

Advance Pricing Arrangements: Optimal Tool – Optimal Framework?

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Advance Pricing Agreements (APAs) are a diffused tool for taxpayers to obtain certainty in relation to the tax impact of their cross-border activities through an agreement with a tax administration in advance of such activities. APAs can be unilateral, bilateral, or multilateral depending on the number of national tax administrations involved, the latter two promising that the agreement made shall not be questioned in the other affected tax jurisdiction. Departing from the enhanced mutual agreement procedure (MAP) framework recently established among Member States through the Tax Dispute Resolution Directive, a future EU legislative initiative could outline a robust framework for MAP APAs in the Single Market.

Keywords: Advance Pricing Arrangements, Dispute resolution, MAP – Mutual agreement procedures, Administrative Cooperation, BEPS, Transparency, Fiscal State-aid, Transfer Pricing

I APA: AN OVERVIEW

An Advance Pricing Arrangement (APA) is ‘an arrangement that determines in advance of controlled transactions an appropriate set of criteria for the determination of the transfer pricing for those transactions over a fixed period of time’.¹ In essence, it is an agreement between one or more national tax authorities and a taxpayer (or more related taxpayers) for the future tax treatment of one or more specific transaction(s). Since it concerns only controlled transactions, its scope is limited by definition to transfer pricing questions and those regarding permanent establishments (PEs) and profit allocation – arising in connection with Articles 7 and 9² of the OECD Model Tax Convention (OECD Model³).⁴ Therefore, it is principally based on the application of transfer pricing rules and the arm’s length principle.

In terms of purpose, an APA is an institution that complements the various domestic and international existing tax dispute resolution mechanisms and allows their prevention with an agreement in advance. Transfer pricing issues can be determined before the performance of

the questionable transaction in a collaborative manner that engages both a taxpayer and a tax administration. A key advantage of such *a priori* determination is evidence-related: taxpayers and tax administrations discuss current – and hence easily evidenced – transactions while *a posteriori* tax dispute resolution mechanisms rely necessarily on existing evidence of past events. Consequently, the benefits of an APA include:

- Increased tax certainty for taxpayers;
- Optimal tax risk management for taxpayers and tax administrations;
- Improved resource allocation for both taxpayers and tax administrations;
- Promotion of cooperative relationships between taxpayers and tax administrations which enhances tax compliance;
- Effective reduction of double taxation issues and, consequently, an increase in investment and growth.⁵

In terms of background, APAs were borne in the late 1980s to afford multinational taxpayers to enjoy certainty

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¹ OECD, *OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations 2017* (OECD Publishing 2017), (hereinafter ‘OECD TP Guidelines’), para. 4.134.

² OECD TP Guidelines, *supra* n. 2, Annex II to Ch. IV, Ch. C.3.1, para. 35.

³ OECD, *Model Tax Convention on Income and on Capital: Condensed Version 2017* (OECD Publishing 2017).

⁴ Certain countries provide for a wider scope of APA in their domestic legislation. Thus, in Italy, an APA may also be requested for questions arising from the transfer of a company’s residence (exit taxation). Cf. P. Valente, *Tax Rulings and Advance Pricing Agreements in Italy*, 85 *Tax Notes Int’l* 5 (2017).

⁵ OECD TP Guidelines, *supra* n. 2, paras 4.153 et seq.

for the tax treatment of their operations. The United States was among the first countries to apply the institution, having engaged in more than 1,400 negotiations in the thirty years that followed. Today, the institution – that has apparently proven successful – has been adopted in more than forty countries worldwide and continues to attract the interest of legislators and policy-makers.⁶

Evidencing the diffusion of the practice, in 1999, the OECD published guidance on the conduct of an APA. The purpose of such guidance, which is an integral element of the OECD Transfer Pricing (TP) Guidelines, is to provide recommendations towards more transparent, more efficient, and more consistent APA procedures. Therefore, the OECD points out the elements of APA procedures that risk undermining APAs' effectiveness if not carefully structured. For example, an APA refers to the future and, therefore, is based on predictions which, if proven untrue, shall compromise the effect of the agreement that is reached. Hence, the scope of each APA and its years of effect should be outlined in order to secure maximum predictability.

