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Quantera Global

Quantera Global B.V.
Eindhovenseweg 128
5582 HW Waalre
T. +31 88 221 5800
www.quanteraglobal.com

To OECD International Co-operation and Tax Administration Division, Centre for Tax Policy and Administration

From Quantera Global

Date January 25, 2021

Ref Memo to OECD Centre for Tax Policy and Administration (Action 14).docx

Comments on Public Consultation Document BEPS Action 14: Making Dispute Resolution Mechanisms More Effective – 2020 Review

Quantera Global welcomes the opportunity to comment on the Action 14 consultation paper released on November 18, 2020. Please find below our remarks.

General remarks

Increasing levels of transfer pricing audit activity, interpretations and applications of new transfer pricing rules, and complex business models will for sure result in a substantial increase of tax related disputes. As levels of tax controversy increase the mechanisms to solve the disputes such as the mutual agreement procedure (MAP), are more important than ever. Common standards and procedures will further improve efficiency and confidence of taxpayers that their issues will be properly and timely addressed.

In addition to solving disputes that have arisen also the avoidance of new disputes is crucial. Not just because certainty allows taxpayers to focus on business rather that on dealing with lengthy disputes, but also certainty will mitigate the number of new disputes and help authorities to manage their caseload. Further use of (bilateral) APA programs is therefore welcomed.

Both MAPs and APAs do require sufficient resources to make the procedures effective and limit any thresholds to enter into the procedures. Therefore the allocation of adequate resources at the level of tax authorities will be crucial to the success of any form of consensus on the dispute resolution mechanisms. We would welcome strong commitments by tax authorities to allocate additional resources to the MAP and APA programs when it shows that existing resources will not be able to meet the intended goals.

Proposals to strengthen the Minimum Standard

Proposal 1: Increase the use of Bilateral APAs

We welcome the proposal to strengthen the Minimum Standard and to introduce an obligation to establish a bilateral advanced pricing agreement ("APA") program. However we would prefer not to include an exemption for jurisdictions with a low volume of transfer pricing MAP cases. We do not feel the mere number of cases would be a good indicator of the potential benefit of having access to bilateral APAs. We belief all jurisdictions should provide at least access to a bilateral APA. For those jurisdictions that have only a limited number of cases it could be considered to allow to deal with requests on a case by case basis and not to insist on formal APA programs that would require substantial additional efforts and resources. We belief it would be helpful when taxpayers should not need to question whether a bilateral APA would be possible or not. The option to pursue a bilateral APA should be a standard option.
Obviously all authorities would need to commit to allocate sufficient resources to handle the APA cases, whether as part of a formal APA program or relating to incidental APAs. If available resources would require some limitation in the number of cases to be handled such limitation could be to limit the bilateral APAs to complex cases only.

Proposal 2: Expand access to training on international tax issues for auditors and examination personnel.

We have experiences with inappropriate adjustments that ultimately are withdrawn in MAP. Although we do support the training of officials as a best practice we belief it would be more effective to introduce mandatory early involvement of the competent authority ("CA") in cases that could end up in a MAP. The early involvement of the CA will have a direct impact on the evaluation of the case and will also lead to 'training on the job' for the local auditors in respect of the international considerations of a MAP. Having mandatory involvement of the CA will (1) create relevant awareness at the level of the local auditors, (2) reduce the number of inappropriate adjustments and avoidable MAP procedures and (3) likely will support a reduction of processing time of the remaining MAPs. The CA should be independent from the local auditors to be effective.
The mandatory early involvement of the CA would requires tax authorities to allocate sufficient resources to the CA to handle the workload.

Proposal 3: Define criteria to ensure that access to MAP is granted in eligible cases and introduce standardized documentation requirements for MAP requests.

We still see cases where taxpayers are being pressured to agree to not request a MAP as part of a local settlement. Although this should not happen it is not likely that formal statements about having access to MAP will really make a difference in practice. Most taxpayers that agree to waive the MAP option do so because they need to deal with the same person again and again for a long period of time. For these taxpayers the constructive relationship with the individual auditor may be more important than a certain amount of double taxation. They would likely make the same evaluation when they would

know for sure that they still could formally request a MAP. And likely hey would come to the same conclusion not to pursue the MAP in order to maintain a good relationship with their local tax auditor. So if this practice of putting pressure on taxpayer is to be eliminated it would need to solved at the level of the auditor and not at the level of the taxpayer rights. This would require clear measures that would put a substantial 'penalty' on undue behaviour of the tax officials putting pressure on tax payers. In addition it should be made explicit that taxpayers as well as CA will not be legally bound to any waiver of their right to request a MAP. This would allow a taxpayer to reconsider and come to the conclusion that requesting a MAP would best serve its interests.
Standardized documentation requirements for MAP requests will help taxpayers to prepare and process a MAP request. It will also help less experienced tax authorities to get started. Therefore we do belief that having a specific list of items to be provided is a good thing. The list should be construed in a way that it would cover most of the countries. However countries should be allowed to tailor such list with information that otherwise would have been requested from taxpayer in second instance. Whether long or short the appropriate list should facilitate a smooth processing of a MAP request.

