DRAFT CONTENTS OF THE 2017 UPDATE TO THE OECD MODEL TAX CONVENTION

Comments received on the 11 July 2017 public release

11 August 2017
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Dear Sir,

The three following associations:
− Association Française de la Gestion financière (AFG),
− Association Française des Investisseurs pour la Croissance (AFIC,) and
− Association française des Sociétés de Placement Immobilier (ASPI)
would like to thank the OECD for the opportunity to comment the « Draft content of the 2017 update of the OECD model tax convention ».

First of all, we welcome the concept of “recognised pension funds” amongst the persons covered. We do regret that a concept of “recognised CIV” has not been similarly included into Article 1.

Nevertheless, we appreciate the comments concerning the qualification for treaties of collective investments vehicles (pages 22 to 35 and 192 to 196) as well as the examples DK, L and M at the end of the draft report.

Even if it seems that comments are not requested on those parts of the report, we would like to draw your attention to some remarks.

**General remark**

We understand that, in order to be considered as a CIV, the funds must fulfil three conditions:
− To be widely-held, ¹,
− To hold a diversified portfolio of securities and,
− To be subject to investor-protection regulation in the country in which they are established.

We welcome the statement that « a vehicle that meets the definition of a widely held CIV will be treated as the beneficial owner of the dividends and interest that it receives so long as the managers of the CIV have discretionary powers to manage the assets generating such income » as well as the recommendation of a « an administrative feasible way to make claims ».

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¹ We would like to draw your attention to the fact that regulated funds (such as FIA in Europe) do not hold only securities but also other assets such as loans, real estate etc.
However, the recommended provision drafted on page 31, paragraph 35 providing that a CIV may be considered as the beneficial owner of the income it receives but “only to the extent that the beneficial interests in the CIV are owned by equivalent beneficiaries” may be impractical in practice.

It seems to us that we must distinguish between:
− Funds which keep their register and therefore know the identity of their investors (beneficial owners) and which may apply the LOB clause,
− From funds whose shares or units are kept by financial institutions and therefore do not know the identity of the final investors. For those funds any LOB clause may be impractical in practice.

We think that a fund which meets the 6 following conditions:

- is widely-held,
- holds a diversified portfolio of securities,
- is subject to investor-protection regulation in the country in which it is established,
- publishes a daily NAV (which is in practice equivalent to a listing),
- whose manager has discretionary powers to manage the assets (with no interference from any investor),
- benefits from authorisations to market its shares/units only in tax treaty-countries, should be considered as a beneficial owner without being subject to the LOB clause i.e. the approach described on paragraph 46 page 35 concerning publicly traded CIV would apply. Therefore, the CIV (which could be labelled “recognised CIV”) would be entitled to treaty benefits without regard to the residence of its investors.

Indeed, those conditions, and in particular the fact that the fund is widely held and therefore has many investors which cannot interfere into the management of the assets, demonstrate that the fund cannot be used for treaty shopping purposes. In practice, investors select a fund because of the nature of its assets and their performance and not because of their localisation.

This approach would be coherent with paragraph 43 on page 34 which rightly explains that «managers often do not themselves know the names and treaty status of the beneficial owner» and « It may be appropriate to assume that a CIV is owned by residents of the State in which it is established if the CIV has limited distribution of its shares or units ».

Moreover, no distinction should be done between funds which distribute or capitalise their income as the taxation of the investors may be different in every country where the fund is distributed. For example, in France, the coupon distributed buy a funds is taxed the same way as the capital gain realised on the sale/redemption of the funds’ shares/units.

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2 For example, it is impossible to determine the proportion of investors that are treaty-entitled at each calendar quarter as suggested in paragraph 45, page 34.
3 See footnote 1
4 We understand that the specific treatment benefiting to publicly trader CIV is justified by the fact that “the shareholders or unitholders of such a CIV cannot individually exercise control over it”: this condition is also met by many CIV which are not legally traded, but whose NAV is computed and published every day.
Concerning distribution, we think that a link between the tax regulation and the financial regulation should be made: a CIV cannot freely market its shares abroad. Within the EU, the « European passport » is subject to strict regulation. Likewise, some countries have signed specific distribution agreements with some countries but which impose a lot of conditions and constraints, especially the supervision of a financial authority. It seems to us that, in order to put in place an “administrative feasible way” to make claims, the States of distribution should be considered and the CIV’s investors should be deemed to be residents of those countries.

**Specific comments on certain paragraphs**

- Page 28, paragraph 26: « Even in the case where the income of the CIV is taxed at a zero rate or is exempt of tax, the requirements to be treated as a resident may be met if the requirements to qualify for such a lower rate or exemption are sufficiently stringent »: it seems to us that an example in which the requirements are considered as stringent would help.

- In the example at paragraph 38 page 32, we do not understand what rate of WHT would be applied.

- Concerning the examples at the end of the report, we would like to remind you that financial regulation (such as the EU directive on Alternative Investment Funds) may authorise a fund to be managed by a management company established in another country. Therefore, there will be no staff in the State where the fund has been set up (staff being located at the level of the managing company).

Should you need any further information, please do not hesitate to contact us.