APAs may be unilateral, bilateral, or multilateral depending on the number of national tax authorities that are involved. A unilateral APA binds only one tax administration and one taxpayer. A bilateral APA is a 'single mutual agreement between the competent authorities of two tax administrations under the relevant treaty',⁷ and a multilateral APA is an agreement between more than two competent authorities. Accordingly, the latter (bilateral and multilateral) may be considered preferable to the former which cannot prevent that the agreed transfer pricing could be questioned by other tax jurisdictions that are affected.⁸ Article 25(3) of the OECD Model may be considered as the legal basis for bilateral APAs as it provides for a mutual agreement procedure (MAP)⁹ to clarify the interpretation/application of double tax conventions (DTCs) and/or in relationship to any double taxation issues (even beyond DTCs). The OECD's above guidance on an APA refers primarily to bilateral APAs concluded through a MAP.

Despite its success and wide diffusion, the APA has recently incited significant concerns because, being confidential and hence not public, it has the potential to be exploited for tax avoidance purposes. Indicatively, in the context of the Base Erosion and Profit Shifting (BEPS) Project, it was considered that preferential tax regimes

could be applied through an APA; it was hence decided to enhance the transparency of the institution.¹⁰ It is equally telling that, in the last few years, the European Commission has initiated a series of investigations into tax ruling practices – including the APA – of Member States. In this framework, several APAs have been examined, often with decisions that fiscal state aid has been conferred therethrough.¹¹ The results are the cancellation of respective APAs, substantial penalties to a series of multinationals for allegedly unpaid taxes, an avalanche of cases currently pending before the Court of Justice of the EU, and an endless political debate involving Member States, EU institutions, and extra-EU countries. It is no surprise that the APA institution is questioned concerning its potential to actually provide tax certainty, especially in the EU.¹²

Regarding the above, the APA institution is undergoing important change worldwide in the context of the fight against tax avoidance and evasion. Although such change may be considered to have enhanced the mechanism overall, there appears to be a significant margin for improvement.

Thus, the present article seeks to primarily provide an overview in part two of the changes made or promoted at an international level in the context of the BEPS Project. Part three then focuses on the EU, the further changes brought by the European legislator, and their impact in order to suggest an additional step ahead: the establishment of a pan-European framework for the conduct of APAs involving Member States. Finally, part four concludes that the changes that have already been implemented have effectively prepared the grounds for more substantial international cooperation in relation to APAs to the benefit of international taxation and the economy as a whole.

2 BEPS IMPACT ON APAs

With the intention of remedying deficiencies identified in the international tax framework, the BEPS Project promised and delivered substantial changes to the existing domestic, bilateral, and international rules. Regardless of its merits, change always means transition and is associated with uncertainty and risks until the establishment of new standards. Correspondingly, there is an intensified need for mechanisms that can enhance certainty, reduce

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⁶ K. Chung, S. Keshvani & E. Morris, *Global APA Programmes: Get Ready to Apply BEPS Guidance Prospectively*, Int'l Tax Rev. (22 Mar. 2016).

⁷ OECD TP Guidelines, *supra* n. 2, Annex II to Ch. IV, Ch. A.2, para. 2.

⁸ OECD TP Guidelines, *supra* n. 2, paras 4.140 and 4.158.

⁹ P. Valente, *Mutual Agreement Procedure: Developments Around the Globe*, Tax Analysts (2019) (forthcoming).

¹⁰ OECD, *Countering Harmful Tax Practices More Effectively, Taking into Account Transparency and Substance, Action 5 – 2015 Final Report*, OECD/G20 Base Erosion and Profit Shifting Project (OECD Publishing 2015).

