	109	66	76	84	87	82	79	78	93
	Sweden	94	100	125	103	134	163	198	183	186	192
	Switzerland	33	33	88	143	142	187	231	256	271	328
	Turkey	2	3	2	4	8	4	2	4	4	5
	United Kingdom	84	109	126	120	131	133	143	160	190	229
	United States	430	500	578	724	705	686	573	732	956	998
	TOTAL	2352	2671	2897	3426	3328	3838	4073	4566	5429	6176

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OECD Statistics (2006-2015): time to completion

These statistics reveal that at the end of the 2015 reporting period, the total number of open MAP cases reported by OECD member countries was 6176, a 14% increase as compared to the 2014 reporting period and a 163% increase as compared to the 2006 reporting period (MAP cases involving two OECD member countries are double-counted in this total). For the OECD member countries for which data was provided, the average time for the completion of MAP cases with other OECD member countries was:

20.47 months in the 2015 reporting period;
23.79 months in the 2014 reporting period
23.57 months in the 2013 reporting period;
25.46 months in the 2012 reporting period;
25.59 months in the 2011 reporting period;
27.30 months in the 2010 reporting period;
22.82 months in the 2009 reporting period;
22.42 months in the 2008 reporting period;
18.93 months in the 2007 reporting period; and
22.10 months in the 2006 reporting period.

Article 25 of the OECD Model Convention

21 November 2017

THE 2017 UPDATE TO THE OECD MODEL TAX CONVENTION

This note includes the contents of the 2017 update to the OECD Model Tax Convention (the 2017 Update).

The 2017 Update was approved by the Committee on Fiscal Affairs on 28 September 2017 and by the OECD Council on 21 November 2017.

The 2017 Update primarily comprises changes to the OECD Model Tax Convention (the OECD Model) that were approved as part of the BEPS Package or were foreseen as part of the follow-up work on the treaty-related BEPS measures.

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THE 2017 UPDATE TO THE OECD MODEL TAX CONVENTION

The changes include the following:

- Changes to **Article 25** and to the Commentaries on Articles 2, 7, 9 and 25 contained in the Report on Action 14 or which that Report indicated would be developed as part of the follow-up work on Action 14.
- These changes include changes to **paragraph 5** of Article 25, related Commentary changes and amendments to the “Sample Mutual Agreement on Arbitration” contained in an Annex to that Commentary.
- The changes related to the OECD Model MAP arbitration provision and its Commentary are intended to reflect the MAP arbitration provision developed in the negotiation of the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (the Multilateral Instrument or “MLI”) adopted on 24 November 2016.

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THE 2017 UPDATE TO THE OECD MODEL TAX CONVENTION

The changes include the following:

- **15.5** [New Paragraph] *Further tax considerations that should be taken into account when considering entering into a tax treaty include the various features of tax treaties that encourage and foster economic ties between countries, such as [...], the greater certainty of tax treatment for taxpayers who are entitled to benefit from the treaty and the fact that tax treaties provide, through the **mutual agreement procedure**, together with the possibility for Contracting States of moving to **arbitration**, a mechanism for the resolution of cross-border tax disputes.*

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THE 2017 UPDATE TO THE OECD MODEL TAX CONVENTION

The changes include the following:

Article 25

28. Replace paragraph 1 of Article 25 by the following:

1. Where a person considers that the actions of one or both of the Contracting States result or will result for him in taxation not in accordance with the provisions of this Convention, he may, irrespective of the remedies provided by the domestic law of those States, present his case to the competent authority of **either [the] Contracting State [of which he is a resident or, if his case comes under paragraph 1 of Article 24, to that of the Contracting State of which he is a national]**. The case must be presented within three years from the first notification of the action resulting in taxation not in accordance with the provisions of the Convention