Kind regards
Comments on the
DRAFT CONTENTS OF THE 2017 UPDATE TO THE OECD MODEL TAX CONVENTION

These comments have been prepared by the BEPS Monitoring Group (BMG). The BMG is a network of experts on various aspects of international tax, set up by a number of civil society organizations which research and campaign for tax justice including the Global Alliance for Tax Justice, Red de Justicia Fiscal de America Latina y el Caribe, Tax Justice Network, Christian Aid, Action Aid, Oxfam, and Tax Research UK. These comments have not been approved in advance by these organizations, which do not necessarily accept every detail or specific point made here, but they support the work of the BMG and endorse its general perspectives. They have been drafted by Jeffery Kadet and Sol Picciotto, with contributions and comments from Tommaso Faccio.

August 2017

GENERAL COMMENTS

The 2017 revised version of the OECD Model Convention constitutes the most extensive revision since the model convention was first formulated. Many of the changes have been subject to public consultation, some of them as part of the G20/OECD project on Base Erosion and Profit Shifting (BEPS). However some, although resulting from that process, have not previously been issued as drafts for consultation. We understand that this is not always possible, especially in view of the many changes which have been put forward as a result of the intensive work over the past few years, especially in the BEPS project. We would nevertheless like to make comments on two of the changes on which responses have not been specifically requested.

1. Changes to paragraph 2 of Article 3 and related changes to the Commentaries on Articles 3 and 25

These changes provide that if the competent authorities agree on an interpretation of a treaty provision, that interpretation should override domestic law. This proposal was not included in the report on Action 14 of the BEPS project, but is presented here as part of the follow-up work to ‘clarify the legal status of a competent authority mutual agreement’. In our view, it is much more than a mere clarification. The relationship of an ‘interpretive mutual agreement’ between the competent authorities with provisions of domestic law is a sensitive one. Tax treaties are generally incorporated directly into domestic law, in various ways, and hence their provisions are subject to interpretation in the usual way by the courts. Courts generally are willing to give considerable weight to the views of administrative authorities responsible for applying such provisions about their meaning. However, courts have been much more reluctant to accept that...
such interpretations can override their jurisdiction to interpret their domestic law.¹ Inclusion of this new provision in a treaty may of course produce that very effect. However, this could be challenged, as an excessive delegation of power to administrative authorities.

Hence, instead of clarification, this provision could introduce confusion. Its inclusion is not merely a matter of ‘removal of doubt’, but raises important policy questions. These are related to the agenda of creating supranational resolution of tax treaty disputes. As our previous comments have pointed out, this shift will prove unacceptable to public opinion, especially if the administrative competent authority procedures continue in their current form of being conducted in total secrecy. We ourselves are generally supportive of increased use of interpretive mutual agreements between competent authorities, which could do much to clarify interpretation of tax treaties, and hence reduce conflicts. This depends however on their being established on a proper basis, with adequate provision for their publication in a systematic manner. The way in which these changes are being introduced, with no opportunity for public discussion, does not inspire confidence.

We regret the inclusion of this provision without adequate consultation, and advise countries not to include it in their treaties.

2. The addition of a new Article 29 (Entitlement to Benefits) and related Commentary, which includes in the OECD Model Tax Convention a limitation-on-benefits (LOB) rule (simplified and detailed versions), an anti-abuse rule for permanent establishments situated in third States, and a principal purposes test (PPT) rule.

The inclusion of an effective anti-abuse provision in all tax treaties is a central element of the BEPS project. Regrettably, the countries involved in the negotiations failed to reach agreement on the form that this should take. The large majority opted for a broad principal purpose test (PPT), although some consider that it could be combined with a simplified limitation of benefits provision (SLoB). However, the USA in particular held out against this, insisting on a detailed LoB article. This has been accepted as complying with the minimum commitments for the BEPS project, provided it is combined either with a PPT, or with suitable anti-conduit rules. The result is a complex menu of options, as we warned in our comments on the BEPS discussion drafts in 2015.

Despite the complexity, we commend the efforts made by the drafters to present the several options as clearly as possible. Most states are likely to opt for the simple solution of a general PPT provision, which allows them to apply the domestic anti-abuse solutions they consider appropriate. It remains to be seen, however, whether this will be accepted by key states, especially the US, which distrust a measure that they consider permits excessive discretion, and may insist on a detailed LoB provision. However, these detailed rules are complex and difficult to apply, and as shown by the experience of the continual revisions made to the US model over several decades, the attempt to establish bright-line rules is ineffective against ingenious and continually developing avoidance techniques.

Such a detailed article is now provided in this draft model. Although a previous version was issued in the work on Action 6 of the BEPS project, it was regarded as provisional pending finalization of the US model treaty. Although this version has therefore not been subject to

public consultation, a version which is presumably the same or very similar was presented to the UN Committee of Experts, and discussed in detail at its meetings of December 2016 and April 2017.

We suggest that it would be very helpful to users of the model conventions for the OECD Commentary to mention the UN model, and clarify whether the texts are indeed the same, or point out any differences. For example, the UN Committee rejected the SLoB. The UN model convention’s Commentary frequently refers to the OECD model, and indeed often includes explicit quotations from its Commentary. Such cross-referencing is helpful to users, and would be especially so in relation to this highly detailed article.

SPECIFIC COMMENTS

1. Changes to paragraph 13 of the Commentary on Article 4 related to the issue whether a house rented to an unrelated person can be considered to be a “permanent home available to” the landlord for purposes of the tie-breaker rule in Article 4(2) a.”

This change to paragraph 13 of the Commentary on Article 4 makes good sense. We believe that it is inappropriate for any individual to claim that a home that has been rented out and is not actually available to him is a home for purposes of applying any tax treaty. We therefore believe that this clarifying addition to paragraph 13 is appropriate. We approve of this change.

