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International Co-operation and Tax Administration Division
Centre for Tax Policy and Administration
Organisation for Economic Co-operation and Development

By email: taxpublicconsultation@oecd.org

Dear Achim, Sophie and Matt

BEPS Action 14: Making Dispute Resolution Mechanisms More Effective – 2020 Review

Thank you for the opportunity to comment on the Public Consultation Document *BEPS Action 14: Making Dispute Resolution Mechanisms More Effective – 2020 Review* published on 18 November 2020 (the 'Consultation Document'). These comments are written from the perspective of Deloitte's UK firm.

Multinational businesses should be taxed only once on their commercially generated profits and other business income. Governments have long recognised that agreeing double tax treaties and providing assurance and certainty are essential to remove a potentially significant barrier to international trade, and are important factors in countries' ability to attract inward investment.

The mutual agreement procedure (MAP) in Article 25 of the 2017 OECD Model Tax Convention on Income and on Capital (the 'OECD Model Treaty') is a key element in ensuring that double taxation is eliminated in practice. It is particularly important (and has been used most often to date) for resolution of disputes arising from taxation of trading profits: in relation to transfer pricing (under Article 9 of the OECD Model Treaty), permanent establishments (Article 5) and business profits (Article 7) where the establishment of countries' taxing rights is heavily based on the gathering and interpretation of facts.

Many countries have made significant progress since the implementation of BEPS Action 14 in improving MAP dispute resolution and in ensuring that treaty obligations under MAP are met, and there are many examples where the process has worked well. The experience (at least from a European perspective) has been that the majority of cases that are accepted into MAP are ultimately resolved. However, the ability of businesses to gain access to MAP remains the area of greatest challenge.

The most significant concern that has arisen since the conclusion of the BEPS Action 14 work in 2015 has been the increasing use in some countries of domestic tax code measures (often newly introduced measures) as an alternative to transfer pricing such that MAP is not made available. This is particularly the case in relation to the denial of deductions for cross-border intra-group charges for royalties and services. It would be helpful if it could be made clear that such cases should be eligible for MAP, such that properly determined royalty and services charges made at arm's length in accordance with the OECD Transfer Pricing Guidelines agreed under MAP should not be subject to further domestic tax measures.

The most appropriate and important resolution mechanism under MAP remains mandatory binding arbitration. A mandatory and binding mechanism is essential to ensure that a business is not taxed twice

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on the same profits. Any improvements that can be made to help countries towards a mandatory binding resolution mechanism are welcomed, recognising that this may need to be undertaken in a series of steps as part of a programme of continuous improvement.

Providing sufficient resources to competent authorities remains an important factor in ensuring that MAP treaty obligations can successfully be met. It is likely that this will be a challenge for many tax authorities, given both the increase in MAP cases following the BEPS work, the potential increase in the use of bilateral Advance Pricing Agreements (APAs), and the work on tax certainty being carried out as part of the OECD/G20 Inclusive Framework's work to develop a solution to the tax challenges arising from the digitalisation of the economy.

Please see the Appendix for comments on the specific questions in the Consultation Document.

Please do not hesitate to contact us if you would like to discuss any of the points raised in this letter. We would be happy to speak on this topic at the virtual Public Consultation meeting on 1 February 2021 if it would be helpful.

Yours sincerely

Alison Lobb
Deloitte LLP

Appendix

1. Introduction

Q1: Please share any general comments on your experiences with, and views on, the status of dispute resolution and suggestions for improvement, including experiences with jurisdictions that obtained a deferral of their peer review.

As a result of the COVID-19 pandemic it has in many cases not been possible for face-to-face meetings between tax authorities to discuss MAP cases to take place. However, many tax authorities have successfully continued discussions through virtual online meetings. This virtual approach does not appear to have caused a discernible delay in negotiations and may have accelerated timeframes for resolution. Individual cases have not been held until the date of a scheduled periodic meeting or until sufficient cases have built up to justify a tax authority budget for international travel expenses. Consideration should be given to the use of virtual meetings on an ongoing basis to improve resolution times and reduce costs for tax authorities.