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THE 2017 UPDATE TO THE OECD MODEL TAX CONVENTION

29. Replace paragraph 5 of Article 25 by the following (cont'd):

5. Where,

- a) under paragraph 1, a person has presented a case to the competent authority of a Contracting State on the basis that the actions of one or both of the Contracting States have resulted for that person in taxation not in accordance with the provisions of this Convention, and b) the competent authorities are unable to reach an agreement to resolve that case pursuant to paragraph 2 within two years from the **[presentation of the case to the competent authority of the other Contracting State] date when all the information required by the competent authorities in order to address the case has been provided to both competent authorities,**

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THE 2017 UPDATE TO THE OECD MODEL TAX CONVENTION

29. Replace paragraph 5 of Article 25 by the following (cont'd):

...any unresolved issues arising from the case shall be submitted to arbitration if the person so requests *in writing*. These unresolved issues shall not, however, be submitted to arbitration if a decision on these issues has already been rendered by a court or administrative tribunal of either State. Unless a person directly affected by the case does not accept the mutual agreement that implements the arbitration decision, that decision shall be binding on both Contracting States and shall be implemented notwithstanding any time limits in the domestic laws of these States. The competent authorities of the Contracting States shall by mutual agreement settle the mode of application of this paragraph.

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Article 25

191. Add the following new paragraph 5.1 to the Commentary on Article 25:

5.1 *The undertaking to resolve by mutual agreement cases of taxation not in accordance with the Convention **is an integral part of the obligations assumed by a Contracting State** in entering into a tax treaty and must be performed in good faith. In particular, the requirement in paragraph 2 that the competent authority “shall endeavour” to resolve the case by mutual agreement with the competent authority of the other Contracting State means that the competent authorities **are obliged to seek to resolve the case in a fair and objective manner**, on its merits, in accordance with the terms of the Convention and applicable principles of international law on the interpretation of treaties.*

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Article 25

192. Add the following new paragraphs 6.1 to 6.3 to the Commentary on Article 25:

6.1 *Through Article 25, the Contracting States have delegated to the competent authorities broad powers concerning the application and interpretation of the provisions of the Convention. Paragraph 2 authorises the **competent authorities to resolve by mutual agreement cases presented by taxpayers in order to avoid taxation which could otherwise result from domestic laws but would not be in accordance with the Convention.** Paragraph 3 similarly authorises the competent authorities to resolve by mutual agreement difficulties or doubts concerning the interpretation or application of the Convention, both in individual cases (e.g. with respect to a single taxpayer's case) and more generally (e.g. through the joint interpretation of a provision of the treaty applicable to a large number of taxpayers).*

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THE 2017 UPDATE TO THE OECD MODEL TAX CONVENTION

Article 25

192. Add the following new paragraphs 6.1 to 6.3 to the Commentary on Article 25:

6.1 *...Under paragraph 3, the competent authorities can, in particular, enter into a mutual agreement to define a term not defined in the Convention, or to complete or clarify the definition of a defined term, where such an agreement would resolve difficulties or doubts arising as to the interpretation or application of the Convention. Such circumstances could arise, for example, where a conflict in meaning under the domestic laws of the two States creates difficulties or leads to an unintended or absurd result. As expressly recognised in paragraph 2 of Article 3, **an agreement reached under paragraph 3 concerning the meaning of a term used in the Convention prevails over each State's domestic law meaning of that term.***

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THE 2017 UPDATE TO THE OECD MODEL TAX CONVENTION

Article 25

192. Add the following new paragraphs 6.1 to 6.3 to the Commentary on Article 25 (cont'd):

6.2 *More generally, whilst the status under domestic law of a mutual agreement reached pursuant to Article 25 may vary between States, it is clear that the principles of international law for the interpretation of treaties, as embodied in Articles 31 and 32 of the Vienna Convention on the Law of Treaties, **allow domestic courts to take account of such an agreement.** The object of Article 25 is to promote, through consultation and mutual agreement between the competent authorities, **the consistent treatment of individual cases** and the same interpretation and/or application of the provisions of the Convention in both States. Article 25 also authorises the competent authorities to resolve, by mutual agreement, difficulties or doubts as to the interpretation or application of the Convention; such a mutual agreement, reached pursuant to the express mandate contained in paragraph 3 of the Article, represents objective evidence of the competent authorities' mutual understanding of the meaning of the Convention and its terms. **For these reasons, an agreement reached by the competent authorities under Article 25 must be taken into account for purposes of the interpretation of the Convention.***