2. “Changes to paragraphs 17 and 19 of, and the addition of new paragraph 19.1 to, the Commentary on Article 4. These changes are intended to clarify the meaning of “habitual abode” in the tie-breaker rule in Article 4(2) c).”

We believe that this additional guidance on the meaning of “habitual abode” is long overdue. We applaud this addition to the Commentary.

3. “The addition of new paragraph 1.1[5] to the Commentary on Article 5. That paragraph indicates that registration for the purposes of a value added tax or goods and services tax is, by itself, irrelevant for the purposes of the application and interpretation of the permanent establishment definition.”

We agree that with the differing bases for application of VAT/GST and income-based tax, the addition of this clarifying paragraph is appropriate. We also believe, though, that as a practical matter, the voluntary or required registration for VAT/GST will continue to be a helpful signpost for local country tax authorities to be alerted to the potential of a permanent establishment.

4. “Deletion of the parenthetical reference “(other than a partnership)” from subparagraph 2 a) of Article 10, which is intended to ensure that the reduced rate of source taxation on dividends provided by that subparagraph is applicable in the case where new Article 1(2) would have the effect that a dividend paid to a transparent entity would be considered to be income of a resident of a Contracting State because it is taxed either in the hands of the entity or in the hands of the members of that entity. That deletion is accompanied by new paragraphs 11 and 11.1 of the Commentary on Article 10.”

We agree that this Article 10 change is appropriate and the new Commentary paragraphs provide clear explanations.
Dear Working Party No. 1,

Thank you for the opportunity to comment on the Draft 2017 update to the OECD Model Tax Convention (the “2017 Update”) issued 11 July 2017. We acknowledge and thank the OECD for the time and effort put into this draft.

Overall, BIAC welcomes the four changes to the OECD Model Tax Convention in the 2017 Update with considerable support for the addition of new paragraph 1.1 to the Commentary on Article 5. BIAC strongly supports this language which indicates that registration for the purposes of a value added tax (“VAT”) or goods and services tax (“GST”) is, by itself, irrelevant for the purposes of the application and interpretation of the permanent establishment definition.

BIAC believes that registering for VAT or GST should not have negative implications for income taxes and would encourage the OECD to strengthen this proposition further by ensuring that the addition to paragraph 1.1 cross-references the similar provisions in the OECD VAT Guidelines and the Base Erosion and Profit Shifting (“BEPS”) Action 1 Final Report.

Again, we thank you for the opportunity to comment on the 2017 Update, and look forward to working with you further.

Sincerely,

Alan McLean
Deputy Chair BIAC Tax Committee
ICC Comments on the OECD Model Tax Convention

The International Chamber of Commerce (ICC) appreciates the opportunity to comment on the draft contents of the 2017 update to the OECD Model Tax Convention.

ICC particularly welcomes the opportunity to provide input on the Commentary of Article 5 of the Convention which relates to the definition of a Permanent Establishment (PE) for taxation purposes. ICC fully supports the amendment to the Commentary of this Article, which specifies that the treatment of a foreign enterprise in terms of Value Added Tax (VAT)/Goods and Service Tax (GST) is, in itself, immaterial in the determination of a permanent establishment as outlined in the Convention. It holds true that a company registering for VAT or GST, and thereby operating as an uncompensated tax collector, should not be negatively impacted in the context of income taxes.

ICC believes that it would be beneficial to include in the Commentary a cross-reference to the VAT/GST Guidelines and with BEPS Action item 1 Final Report, which affirms that a registration for VAT/GST purposes does not constitute a PE for direct purposes. Similarly we would recommend that when the VAT/GST Guidelines are next updated that a cross-reference be included to the new paragraph in the Model Convention Commentary. It is our view that these cross-references would provide for greater alignment, harmonization and clarity when addressing issues overlapping with other areas of taxation.

Furthermore, ICC respectfully recommends providing further clarification in the draft text of the Commentary in order to highlight that registration for VAT/GST falls within the scope of treatment under VAT/GST. Please find below a proposed addition to the current text

“In many States, a foreign enterprise may be allowed or required to register for the purposes of a value added tax or goods and services tax (VAT/GST) regardless of whether it has in that State a fixed place of business through which its business is wholly or partly carried on or whether it is deemed to have a permanent establishment in that State under paragraph 5 of Article 5. By itself, however, treatment under VAT/GST is irrelevant for the purposes of the interpretation and application of the definition of permanent establishment in the Convention; when applying that definition, one should not, therefore, draw any inference from the treatment of a foreign enterprise for VAT/GST purposes, including from the fact that a foreign enterprise has registered for VAT/GST purposes.”

ICC recognizes that this proposal is predominantly for the purpose of increased clarification, and reiterates its strong support for the inclusion of this new paragraph to the Commentary on Article 5 of the OECD Model Tax Convention.

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1 The reference in the VAT Guidelines is in footnote 24 and the reference in Action 1 Final Report is in paragraph 337 on page 127.

Submitted to OECD on 10 August 2017
The International Chamber of Commerce (ICC) Commission on Taxation

ICC is the world business organization, whose mission is to promote open trade and investment and help business meet the challenges and opportunities of an increasingly integrated world economy.

Founded in 1919, and with interests spanning every sector of private enterprise, ICC’s global network comprises over 6 million companies, chambers of commerce and business associations in more than 130 countries. ICC members work through national committees in their countries to address business concerns and convey ICC views to their respective governments.