Proposal 4: Suspend tax collection for the duration of the MAP process under the same conditions as are available under the domestic rules.

We support any measures that help mitigating cash flow challenges for taxpayers due to a pending MAP. Eliminating the cash flow impact will help to further improve access to MAP.
As MAP is always dealing with at least two countries there can always be differences between local domestic rules. In order to avoid a patchwork of rules we would support a standard approach to deal with tax collection for the duration of a MAP irrespective of the local domestic rules. This will support and further improve access to MAP and provide for a clear and uniform approach.

Proposal 5: Align interest charges/penalties in proportion to the outcome of the MAP process.

We agree to the suggested alignment of interest and penalties and to elevate this to a minimum standard.

Proposal 6: Introduce a proper legal framework to ensure the implementation of all MAP agreements.

Proper implementation of the MAP agreements is an essential part of the whole process. If a country does not intend to implement a MAP agreement it should not enter into the agreement. As local limitations may be divers it is burdensome for taxpayers and tax authorities alike to consider the specific risk for a specific case.
Countries that enter into a MAP should be prepared to implement the agreements and the local regulations should not prohibit a proper implementation. The suggested three alternative options to establish a proper legal framework will provide for a more clear and consistent behaviour of countries involved in MAP and will further improve the active use of MAPs by taxpayers.

Proposal 7: Allow multi-year resolution through MAP of recurring issues with respect to filed years.

We have experiences with multi-year resolution of cases that cover a period of more than 10 years. We believe that including multi-year resolution through MAP into the minimum standard would contribute to the effective resolution of cases. Once authorities have agreed on a given case they would save considerable time and resources by applying the agreement to all years that provide for (sufficient) facts and circumstances.
As efficiencies apply both to taxpayers and tax authorities it would be balanced to allow multiple year resolution also on the initiative of tax authorities and not just on taxpayer initiative. Parties should have the opportunity to consider the appropriateness of a multi-year resolution at any time during a pending MAP.

Proposal 8: Implement MAP arbitration or other dispute resolution mechanisms as a way to guarantee the timely and effective resolution of cases through the mutual agreement procedure.

Having arbitration included in the minimum standard will certainly have an impact on the resolution of MAPs. However it would need to be combined with additional measures that would prohibit undue delay by limiting the possible extension of time limits. Without such limitation countries will seek to extend the applicable time limits repeatedly and this would effectively take away the incentive that the arbitration option would provide. Although such extension would need taxpayer consent it will be difficult for a taxpayer to refuse. Therefore clear and limited options to extend time limits should be part of the package. Extending the time limits should be the exception and not the standard.
Although a swift resolution of a MAP should be the primary goal it will only be possible if countries will allocate sufficient resources to handle their MAP caseload.

Proposals to strengthen the MAP Statistics Reporting Framework

Proposal 1: Reporting of additional data relating to pending or closed MAP cases.

We agree that the three suggested additional data items would further support a proper analysis of a country's performance. Additionally we like to suggest to include additional data on proper implementation of MAPs and to apply a chess-clock principle to illustrate the allocation of the overall processing time of the MAP to either CA.
Data on implementation of MAP agreements.
Publication of data will provide a strong incentive to countries to show they are really making a best effort. Including data on proper implementation of MAPs will allow to identify countries that effectively do not implement MAP agreements. Data should include the reason for non-implementation.
Chess-clock principle in respect of processing time of a MAP.
Currently only overall information on processing time of a MAP is provided. If the overall processing time would be 4 years this does not provide much insight in who was responsible for the delay. Using a chess-clock principle would allocate the overall 4 year period to both competent authorities which would allow to identify whether a certain CA was responsible for substantial delay or not.

Proposal 2: Providing relevant information on other practices that impact MAP-APA statistics.

Many countries already provide some form of APA statistics. However these statistics are not aligned which does not support a proper analysis and comparison of country performances. We welcome the publication of consistent APA statistics by the OECD.
The suggested data in the consultation document would be useful. However we feel that the information on MAP and APA should be as similar as possible. This would allow taxpayers to compare and decide which alternative they would prefer.