¹¹ R. H. C. Luja, *Do State Aid Rules Still Allow European Member States to Claim Fiscal Sovereignty?*, 25 EC Tax Rev. 5–6, (2016).

¹² E. Sporken & M. Stuyt, *Do Advance Pricing Agreements Still Provide Certainty in the Netherlands?*, Bloomberg Tax (2017).

disputes, and/or permit their prompt and smooth resolution. Increased tax uncertainty has also recently been acknowledged in a targeted joint report by the OECD and the IMF¹³ which suggest, among others, the use of the APA mechanism as a solution.

In more detail, the BEPS Project, and particularly Actions 8–10,¹⁴ led to important amendments to the OECD TP Guidelines. Such amendments must be implemented in domestic legislation which means that they might be applied differently in the various countries (more than 100) of the Inclusive Framework. The novelty of the rules and their potential different interpretations and applications in various jurisdictions may be expected to affect the content of the APAs – based on TP rules – while increasing their demand. Furthermore, the new rules seem to favour a more subjective (rather than objective) application of the arm's length principle which risks further multiplying disputes on transfer pricing matters.¹⁵

Secondly, transparency has been a key pillar of the entire BEPS Project, and the commitment to its enhancement shall also affect APAs. In fact, following the implementation of BEPS measures, multinationals are required to disclose more information on their TP policies in the master file, the local file, and the country-by-country report (CbCR) – including information on the APAs they have concluded.¹⁶ Such data shall also be communicated to all tax administrations that have an interest thereon due to the multinationals' activity in their jurisdiction. A greater number of tax administrations knowing more about multinationals' activities may be expected to lead to additional scrutiny and potential audits and disputes. On such premises, the value of APAs is enhanced since it is to the interest of taxpayers (and tax administrations) to address complex and arguable issues in advance and in a collaborative manner.

For the same transparency reason, post-BEPS, APAs themselves are provided to be exchanged among all

forementioned tax administrations with interest therein.¹⁷ Such a measure was envisaged to target preferential tax regimes and harmful tax competition that could be promoted through non-transparent ruling regimes, including APAs. To achieve this, mandatory and spontaneous exchange was provided, i.e. communication regarding the APA by the tax administration within three months¹⁸ to the residence jurisdictions of all related parties of the relevant transaction or those deriving benefits therefrom and in that of the direct and ultimate parent entity. The legal basis for the exchange may be:

- a DTC providing for exchange of information (Article 26 of the OECD Model)¹⁹;
- a tax information exchange agreement (TIEA) permitting spontaneous exchange of information²⁰;
- the Multilateral Convention on Mutual Administrative Assistance in Tax Matters for the signatory countries;
- the Directive for Administrative Cooperation (DAC) for exchanges among EU Member States.²¹

Considering the above, the content of APAs is highly likely to change, taking into account the fact that several tax administrations shall be made aware thereof.

Thirdly, the BEPS Project seeks to change the type of APAs requested and concluded. In particular, the Final Report on Action 14²² includes two recommendations directly referring to APAs:

- Best Practice 4: Countries should implement bilateral APA programs;
- Best Practice 11: Countries' published MAP guidance should provide guidance on multilateral MAPs and advance pricing arrangements (APAs).

In addition, when bilateral APA programs are established, their rollback effect should be provided and such a requirement is a minimum standard for BEPS

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¹³ OECD, International Monetary Fund, *Tax Certainty*, IMF/OECD Report for G20 Finance Ministers (2017).

¹⁴ OECD, *Aligning Transfer Pricing Outcomes with Value Creation, Actions 8-10 – 2015 Final Reports*, OECD/G20 Base Erosion and Profit Shifting Project (OECD Publishing 2015).

¹⁵ J. Osborn & E. B. Khrpounova, *Advance Pricing Agreements in the Post-BEPS Era*, 150 *Tax Notes* 10 (2016).