2. Proposals to strengthen the Minimum Standard

Proposal 1: Increase the use of bilateral APAs

Q2: Please share your views on this proposal.

The increased use of bilateral APAs is helpful; businesses welcome the certainty that bilateral APAs can bring, provided that the bilateral APAs can be concluded within a reasonable timeframe. Increasing the use of bilateral APAs can save tax authority resources in terms of time and costs in the longer term as businesses with a bilateral APA may otherwise have sought resolution through the MAP process in future periods.

To be successful, it is important that APAs are entered into collaboratively. Some tax authorities regard APAs as part of their audit programme and see the 'compromise' result inherent in such agreements as a 'loss' of tax, which can hinder the process.

It would be helpful to have standardised criteria for acceptance into bilateral APA programmes as criteria can vary between countries. It is not uncommon for countries which charge an APA fee to businesses to have fewer requirements.

An increase in the use of bilateral APAs is only possible to the extent that there is sufficient tax authority capacity – some tax authorities have very limited numbers of staff with sufficient training, skills (including language skills) and experience. In addition, extremely long APA processes due to a lack of resource capacity can deter businesses from applying for APAs, particularly where a business is evolving over time.

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

Q3: Do you have experience with inappropriate adjustments reflecting lack of experience on international tax matters that would later need to be withdrawn in MAP? If so, what do you think would be the best way to address this situation? For instance, would you support elevating the best practice into the Minimum Standard?

Q4: Do you have suggestions on how tax administrations can increase awareness on international taxation in the relevant audit and examination staff?

The 'Global Awareness Training Module' is helpful in increasing awareness for relevant audit staff, but will only be effective if tax authorities commit the time and resources to fully train all relevant staff.

It may be helpful to evaluate which aspects of previous training programmes were most successful when designing any future training.

Consideration is also needed in respect of other causes of inappropriate adjustments. For example, in some tax authorities, audit and examination staff are assessed based on the total amount of additional tax collected as a result of tax audit settlements, disregarding whether these settlements are supportable in a future MAP. (It is important that Competent Authorities have the independence to reduce or eliminate adjustments agreed by their own audit function but this is not yet the case in all jurisdictions).

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

Q5: Based on your experience, are there any particular situations or circumstances in which access to MAP was inappropriately denied and that are currently not covered by the Action 14 Minimum Standard? In addition, are there circumstances where you did not submit a MAP request because access would be denied according to available information? If so, please specify these situations or circumstances.

Q6: Please share your views on whether there should be additions to the list of situations/circumstances in which access to MAP should be granted.

Ensuring access to MAP is granted in all eligible cases is a key issue and there are a number of situations in which, despite being covered by the Action 14 Minimum Standard, access to MAP is inappropriately denied.

Increasingly in some countries, determinations are being made that an adjustment to profits relates to a domestic tax code matter, rather than a transfer pricing or other treaty matter, such that MAP access is denied. It is hard to see that some such approaches are not an attempt to circumvent MAP treaty obligations as the focus of legislation and audits are on matters that are typically found within intra-group transactions. Examples include denial of deductions for intangibles-related expenses except where a bilateral APA has been agreed, or for service charges that are not accompanied by extreme levels of additional information over and above that required under the indirect charging method set out in Chapter VII of the OECD *Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations*. Other tax authorities may deny access to MAP on the basis that there is no double taxation (e.g. as a result of losses), despite Article 25 of the OECD Model Treaty only requiring "taxation not in accordance with the provisions of this Convention".

Similar issues can also arise where a transfer pricing methodology is accepted from a treaty perspective but there are domestic law restrictions on the deductions for relevant intra-group expenditure.

Any domestic anti-abuse rule should not be disproportionately applied to overseas intercompany charges and should not in itself preclude the ability to enter MAP. MAP access should not be denied in cases where a treaty anti-abuse provision, or a domestic anti-abuse rule that may conflict with the provisions of a treaty, is applied. If countries seek to limit or deny access to MAP in such cases this should be advised to their treaty partners and also published so that businesses may make decisions accordingly.