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THE 2017 UPDATE TO THE OECD MODEL TAX CONVENTION

Article 25

192. Add the following new paragraphs 6.1 to 6.3 to the Commentary on Article 25 (cont'd):

6.3 *In addition, there are some cases where the application of certain treaty provisions has been expressly delegated by the Contracting States to **the competent authorities and the agreements reached by the competent authorities in these matters legally govern the application of these provisions.** Subparagraph d) of paragraph 2 of Article 4, for example, provides that the competent authorities shall resolve by mutual agreement certain cases where an individual is a resident of both Contracting States under paragraph 1 of that Article. Some treaties similarly delegate to the competent authorities the power to determine jointly the status of various entities or arrangements for the purposes of certain treaty provisions (see, for example, subdivision (i) of subparagraph b) of the suggested provision in paragraph 35 of the Commentary on Article 1) or the power to supplement or modify lists of entities, arrangements or domestic law provisions referred to in these treaties.*

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THE 2017 UPDATE TO THE OECD MODEL TAX CONVENTION

Article 25

193. Replace paragraph 7 of the Commentary on Article 25 by the following:

7. The rules laid down in paragraphs 1 and 2 provide for the elimination in a particular case of taxation which does not accord with the Convention. As is known, in such cases it is normally open to taxpayers to litigate in the tax court, either immediately or upon the dismissal of their objections by the taxation authorities. When taxation not in accordance with the Convention arises from an incorrect application of the Convention in both States, taxpayers are then obliged to litigate in each State, with all the disadvantages and uncertainties that such a situation entails. So paragraph 1 makes available to taxpayers affected, without depriving them of the ordinary legal remedies available, a procedure which is called the mutual agreement procedure because it is aimed, in its second stage, at resolving the dispute on an agreed basis, *i.e.* by agreement between competent authorities, the first stage being conducted exclusively ***in one of the Contracting States*** [the State of residence (except where the procedure for the application of paragraph 1 of Article 24 is set in motion by the taxpayer in the State of which he is a national)] from the presentation of the objection up to the decision taken regarding it by the competent authority on the matter.

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THE 2017 UPDATE TO THE OECD MODEL TAX CONVENTION

Article 25

194. Replace paragraphs 14 to 19 of the Commentary on Article 25 by the following:

14. It should be noted that **the mutual agreement procedure**, unlike the disputed claims procedure under domestic law, **can be set in motion by a taxpayer without waiting until the taxation** considered by him to be “not in accordance with the Convention” has been charged against or dure in motion, he must, and **it is sufficient** if he does, establish **that the “actions of one or both of the Contracting States” will result in such taxation, and that this taxation appears as a risk which is not merely possible but probable**. Such actions mean all acts or decisions, whether of a legislative or a regulatory nature, and whether of general or individual application, having as their direct and necessary consequence the charging of tax against the complainant contrary to the provisions of the Convention. Thus, for example, if a change to a Contracting State’s tax law would result in a person deriving a particular type of income being subjected to taxation not in accordance with the Convention, that person could set the mutual agreement procedure in motion as soon as the law has been amended and that person has derived the relevant income or it becomes probable that the person will derive that income.