The fundamental mission of ICC is to promote open international trade and investment and help business meet the challenges and opportunities of globalization. ICC conveys international business views and priorities through active engagement with the United Nations, the World Trade Organization, the Organisation for Economic Co-Operation and Development (OECD), the G20 and other intergovernmental forums.

The ICC Commission on Taxation promotes transparent and non-discriminatory treatment of foreign investment and earnings that eliminates tax obstacles to cross-border trade and investment. The Commission is composed of more than 150 tax experts from companies and business associations in approximately 40 countries from different regions of the world and all economic sectors. It analyses developments in international fiscal policy and legislation and puts forward business views on government and intergovernmental projects affecting taxation. Observers include representatives of the International Fiscal Association (IFA), International Bar Association (IBA), Business and Industry Advisory Committee to the OECD (BIAC), Business Europe and the United Nations Committee of Experts on International Cooperation in Tax Matters.
Comments on the Draft contents of the 2017 update to the OECD Model Tax Convention

Dear Sirs,

We would like to thank you for the exceptional work and results achieved with regard to the treaty-related measures developed as part of the OECD/G20 BEPS Project and for the opportunity to submit our comments on the proposed further changes to the OECD Model that have been released for the first time in the “Draft contents of the 2017 update to the OECD Model Tax Convention”, released on 11 July 2017 (“Draft”). Our comments are set below.

1. Commentary on Article 4: “permanent home” test

The aim of the proposed addition to the Commentary on Article 4 concerning the “permanent home” test is appreciated.

We note, however, that the new sentence to be included in paragraph 13 of the Commentary, which concerns the case of an individual renting out a house situated in a Contracting State, appears to deal with the concept of
“availability” of a home, and, as such, does not have the purpose of better illustrating the content of the previous sentences, as the phrase “For instance” at the beginning of the new sentence would seem to suggest. Indeed, the previous sentences of paragraph 13 deal with the concept of “permanence” of the home, rather than with the concept of its “availability”.

For this reason, we would suggest adding the following wording before the proposed sentence:

*The mere ownership of a house or apartment does not necessarily imply its availability.*

As a further comment, given that the new sentence specifically refers to cases where the house, in addition to being rented out, has been “effectively handed over” and, as a consequence, the owner has no possession and possibility to stay there, we believe that it would be excessively restrictive to limit such cases to the renting out of a house to an “unrelated” party. In this respect, our suggestion is to delete the words “to an unrelated party” and substitute “to a genuine tenant” for them.

With such proposed changes, the proposed sentences would read as follows:

*The mere ownership of a house or apartment does not necessarily imply its availability. For instance, a house owned by an individual cannot be considered to be available to that individual during a period when the house has been rented out and effectively handed over to a genuine tenant an unrelated party so that the individual no longer has the possession of the house and the possibility to stay there.*

More generally, with respect to the notion of “permanent home available” to the individual, it would be appropriate for the Draft to better elucidate that concept. In particular, the Commentary should be modified in order to clarify whether the “permanent home” test is essentially objective or subjective.
In this respect, the Commentary should discuss (i) whether there is a time-threshold (e.g. 1 year or 2), which, if met, qualifies in any case the dwelling available in the relevant Contracting State as “permanent home” (the alternative that in our view is preferable), or, on the contrary, (ii) whether only stays in the Contracting State that are planned not to be temporary qualify, so that any stay which is planned to be temporary never qualifies for the “permanent home” test, even if of a long duration (e.g. 2 or 3 years).

In addition, the Commentary should discuss whether, and to what extent, a change of the initial expectation or intention of the taxpayer should affect the “permanent home” test (as the Commentary on Article 5 does in respect of the “permanent establishment” concept – see paragraph 6.3 of the current Commentary, which corresponds to paragraph 34 of the proposed new Commentary). More precisely, if the interpretation sub (i) were agreed upon and included in the Commentary, the Commentary should discuss whether the continuous availability of a dwelling for a period shorter than the minimum threshold (e.g. 9 months spent by an expat in the relevant Contracting State) nonetheless qualifies the dwelling as “permanent home” where the stay was initially planned to last longer than the threshold and the actual shorter stay was the result of a change in circumstances (e.g., with regard to the previous example, the intention was to stay for 3 years, but due to a change in the business plan of the employer the stay had lasted for only 9 months). If, alternatively, interpretation sub (ii) were included in the Commentary, there would be a need to clarify whether the continuous availability of a dwelling in the Contracting State for a very short period of time (e.g. 3 months) nonetheless qualifies the dwelling as “permanent home” where the stay was initially planned to be indefinite and turned out to be so short due to a change in circumstances. In addition, under interpretation sub (ii), the Commentary should also elucidate whether, in the case the taxpayer had the initial intention to stay in the relevant Contracting State for a limited period of time and later decided to remain indefinitely in that State, the initial intention leads to a qualification of the dwelling as a non-permanent home until the change of intention occurred.
In any case, it would be useful if the Commentary could clarify that the availability of different dwellings at subsequent points in time is not decisive for the purpose of the “permanent home” test. Thus, if the taxpayer moved to a Contracting State with a view to stay there indefinitely and, while looking for a house to buy, rented a flat for a short period of time (e.g. 6 months), that flat should be regarded as a “permanent home” in the same way as the house subsequently purchased should be.