¹⁶ OECD, *Transfer Pricing Documentation and Country-by-Country Reporting, Action 13–2015 Final Report*, OECD/G20 Base Erosion and Profit Shifting Project (OECD Publishing 2015).

¹⁷ OECD, *supra* n. 11.

¹⁸ The exchange obligations refers to six types of rulings: rulings relating to preferential regimes; unilateral APAs or other cross-border unilateral rulings in respect of transfer pricing; cross-border rulings providing for a downward adjustment of taxable profits; permanent establishment rulings; related-party conduit rulings; and any other type of ruling that might be considered by the Forum on Harmful Tax Practices that can incite BEPS concerns. A ruling may be defined as 'any advice, information or undertaking provided by a tax authority to a specific taxpayer or group of taxpayers concerning their tax situation and on which they are entitled to rely'. Cf. OECD, *supra* n. 11, Ch. 5, paras 95 et seq.

¹⁹ OECD Model Convention (2017): Commentary to Art. 26, paras 9 et seq.

²⁰ The TIEA model has been supplemented with a Protocol since June 2015 to be used by jurisdictions wishing to extend the scope of existing TIEAs to automatic and/or spontaneous exchange of information.

²¹ Council Directive 2011/16/EU of 15 Feb. 2011 on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC ('DAC'), OJ L64/1 (11 Mar. 2011).

²² OECD, *Making Dispute Resolution Mechanisms More Effective, Action 14 – 2015 Final Report*, OECD/G20 Base Erosion and Profit Shifting Project (OECD Publishing 2015).

compliance.²³ In such a case, the APA shall also be effective for past years – i.e. before its conclusion – provided that the law and facts in its basis have been the same.

Apart from the above, the key focus of Action 14 has been the improvement of the MAP mechanism for the resolution of tax disputes. Considering that bilateral and/or multilateral APAs are concluded through a MAP, such improvements may be expected to strengthen such an APA instrument as well.

In summary, the inherent uncertainty during the (ongoing) phase of implementation of the BEPS measures is foreseen to increase the need for taxpayers to proactively obtain certainty with respect to the tax treatment of their transactions. A key tool to this effect is the APA. Equally, the enhanced level of disclosure that is required from taxpayers that accords with BEPS measures may be expected to convince on the value of the APA even those that used to avoid it due to confidentiality concerns. Finally, the improvement of the MAP and, therefore, of international administrative cooperation and the compulsory exchange of information on APAs may be expected to increase the demand for bilateral (or multilateral) APAs that are concluded through a MAP. In this respect, it is also relevant that unilateral APAs appear to be losing their status following repeated accusation at both international and EU levels that they can serve harmful tax practices.

3 EU: STEPS MADE AND STEPS TO BE DONE

3.1 Fiscal State-Aid-Proof Bilateral APAs

In the area of proactive tax certainty, the EU has attracted heavy criticism for its allegedly aggressive application of EU state aid rules to often cancel APAs concluded by (sovereign) EU Member States.²⁴ In a number of cases, APAs have been deprived of their effect retroactively even decades after their conclusion. Therefore, it is no surprise that taxpayers' confidence for such a mechanism has been undermined with the risk that they could be discouraged from its use.

However, in this regard, it is critical to distinguish between unilateral APAs, on the one hand, and bilateral or multilateral APAs on the other. The European Commission's investigations have been limited to the former with the latter, i.e. bilateral and multilateral APAs, remaining outside the fiscal state aid debate. In fact, it would not be reasonable for Member States to seek to promote the implementation of unfair, preferential tax regimes in the context of negotiations with other Member States or extra-EU countries.

Bilateral or multilateral APAs are more transparent by definition, therefore, less attractive for harmful tax practitioners and subsequently more trustworthy as tax certainty tools. In this framework, the increasing loss of confidence for unilateral APAs, also as a result of state aid investigations, may be expected to increase the demand for bilateral and multilateral APAs.