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THE 2017 UPDATE TO THE OECD MODEL TAX CONVENTION

Article 25

194. Replace paragraphs 14 to 19 of the Commentary on Article 25 by the following (cont'd):

14. [...] Another example might be a case where **a Contracting State's transfer pricing law requires a taxpayer to report taxable income in an amount greater than would result from the actual prices used by the taxpayer in its transactions with a related party, in order to comply with the arm's length principle**, and where there is substantial doubt whether the taxpayer's related party will be able to obtain a corresponding adjustment in the other Contracting State in the absence of a mutual agreement procedure.

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Article 25

194. Replace paragraphs 14 to 19 of the Commentary on Article 25 by the following (cont'd):

14. [...] ***Such actions may also be understood to include the bona fide taxpayer-initiated adjustments which are authorised under the domestic laws of some countries*** and which permit a taxpayer, under appropriate circumstances, to amend a previously-filed tax return in order to report a price in a controlled transaction, or an attribution of profits to a permanent establishment, that is, in the taxpayer's opinion, in accordance with the arm's length principle (see paragraph 6.1 of the Commentary on Article 9 and paragraph 59.1 of the Commentary on Article 7). As indicated by the opening words of paragraph 1, whether or not the actions of one or both of the Contracting States will result in taxation not in accordance with the Convention must be determined from the perspective of the taxpayer. Whilst the taxpayer's belief that there will be such taxation must be reasonable and must be based on facts that can be established, **the tax authorities should not refuse to consider a request under paragraph 1 merely because they consider that it has not been proven** (for example to domestic law standards of proof on the "balance of probabilities") that such taxation will occur.

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THE 2017 UPDATE TO THE OECD MODEL TAX CONVENTION

Article 25

194. Replace paragraphs 14 to 19 of the Commentary on Article 25 by the following (cont'd):

15. Since the first steps in a mutual agreement procedure may be set in motion at a very early stage based upon the mere probability of taxation not in accordance with the Convention, the initiation of the procedure in this manner would not be considered the [presentation of the case to the competent authority] **starting date** for the purposes of determining the [start] **beginning** of the two year period referred to in paragraph 5 of the Article.[...]
16. To be admissible objections presented under paragraph 1 must first meet a twofold requirement expressly formulated in that paragraph: in principle, they must be presented to the competent authority of **either Contracting State** [the taxpayer's State of residence (except where the procedure for the application of paragraph 1 of Article 24 is set in motion by the taxpayer in the State of which he is a national)], and they must be so presented **within three years of the first notification of the action which gives rise to taxation** which is not in accordance with the Convention. [...]

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THE 2017 UPDATE TO THE OECD MODEL TAX CONVENTION

Article 25

194. Replace paragraphs 14 to 19 of the Commentary on Article 25 by the following (cont'd):

17. The *option provided to the taxpayer to present his case to the competent authority of either Contracting State is intended to reinforce **the general principle that access to the mutual agreement procedure should be as widely available as possible and to provide flexibility.** This option is also intended to ensure that the decision as to whether a case should proceed to the second stage of the mutual agreement procedure (i.e. be discussed by the competent authorities of both Contracting States) is open to consideration by both competent authorities. Paragraph 1 permits a person to present his case to the competent authority of either Contracting State; **it does not preclude a person from presenting his case to the competent authorities of both Contracting States at the same time [...].** Where a person presents his case to the competent authorities of both Contracting States, he should appropriately inform both competent authorities, in order to facilitate a co-ordinated approach to the case. [of which he is a resident (except where the procedure for the application of paragraph 1 of Article 24 is set in motion by the taxpayer in the State of which he is a national) is of general application, regardless of whether the taxation objected to has been charged in that the other State and regardless of whether it has given rise to double taxation or not. If the taxpayer should have transferred his residence to the other Contracting State subsequently to the measure or taxation objected to, he must nevertheless still present his objection to the competent authority of the State in which he was a resident during the year in respect of which such taxation has been or is going to be charged.]*

Multilateral Convention to Implement Tax Treaty Related Measures to Prevent BEPS

Multilateral Convention to Implement Tax Treaty Related Measures to Prevent BEPS (Paris, November 24, 2016)