Furthermore, it should be highlighted that, where the “permanent home” test is satisfied exclusively for a part of the relevant tax year, its effects should be considered separately for both the part of the tax year in which the test is satisfied and for the part of the tax year in which the test is not satisfied. For example, if the taxpayer had a permanent home available exclusively in one of the Contracting States for the first 4 months of the relevant tax year and also had a permanent home available in both Contracting States (or in neither State) for the remaining 8 months of the tax year, the permanent home test would be decisive to establish the treaty residence with regard to the first 4 months, while not being conclusive for the remaining 8 months.

Finally, the Commentary should confirm that, in the case the taxpayer moved from one Contracting State to the other for a temporary stay, after which he returned to the first-mentioned State, the dwelling maintained at his disposal in the Contracting State of origin would generally qualify as a “permanent home”. This conclusion seems implicitly supported by current paragraph 15 of the Commentary on Article 4.

2. Commentary on Article 4: “habitual abode” test

With regard to paragraph 17 of the Commentary on Article 4, we propose to delete the reference to the “State where he stays more frequently”, as it appears misleading in that context, and substitute for it a reference to the “first-mentioned State”. As a result, paragraph 17 would read as follows:

17. In the first situation, the case where the individual has a permanent home available to him in both States, the fact of having
an habitual abode in one State rather than but not in the other appears therefore as the circumstance which, in case of doubt as to where the individual has his centre of vital interests, tips the balance towards the State where he stays more frequently first-mentioned State. For this purpose regard must be had to stays made by the individual not only at the permanent home in the State in question but also at any other place in the same State.

We praise the introduction of a reference to the frequency, duration and regularity of stays that are part of the settled routine of an individual’s life and are, therefore, more than transient, for the purpose of elucidating the concept of “habitual abode”. In this respect we would propose the inclusion in paragraph 19 of a third example, concerning a situation that is common in practice, i.e. the case of an individual working in a Contracting State and spending most of the weekends in the other Contracting State.

Assume, finally, that the individual works in State A and returns to State B practically every weekend. In that case, the individual will have an habitual abode both in State A and in State B, as his returns to State B are both frequent and regular and their overall duration allows him to settle a routine life also in that State.

With regard to the period of time over which it must be established whether an individual has an habitual abode in one or both Contracting States, it would be helpful if the Commentary gave clearer directions, for example by providing that, as a general rule, such a period should cover the fiscal year concerned and the two (or four) preceding years, unless during that period there were major, non-temporary, changes in the habits of the individual. In this respect, the broad expression “changes in the habits” should replace the more limited expression “changes of personal circumstances” included in paragraph 19.1 of the draft Commentary on Article 4. A change in habits lasting for more than a certain number on months (e.g. twelve months) should not be regarded as temporary, while a change lasting for less than such a threshold should. Moreover, the Commentary should state that, whenever a major, non-temporary, change in the habits of the individual occurs such a change should be taken as a
dividing line between periods that would be regarded as independent for the purpose of the analysis.

Finally, we would propose to amend the last part of paragraph 19.1 of the draft Commentary on Article 4. First, the example currently included in paragraph 19.1 should highlight that the reference period for the analysis is longer than the 190 day-period of dual residence because that period should be regarded as “temporary” in the sense previously mentioned. Second, the Commentary should explicitly conclude in the sense that, over the three-year period of analysis, the presence in State D does not amount to an habitual abode therein, lacking the necessary frequency, duration and regularity. Possibly, a second example should be added, in which the period of work in State D amounted to 400 days. The Commentary should note that, since there is a non-temporary and major change in the habits of the taxpayer, that period should be accounted for as an independent period of analysis. During that period, the individual should be regarded as having an habitual abode in State D and not having an habitual abode in State C.

3. Commentary on Article 5: registration for the purposes of value added tax or goods and services tax

We agree with the proposed clarification.

From a formal perspective, we note that the references to the new paragraph of the Commentary on Article 5 should be to paragraph 5 and not to paragraph 1.1 (page 4 of the Draft).

With respect to cases where a foreign enterprise may be required to register in another State for VAT/GST purposes, it might be worth considering that in a number of instances a foreign enterprise might be obliged, or have the possibility, to appoint a representative in the other State. Such representative could either be a third party (e.g. a professional) or a related party (e.g. a local subsidiary). In this respect, the Commentary
should further clarify that even the appointment of such a representative does not, per se, determine the existence of a permanent establishment.¹

Furthermore, since – as already stated in new paragraph 5 of the Commentary – the registration for VAT/GST purposes could also be optional for the foreign enterprise, the Commentary should make it clear that the behaviour of the foreign enterprise for VAT/GST purposes should be irrelevant for the purposes of ascertaining the existence of a permanent establishment under the Convention.

In the light of the above, paragraph 5 could be amended as follows:

5. In many States, a foreign enterprise may be allowed or required to register for the purposes of a value added tax or goods and services tax (VAT/GST) or to appoint a representative (either related or unrelated party) in the other State regardless of whether it has in that State a fixed place of business through which its business is wholly or partly carried on or whether it is deemed to have a permanent establishment in that State under paragraph 5 of Article 5. By itself, however, treatment under VAT/GST is irrelevant for the purposes of the interpretation and application of the definition of permanent establishment in the Convention; when applying that definition, one should not, therefore, draw any interference from the treatment or behaviour of a foreign enterprise for VAT/GST purposes.