3.2 DAC: Strong Administrative Cooperation

In this respect, it is relevant that the EU has taken important steps to enhance administrative cooperation among Member States in accordance with the BEPS recommendations and also taking them further. In particular, in 2011, the respective framework was significantly strengthened by virtue of a new directive²⁵ substituting the then existing 1977 rules.²⁶ DAC provides the legal basis for:

- exchange of tax related information, spontaneously, on request, and automatically among Member States,
- joint tax audits,
- participation of foreign tax administrations in administrative enquiries etc.

Since its introduction, the DAC is regularly updated with the intent of ensuring that Member States' tax administrations can exploit state-of-the-art cooperation tools. Thus, from 2011, five amending directives have been issued, among others, to permit the automatic exchange of information of financial accounts,²⁷ tax rulings and APAs,²⁸ CbCR,²⁹ and reportable cross-border arrangements.³⁰ The automatic exchange of tax rulings and APAs is a key

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²³ *Ibid.*, para. 2.7.

²⁴ L. Lovdahl Gormsen, *State Aid and Direct Taxation and the Big Eruption Between the US and the EU*, 62 *Antitrust Bull.* 2 (2017); Luja, *supra* n. 11.

²⁵ Council Directive 2011/16/EU of 15 Feb. 2011 on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC, *supra* n. 21.

²⁶ Council Directive 77/799/EEC of 19 Dec. 1977 concerning mutual assistance by the competent authorities of the Member States in the field of direct taxation, OJ L 336/15 (27 Dec. 1977).

²⁷ Council Directive 2014/107/EU of 9 Dec. 2014 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation, OJ L 359/1 (16 Dec. 2014).

²⁸ Council Directive (EU) 2015/2376 of 8 Dec. 2015 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation, OJ L 332/1 (18 Dec. 2015).

²⁹ Council Directive (EU) 2016/881 of 25 May 2016 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation, OJ L 146/8 (3 June 2016).

³⁰ Council Directive (EU) 2018/822 of 25 May 2018 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements, OJ L 139/1 (5 June 2018).

novelty of the EU legislation regarding the BEPS measures. It allows Member States to enjoy stronger cooperation with one another than with extra-EU countries in this area. Effective cooperation is then a pre-condition for strengthening the bilateral and multilateral APA institution in the Single Market.

3.3 Tax Dispute Resolution Directive: More Effective MAP ex-Post

Nevertheless, it is beyond question that, focusing on APAs and tax certainty in the Single Market, the most important EU step has been the adoption of a directive to improve tax dispute resolution (Tax Dispute Resolution Directive).³¹ Adopted in 2017, the directive was to have been transposed into Member States' legislation by 30 June 2019 to apply to tax disputes arising in the Single Market after that date in relationship to tax years beginning from 2018.³²

The Tax Dispute Resolution Directive constitutes a landmark for EU taxation because it advocates for the establishment of an EU-wide legislative framework to resolve a broad range of cross-border tax disputes (ex-post). Specifically, the previous framework was exhausted in fragmented MAP provisions that were included in varying Member States' DTCs with an exception for transfer pricing issues that were resolved under common rules established in the Arbitration Convention.³³ Being a Convention, however, the latter was inherently challenging in its enforcement in the event of non-compliance by Member States' signatories.³⁴ In addition, weaknesses identified in the practical application of the Arbitration Convention were considered to undermine effective resolution of even transfer pricing cases.³⁵

The new framework builds on the existing mechanisms and seeks to improve them in accordance with the relevant recommendations in the Final Report on Action 14 of the BEPS Project.³⁶ Yet, it can be praised for advancing such recommendations in an innovative manner that could also inspire further improvement of the global framework.