The Convention is mentioned also in the most recent version of the OECD MC, which includes the following paragraph:

- **39** [Added to par.39]. [...] ***Another relevant multilateral convention is the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent BEPS, which was drafted in order to facilitate the implementation of the treaty-related measures resulting from the OECD/G20 Base Erosion and Profit Shifting Project and which was opened for signature on 31 December 2016.***

Multilateral Convention to Implement Tax Treaty Related Measures to Prevent BEPS

BEPS Plan Summary

Action 1: Address the tax challenges of the digital economy			
“Gaps”	“Frictions”		“Transparency”
<i>i. Establishing international coherence of corporate income taxation</i>	ii. Restoring the full effects and benefits of international standards		iii. Ensuring transparency while promoting increased certainty and predictability
Action 2: Neutralize the effects of hybrid mismatch arrangements	Action 6: Prevent treaty abuse		Action 11: Establish methodologies to collect and analyze data on BEPS and the actions to address it
Action 3: Strengthen controlled foreign company (CFC) rules	Action 7: Prevent the artificial avoidance of PE status		<i>Action 12: Require taxpayers to disclose their aggressive tax planning arrangements</i>
Action 4: Limit base erosion via interest deductions and other financial payments	Assure that transfer pricing outcomes are in line with value creation	Action 8: Intangibles	<i>Action 13: Re-examine transfer pricing documentation</i>
<i>Action 5: Counter harmful tax practices more effectively, taking into account transparency and substance</i>		Action 9: Risk and capital	<i>Action 14: Make dispute resolution mechanisms more effective</i>
Action 15: Develop a multilateral instrument			

Multilateral Convention to Implement Tax Treaty Related Measures to Prevent BEPS

- On **12 February 2013** the report «**Addressing Base Erosion and Profit Shifting**» was published
- In **July 2013** the OECD Committee on Fiscal Affairs (CFA) submitted the **BEPS Action Plan**
- On **16 September 2014** the Action 15 interim report of the BEPS Action Plan called for the **development of a multilateral instrument (MLI)** to implement tax treaty-related BEPS measures
- In **February 2015**, based on the Action 15 interim report, **a mandate** to set up the **ad hoc Group** for the development of a multilateral instrument was developed by the CFA (+ 90 Countries)
- On **5 October 2015** the **final BEPS package** was published
- On **24 November 2016** the ad hoc Group concluded the negotiations and **adopted** the Text of the MLI as well and its accompanying Explanatory Statements
- On **7 June 2017**, representatives covering **68 jurisdictions** gathered in Paris for signing the MLI.

Multilateral Convention to Implement Tax Treaty Related Measures to Prevent BEPS

Flexibility and Transparency

- **Covered Tax Agreement** (OECD is the Depositary)
- **Reservation and notifications** (“opting in-opting out”/bilateral match” - **Positions**)
- Signatories may amend their MLI Positions until ratification; After ratification, signatories can choose to opt in with respect to optional provisions (such as arbitration) or to withdraw reservations. They cannot add reservations.
- MLI **does not** function as an amending protocol, neither **changes** it the underlying text, but it will applied **alongside** the existing treaty, modifying its application (“lex posterior derogate (legi) prior”)
- ***Entry into force***
 - Individual signatories will need to ratify in line with their constitutional arrangements
 - The MLI must be ratified by at least 5 jurisdictions before it first enters into force
 - Following a period of 3 months after the date of the deposit of the ratification by the fifth State, the MLI will enter into force for those first 5 States.
 - A 3 months period will apply for all other Jurisdictions

Multilateral Convention to Implement Tax Treaty Related Measures to Prevent BEPS

- ***Entry into effect***

The default timings are:

- Modified withholding tax provisions will have effect for payments made after the first day of the following calendar year from the “last date”; and
 - Changes relating to taxes levied with respect to taxable period will have effect for taxable periods beginning on or after a period of 6 calendar months has elapsed (or less if both parties agree).
 - Jurisdictions can unilaterally replace the term “calendar year” with “taxable period” (and vice versa)
 - The Jurisdictions can unilaterally “replace” the “date of the deposit” with “30 days after the date of receipt by the Depository of the latest notifications by each Contracting Jurisdictions” (**Italy**)
 - Different provisions apply for dispute resolution and cases could be eligible even where the dispute related to a period before the MLI was in force
- ***Covered Tax Agreements (for Italy)***
 - **84** Double Tax Treaties (whose 77 have already entered into force and 7 not yet ratified) have been included – **17** Double Tax Treaties are out (Albania, Algeria, Belorussia, Chile, Congo, South Korea, Ecuador, Ethiopia, Ghana, Ex Yugoslavia, Macedonia, Mozambique, Oman, Syria, Ex Soviet Union, Uzbekistan, Venezuela).

«Ecofin» Directive

- On 23 May 2017, the European Council of Finance Ministers (ECOFIN) agreed on the terms of a proposed new council directive on tax dispute resolution mechanisms in the EU. The directive aims to improve existing mechanisms for resolving tax disputes between EU member states arising from the interpretation of double tax agreements, by improving access to and the effectiveness of the mutual agreement procedure (MAP) and establishing procedures for dispute resolution by arbitration.
- The directive establishes rules to resolve double taxation disputes that arise from the interpretation and application of tax treaties and EU conventions between EU member states.
- Businesses and individuals can initiate the MAP by submitting a complaint on a question of dispute to each of the competent authorities of the member states concerned (an administrative simplification is available for individuals and smaller undertakings). The complaint must be made within three years from the receipt of the first notification of the action resulting in the question of dispute.

«Ecofin» Directive

- Competent authorities **must endeavor to resolve the dispute by mutual agreement within two years of acceptance (extendable to three years)**. Once a resolution is agreed, then subject to acceptance by the business or individual, the decision is binding, regardless of any domestic time limits.
- Where the competent authorities fail to resolve the question of dispute by mutual agreement within the timeframe, **the business or individual has 50 days to request that arbitration procedures commence**. An Advisory Commission will be set up within 120 days and must deliver its opinion on how to resolve the dispute within six months (extendable by three months, if necessary). Businesses or individuals may appear before the Advisory Commission at their request, and must appear if required by the commission.
- The Advisory Commission will adopt an opinion by simple majority. The competent authorities have a further six months to adopt a final decision. This decision can differ from the Advisory Commission's opinion, but if the competent authorities fail to reach an agreement, they will be bound by the Commission's opinion. Subject to the business or individual accepting the final decision, the final decision is binding and will be implemented, regardless of time limits in domestic tax legislation.

«Ecofin» Directive

- The final decision will not create precedent. Every decision will be published (either in full, or at the request of the business, individual or competent authorities in an anonymized summarized form) and will be made publically available by the European Commission.
- An Advisory Commission will be comprised of a chair, up to two representatives of each competent authority and up to two “persons of independent standing” appointed by each competent authority.
- Any other type of dispute resolution process also is acceptable, including the “final offer” (otherwise known as “last best offer” or “baseball”) arbitration process, whereby each competent authority presents its final offer, with reasons, and the Advisory Commission chooses one outcome from the two presented.
- Alternatively, competent authorities may establish an Alternative Dispute Resolution Commission with more flexibility in its composition, but subject to the same timetable and independence rules.

«Ecofin» Directive

- The Directive will be adopted by ECOFIN later in 2017 (once the European parliament has issued an opinion). Member states will be required to adopt the directive in their domestic legislation by 30 June 2019. ECOFIN will review the operation of the directive in 2024.
- The directive will apply to complaints submitted after 1 July 2019, relating to tax years starting on or after 1 January 2018. Competent authorities may agree to apply the directive to complaints submitted earlier and/or for earlier tax years.