¹ In a similar fashion, for EU VAT purposes, Article 11(3) of the Council Implementing Regulation (EU) no. 282/2011 of 15 March 2011, provides that “The fact of having a VAT identification number shall not in itself be sufficient to consider that a taxable person has a fixed establishment.”
4. Article 10: deletion of the parenthetical reference “(other than a partnership)” and related changes to the Commentary

We agree with the deletion of the reference to “(other than a partnership)” in paragraph 2(a) of Article 10, as well as with new paragraphs 11 and 11.1 of the Commentary on Article 10. Nonetheless, we would propose to include the following further clarifications.

At the end of the last sentence of paragraph 11 of the Commentary, which reads “That conclusion is confirmed by the provision on fiscally transparent entities in paragraph 2 of Article 1”, it should be added “and by paragraphs 2 through 6.7 of the Commentary on Article 1 as they read since 2000 and before the inclusion of Article 1, paragraph 2 in the Model”. Indeed, the conclusion that a partnership, which is treated as a company for tax purposes in its State of residence, should be entitled to the benefits of Article 10(2)(a) with respect to dividends paid by a company resident of the other State, as long as it holds directly at least 25 per cent of the capital of that company, holds true irrespective of whether the relevant Convention includes new Article 1(2). The proposed new wording is aimed at clarifying this point.

In addition, the Commentary should confirm that, for the purpose of determining whether the threshold of 25 per cent holding in the capital of the distributing company is met, multiple indirect holdings through different fiscally transparent entities and arrangements should be added up. In this respect, at the end of the third sentence of paragraph 11.1 of the Commentary, which reads “Also, for the purposes of the application of subparagraph a) of paragraph 2 in such a case, a member that is a company should be considered to hold directly, in proportion to its interest in the fiscally transparent entity or arrangement, the part of the capital of the company paying the dividend that is held through that entity or arrangement and, in order to determine whether the member holds directly at least 25 per cent of the capital of the company paying the dividends, that part of the capital will be added to other parts of that capital that the member may otherwise hold directly”, it should be added “or through other fiscally transparent entities or arrangements”.
Finally, the Commentary should better elucidate the mechanism for computing the days of holding in the capital of the distributing company in the case a direct holding is followed (or preceded) by an indirect holding through fiscally transparent entities and arrangements. To that end, after the fourth sentence of paragraph 11.1 of the Commentary, which reads “In that case, for the purposes of the application of the requirement that at least 25 per cent of the capital of the company paying the dividends be held throughout a 365 day period, it will be necessary to take account of both the period during which the member held the relevant interest in the fiscally transparent entity or arrangement and the period during which the part of the capital of the company paying the dividend was held through that entity or arrangement: if either period does not satisfy the 365 day requirement, subparagraph a) will not apply and subparagraph b) will therefore apply to the relevant part of the dividend.”, the following sentences should be included: “However, for the purposes of the application of the requirement that at least 25 per cent of the capital of the company paying the dividends be held throughout a 365 day period, the period of direct holding in the capital of that company and the preceding, or following, period of indirect holding through the fiscally transparent entity or arrangement should be added together. For instance, where a company resident of State B had directly held 30 per cent of the capital of a company resident of State A for 200 days and subsequently transferred that holding to a partnership, treated as fiscally transparent under the laws of State B, so that, as a result, it has indirectly held, through the fiscally transparent partnership, 25 per cent of the capital of the other company for an additional 180 days, the former company should be regarded as having held a participation of at least 25 per cent of the capital of the latter company for a period exceeding 365 days.”.
5. Commentary on Articles 10, 11 and 21: application of Articles 10 and 11 to income arising in a Contracting State and paid to a resident of the same Contracting State

The proposed new paragraph 8 of the Commentary on Article 10 reads as follows:

8. The Article deals only with dividends paid by a company which is a resident of a Contracting State to a resident of the other Contracting State. It and does not, therefore, apply to dividends paid by a company which is a resident of a third State or to dividends paid by a company which is a resident of a Contracting State which are attributable to a permanent establishment which an enterprise of that State has in the other Contracting State may be taxed by the first-mentioned State under paragraph 2 but may also be taxed by the other State under paragraph 1 of Article 7 (see paragraphs 9 and 9.1 of the Commentary on Articles 23 A and 23 B concerning relief of double taxation in such cases). (for these cases, see paragraphs 4 to 6 of the Commentary on Article 21).

Similarly, the proposed new paragraph 6 of the Commentary on Article 11 reads as follows:

6. The Article deals only with interest arising in a Contracting State and paid to a resident of the other Contracting State. It and does not, therefore, apply to interest arising in a third State or to interest arising in a Contracting State which is attributable to a permanent establishment which an enterprise of that State has in the other Contracting State may be taxed by the first-mentioned State under paragraph 2 but may also be taxed by the other State under paragraph 1 of Article 7 (see paragraphs 9 and 9.1 of the Commentary on Articles 23 A and 23 B concerning relief of double taxation in such cases). (for these cases, see paragraphs 4 to 6 of the Commentary on Article 21).
The Draft also provides a consequential change to the Commentary on Article 21 (paragraph 5 thereof).

Although these draft changes are not among those on which comments are expressly invited, we nonetheless consider that they should be subject to public discussion, since, on the one hand, they have not been included – to our knowledge – in any previous OECD public document and, on the other hand, they seem to introduce a deviation from the common understanding of the functioning of Articles 10 and 11.

These draft changes are triggered by the 2014 amendments to Article 10(2) and Article 11(2) of the Model, which were purported to clarify that the limitation of tax in the Contracting State of source remains available when an intermediary that is located in the same Contracting State, or in a third State, is interposed between the beneficiary and the payer, but the beneficial owner is a resident of the other Contracting State.