In detail, a MAP between Member States is enhanced in terms of time and efficiency in four basic aspects. First,

the introduction of mandatory binding MAP arbitration shall ensure that cross-border tax-related disputes in the Single Market shall be effectively resolved.³⁷ While the past framework allowed Member States to not reach a resolution – only obligating them to make best endeavours thereto (with the exception of transfer pricing issues) – the new framework guarantees effective resolution through either a MAP or, with the failure of a MAP, arbitration. Consequently, competent authorities are encouraged to reach a resolution in the context of a MAP, also in order to avoid being bound by a decision of an independent authority.

Secondly, effective resolution is guaranteed for all taxpayers and all cross-border tax disputes in the Single Market that arise in connection with a DTC or the Arbitration Convention, i.e. practically, all disputes associated with taxation of income and capital.³⁸ This implies that, if Member States' tax administrations have to resolve double taxation only in transfer pricing cases, such an obligation is being extended to all cases of double taxation and all questions arising in connection with their tax treaties with other Member States. Accordingly, administrative cooperation in the context of a MAP may be expected to develop in order to embrace the new variety of questions to be posed before it.

Thirdly, the new rules are not restricted in guaranteeing tax dispute resolution, however they target prompt resolution. To achieve this, they provide a strict timeline for Member States' tax administrations' actions in the context of a MAP. Most importantly, they ensure that such a timeline be effectively enforced by permitting taxpayers to take individual action in the event of delays and non-compliance by involving national tax courts and substituting national tax authorities.³⁹

Finally, the new framework promotes consistent tax dispute resolution by providing for the publication of resolution decisions to be reached through a MAP (or mandatory binding MAP arbitration) either as a whole or as a summary.⁴⁰ The entire decision may be published, when all of the parties involved, including taxpayers and tax authorities, grant their consent thereto. In the absence of such consent, the decision shall be published in abstract

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³¹ Council Directive (EU) 2017/1852 of 10 Oct. 2017 on tax dispute resolution mechanisms in the European Union, OJ L 265/1 (14 Oct. 2017) (Tax Dispute Resolution Directive).

³² National tax administrations may decide, at their discretion, to apply the framework prescribed by the directive also to disputes arising in connection with tax years prior to 2018 and/or that have arisen before 1 July 2019. Cf. Art. 23 Tax Dispute Resolution Directive.

³³ Convention 90/436/EEC on the elimination of double taxation in connection with the adjustment of profits of associated enterprises OJ L 225/10 (20 Aug. 1990).

³⁴ By way of an example, the Court of Justice of the EU did not have jurisdiction over such non-compliance.

³⁵ Valente, *supra* n. 9.

³⁶ OECD, *supra* n. 22.

³⁷ Art. 6 Tax Dispute Resolution Directive.

³⁸ Art. 1 Tax Dispute Resolution Directive.

³⁹ Art. 7 Tax Dispute Resolution Directive.

⁴⁰ Art. 18 Tax Dispute Resolution Directive.

and reflect the basic information of the matter, the legal basis, the outcome, and the method of arbitration that was applied. The difference with the previous framework is that the latter provides only for publication of the complete decision subject to consent and only for transfer pricing cases (i.e. falling within the scope of the Arbitration Convention). Otherwise stated, when the parties have not consented to the publication of the full text (which may be considered the most likely scenario for confidentiality purposes), then no information can be revealed. Publication of the outcome, however, ensures:

- wide scrutiny and hence increased responsibility of all of the parties that are involved;
- establishment of standard principles and hence predictability;
- a point of reference for taxpayers and tax authorities and hence tax certainty.

3.4 Extending Tax Dispute Resolution Directive: Effective MAP in Advance

Considering the above, the next step in EU tax dispute resolution could be the establishment of a common framework for the proactive resolution of disputes, e.g. with the extension of the Tax Dispute Resolution Directive to proactive resolution tools, such as APAs. A corresponding legislative initiative may be considered justified and timely, especially taking into account:

- (1) the urgent need to enhance tax certainty in the Single Market;
- (2) the increase expected in the requests for bilateral and multilateral APAs along with the loss of taxpayers' confidence in unilateral APAs and the effective inability of the latter to provide certainty in cross-border matters;
- (3) the advantages of preventing disputes over ex-post dispute resolution;
- (4) the strong administrative cooperation standards implemented in the EU, especially due to the DAC; and
- (5) the enhanced MAP framework established by virtue of the Tax Dispute Resolution Directive.