Although the new text of paragraph 2 of both Article 10 and Article 11 allows the interpretation provided for in the draft Commentary, i.e. that dividends and interest sourced in a Contracting State and beneficially owned by a resident of the same Contracting State may be taxed, without any limitation (except for those imposed by Article 23) in that State under Article 10(2) and Article 11(2), we believe this not to be the common understanding of the functioning of those Articles.

Before the changes to the Model occurred in 2014, Articles 10(2) and 11(2) had generally been interpreted, in accordance with Articles 31 and 32 of the Vienna Convention on the Law of Treaties, as referring exclusively to the case where dividends and interest were sourced in a Contracting State and beneficially owned by a resident of the other Contracting State. That construction was a contextual interpretation supported by the use of the adjective “such” at the outset of paragraph 2 of both Articles, which referred to the dividends and interest covered by paragraph 1 thereof, namely “Dividends paid by a company which is a resident of a Contracting State to a resident of the other Contracting State” and “Interest arising in a Contracting State and paid to a resident of the other Contracting State”. That interpretation was also supported by
paragraph 8 of the Commentary on Article 10 and paragraph 6 of the Commentary on Article 11.

On the contrary, dividends and interest sourced in a Contracting State, beneficially owned by a person resident of the same State and attributable to a permanent establishment of that person situated in the other Contracting State, have always been considered exclusively covered by Article 7.

For the sake of clarify, we would propose upholding such an interpretation by amending paragraph 4 of both Articles 10 and 11. The new texts (respectively) should be as follows:

The provisions of paragraphs 1 and 2 shall not apply if the beneficial owner of the dividends, being a resident of a Contracting State, carries on business in the other Contracting State of which the company paying the dividends is a resident through a permanent establishment situated therein and the holding in respect of which the dividends are paid is effectively connected with such permanent establishment. In such case the provisions of Article 7 shall apply.

The provisions of paragraphs 1 and 2 shall not apply if the beneficial owner of the interest, being a resident of a Contracting State, carries on business in the other Contracting State in which the interest arises through a permanent establishment situated therein and the debt-claim in respect of which the interest is paid is effectively connected with such permanent establishment. In such case the provisions of Article 7 shall apply.

Alternatively, Articles 10 and 11 of the Model could be amended to clarify that they only apply to cases where the relevant items of income are sourced in a Contracting State and beneficially owned by residents of the other Contracting State. In such a case, Articles 10 and 11 would be modified as follows:

**Article 10**
1. Dividends paid by a company which is a resident of a Contracting State to and beneficially owned by a resident of the other Contracting State may be taxed in that other State.

2. However, dividends paid by a company which is a resident of a Contracting State such dividends may also be taxed in that the first-mentioned State according to the laws of that State, but if the beneficial owner of the dividends is a resident of the other Contracting State, the tax so charged shall not exceed:

   a) 5 per cent of the gross amount of the dividends if the beneficial owner is a company (other than a partnership) which holds directly at least 25 per cent of the capital of the company paying the dividends;
   b) 15 per cent of the gross amount of the dividends in all other cases.

The competent authorities of the Contracting States shall by mutual agreement settle the mode of application of these limitations.

This paragraph shall not affect the taxation of the company in respect of the profits out of which the dividends are paid.

**Article 11**

1. Interest arising in a Contracting State and paid to beneficially owned by a resident of the other Contracting State may be taxed in that other State.

2. However, such interest arising in a Contracting State may also be taxed in that the first-mentioned State according to the laws of that State, but if the beneficial owner of the interest is a resident of the other Contracting State, the tax so charged shall not exceed 10 per cent of the gross amount of the interest. The competent authorities of the Contracting States shall by mutual agreement settle the mode of application of this limitation.
Please feel free to contact us at DTC@maisto.it with any questions or comments concerning this letter.

Sincerely yours,
Comments on the Draft Contents of the 

2017 Update to the OECD Model Tax Convention

August 1st, 2017

Tax Treaties, Transfer Pricing and Financial Transactions Division
OECD/CTPA
By email: taxtreaties@oecd.org

To whom it may concern:

We are pleased to comment on selected matters included in the Draft Contents of the 2017 Update to the OECD Model Tax Convention (OECD MTC, the draft taken as a whole) through the consultation taking place from July 11, 2017 to August 10, 2017.

This document may be posted on the OECD website. Full credit goes to Robert Robillard, RBRT Inc. ¹

1. Article 4, changes to paragraph 13 of the Commentary

Suggested changes to paragraph 13 of the Commentary on Article 4 of the OECD MTC intend to provide clarifying explanations on the notion of “permanent home” for the eventual implementation of the tie-breaker rules found in Article 4(2)a) of the OECD MTC.

These explanatory comments read as follows on page 67 of the draft (see last sentence in bold and italic characters):

“13. As regards the concept of home, it should be observed that any form of home may be taken into account (house or apartment belonging to or rented by the individual, rented furnished room). But the permanence of the home is essential; this means that the individual has arranged to have the dwelling available to him at all times continuously, and not occasionally for the purpose of a stay which, owing to the reasons for it, is necessarily of short duration (travel for pleasure, business travel, educational travel, attending a course at a school, etc.). For instance, a house owned by an individual cannot be considered to be available to that individual during a period when the house has been rented out and

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effectively handed over to an unrelated party so that the individual no longer has the possession of the house and the possibility to stay there.”

Regarding the suggested changes included in the draft, we believe that greater clarity could be achieved by adding the following sentence at the end of the paragraph (see the underlined sentence):

“"For instance, a house owned by an individual cannot be considered to be available to that individual during a period when the house has been rented out and effectively handed over to an unrelated party so that the individual no longer has the possession of the house and the possibility to stay there. A house is deemed unavailable when it is either rented out on a weekly, monthly, or any other longer or shorter length of period provided it generates income from a source.""

The first part of the suggested sentence (underlined) would deal in itself with the notion of shorter or longer renting periods.

The last part of the sentence (underlined and bold characters: “provided it generates income from a source”) relates to new paragraph 1 (see page 11 of the draft).

It specifically addresses irregular leasing activities of an house that may arise from the use of online marketplace such as Airbnb for purposes other than direct commercial activities, in which case the “home” should be deemed as “permanent” for the purpose of the tie-breaker rules found in Article 4(2)a).

2. Article 5, new paragraph 1.1 of the Commentary

We would assume that comments are in fact invited with respect to new paragraph 5 instead of paragraph 1.1, as it is numbered in the preamble of the draft. New paragraph 5 to the Commentary on Article 5 read as follows on page 71 of the draft:

“"5. In many States, a foreign enterprise may be allowed or required to register for the purposes of a value added tax or goods and services tax (VAT/GST) regardless of whether it has in that State a fixed place of business through which its business is wholly or partly carried on or whether it is deemed to have a permanent establishment in that State under paragraph 5 of Article 5. By itself, however, treatment under VAT/GST is irrelevant for the purposes of the interpretation and application of the definition of permanent establishment in the Convention; when applying that definition, one should not, therefore, draw any inference from the treatment of a foreign enterprise for VAT/GST purposes.”"

Although accurate in its substance, this paragraph highlights, once more, the unnecessary compliance burden that is created by various criteria for VAT/GST liability around the world. It also highlights the pressing needs for a common criterion to properly determine liability to VAT/GST on a worldwide basis.
In this day and age of e-commerce, companies all across the world must deal on a regular basis with a nightmarish burden to determine liability to VAT/GST in any given foreign country, state, province, territory, county or even city. And this, for no other valid reasons than tax-starved governments’ blind unwillingness to facilitate business expansion and employment creation in an orderly fashion.

In the United States alone, there are over 45 sales tax regimes. Canada displays specific sales tax regimes in Quebec, British-Columbia, Saskatchewan and Manitoba on top of the federal HST regime found in the other provinces and territories.

Smaller businesses simply cannot be expected to ensure compliance with every sales tax regime on an ongoing basis without incurring significant and unjustifiably high costs.

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August 1st, 2017

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2 For an overview, see https://en.wikipedia.org/wiki/Sales_taxes_in_the_United_States.
August 8, 2017

VIA EMAIL
Jefferson VanderWolk
Tax Treaties, Transfer Pricing and Financial Transactions Division
OECD/CTPA
taxtreaties@oecd.org

RE: 2017 Draft OECD Model Tax Convention

Dear Mr. VanderWolk,

USCIB\(^1\) appreciates the opportunity to comment on the limited parts of the OECD Model Convention that were not previously subject to comment.

We strongly support the inclusion of the new paragraph to the Commentary on Article 5 that indicates that treatment of the foreign enterprise under VAT/GST is, by itself, irrelevant for the purposes of the application and interpretation of the permanent establishment definition in the Convention.

The proper application of VAT rules is facilitated by companies registering for VAT. In the context of VAT, companies are functioning as uncompensated tax collectors, so registering for VAT or GST should not have any negative implications for income taxes.

USCIB has two suggestions for improving the draft language. First, the Commentary should cross-reference a similar provision in the VAT Guidelines and the language in the Action 1 Final Report.\(^2\) These cross-references would be helpful in dealing with the “silos” that sometimes cause confusion on issues of overlap between different types of taxes.

Second, USCIB believes the draft language could be usefully clarified by the addition of the language inserted below in bold italics.

In many States, a foreign enterprise may be allowed or required to register for the purposes of a value added tax or goods and services tax (VAT/GST) regardless of whether it has in that State a fixed place of business through which its business is wholly or partly carried on or whether it is deemed to have a permanent establishment in that State under paragraph 5 of Article 5. By itself, however, treatment under VAT/GST is irrelevant for the purposes of the interpretation

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\(^1\) USCIB promotes open markets, competitiveness and innovation, sustainable development and corporate responsibility, supported by international engagement and prudent regulation. Its members include top U.S.-based global companies and professional services firms from every sector of our economy, with operations in every region of the world. With a unique global network encompassing leading international business organizations, USCIB provides business views to policy makers and regulatory authorities worldwide, and works to facilitate international trade and investment.

\(^2\) The reference in the VAT Guidelines is in footnote 24 and the reference in Action 1 Final Report is in paragraph 337 on page 127. It would also be useful when the VAT Guidelines are next updated to cross-reference the new paragraph in the Model Convention Commentary.
and application of the definition of permanent establishment in the Convention; when applying that definition, one should not, therefore, draw any inference from the treatment of a foreign enterprise for VAT/GST purposes, including from the fact that a foreign enterprise has registered for VAT/GST purposes.

USCIB believes that this addition would be helpful since it is not entirely clear that registration for VAT/GST purposes would be “treatment under VAT/GST”. This addition would complete the link between the first sentence of the paragraph and the second sentence of the paragraph.

Sincerely,

William J. Sample
Chair, Taxation Committee
United States Council for International Business (USCIB)