In terms of a timeframe, such an initiative could be a follow-up to the implementation of the new tax dispute resolution rules across the EU that were to be completed by June 2019. In effect, a functional MAP framework is a precondition to effective MAP APA as well as an enabling factor.

An initiative in this direction should subsequently build on the provisions of the Tax Dispute Resolution Directive, amended when necessary to take into account

the special features of proactive dispute resolution. The points of convergence of Member States' APA practices should also be duly weighted and exploited.

As an example, in terms of scope, a Tax Dispute Prevention Directive or APA Directive could extend to all issues that can be the subject matter of an APA according to domestic legislation of the majority of the Member States. Hence, the scope would be expected to encompass primarily transfer pricing questions as well as questions on PE qualification and profit allocation that can arise in cross-border situations.

In relation to such matters, the widest possible range of taxpayers should be granted effective access to the mechanism. Thus, a limitation of the administrative burden on small and medium sized businesses could be considered in the path traced by the EU legislator in the Tax Dispute Resolution Directive.⁴¹

Furthermore, it is essential that taxpayers' rights be properly safeguarded by also taking into account the differences between an APA and dispute resolution through a MAP. APAs are agreements that bind taxpayers and tax administrations. Taxpayers hence must be guaranteed a significant role in the context of MAP APA negotiations, including an effective right to present their case. Other rights such as privacy of the taxpayer's information disclosed to tax administrations in the context of MAP APA should be equally ensured.

The consultation proceedings for the conclusion of bilateral and/or multilateral APAs could benefit from the strict timeline included in the Tax Dispute Resolution Directive for the conduct of a MAP. Equally, non-compliance incidents could be resolved with the involvement of national courts in the substitution of competent tax authorities following a request from a taxpayer.

In addition, the publication of abstracts of the APAs concluded could contribute to increasing the consistency thereof and subsequently the establishment of standard practices and the enhancement of clarity and certainty of the EU tax framework.

Last but not least, being agreements in advance, APAs apply for the future based on predictions. Therefore, it is of crucial importance that a relevant framework makes provisions for efficient and cooperative monitoring of the facts and predictions constituting the basis of a MAP APA during its effective period.

4 CONCLUDING REMARKS

In summary, the present article focused on the prevention of cross-border tax disputes with APAs. In use since the late 1980s, the APA mechanism is recently undergoing

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⁴¹ Art. 17 Tax Dispute Resolution Directive.

important changes at the international level with the intention of ensuring that it cannot be exploited for harmful tax competition purposes. Such changes at both the EU and international levels aim at enhancing transparency regarding APAs and thereby strengthening the mechanism while they are also expected to have significant impact on the content of the APAs.

The new transparency framework promoted within the inclusive framework for unilateral APAs and the increased prejudice against them in the Single Market in the context of fiscal state aid has had adverse consequences on their use. Yet, this is not the case for bilateral and multilateral APAs that involve more than national tax administrations and are

concluded with a MAP. The latter may be expected to be increasingly diffused in the near future.

Considering this, it is proposed that the EU framework for the negotiation and conclusion of APAs between Member States be enhanced with the establishment of common rules. Such rules could build on the recently adopted Tax Dispute Resolution Directive that significantly enhances the MAP in the Single Market. Such a strong MAP would enable smooth negotiation and conclusion of bilateral and/or multilateral APAs in the EU while permitting increased tax certainty in the Single Market. Hopefully, such a step will be seriously considered by the EU legislative bodies in the near future.