Some tax authorities continue to agree audit settlements on the condition that businesses do not subsequently submit a MAP request. Businesses that do not agree to this condition may be told they will be subjected to protracted tax audits. The peer review process is unlikely to address this issue as information on a settlement under audit is currently visible only to the tax authority concerned. Audit adjustments must be in accordance with the applicable double tax treaty and access to MAP should be available in all circumstances envisaged by the treaty. At the very least, tax authorities that offer audit settlements on condition that businesses waive their rights to MAP access should publish the circumstances in which this is the case and make clear that it is each business's choice whether the settlement (and resulting double taxation) is to be accepted. Collection of annual data by the OECD on the number of cases that are settled by each tax authority on the basis of waiver of the right to pursue a MAP claim would also be helpful.

In other cases, higher penalties are charged on settlements where the business intends to make a MAP request in order to deter businesses from doing so.

Businesses have limited recourse if a tax authority will not engage in MAP – to the extent that one Competent Authority accepts a case into MAP, the corresponding Competent Authority should be obliged to do so as well.

Q7: We recognise differences between jurisdictions in the documentation that needs to be provided when a MAP request is filed. Have these differences led to problems in practice? If so, would a common list of minimum information that needs to be provided solve these problems? If so, please specify:

a. *Whether any particular items should or should not be included in such list; and*
b. *Whether there is a need to align the content of such (to be developed) list with any other international rules relating to tax-dispute resolution procedures. If so, please specify which rules and what items in particular.*

A standardised template for a statement of facts, to be prepared by the business and submitted to all tax authorities involved, would be helpful in ensuring that all relevant tax authorities are formulating their positions based on the same information. It should be acceptable for some areas of the template to be marked as 'not applicable' depending on the nature of the individual case. It should also be acceptable for existing transfer pricing documentation to be used as the basis for the statement of facts, and appended to the template with cross-references.

There are practical challenges to creating a list of minimum information that covers every case-specific eventuality. Any attempt is likely to be extremely lengthy and tax authorities would still need to request specific follow-up information in respect of the particular facts and circumstances. This approach would

increase compliance costs without necessarily improving the usefulness of the information received by tax authorities. There is a risk that this approach could be detrimental in cases where a tax authority does not have sufficient resources to process all of the information provided. Businesses should not be denied access to MAP on the basis that they have not provided an item of information included on a generic list which either does not exist or is not relevant to the specific fact pattern.

Q8: Do you have any other comments on this proposal?

There are challenges in respect of the interaction between MAP and domestic court procedures, which can result in limitations on the availability of MAP. In some countries, Competent Authorities do not have the authority to overturn a domestic court decision through MAP and businesses are only permitted access to MAP on the condition that they withdraw from domestic legal processes.

Tax authorities should be encouraged to publish clear guidance on the relationship between MAP and domestic law remedies to ensure that businesses have the necessary information to make informed decisions.

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

Q9: Has the lack of suspension of tax collection in MAP cases created problems in specific cases? Should the best practice be elevated to a Minimum Standard?

Businesses with legitimate cases are deterred from applying for MAP because of the cash flow impact of paying a large settlement up front, and in some cases will choose to accept a lower settlement while waiving rights to MAP. Removing the question of payment would improve access to MAP.

Q10: If you support the elevation to a Minimum Standard, what can be reasonably expected from taxpayers to ensure that taxes due can be collected if the outcome of the MAP process confirms the taxes imposed?

Any steps to mitigate cash flow challenges would be welcomed. For example, tax collection could be linked to the arbitration process or deferred to a specific time (irrespective of whether the MAP process has concluded) to give tax authorities the confidence that they would receive payment within an acceptable specified time period. In limited circumstances it may be appropriate for a tax authority to require a guarantee or other mechanism such as an escrow fund where there are concerns about the credit risk of the relevant business. To avoid overuse of such measures, it would be helpful if the OECD could set parameters over when such requirements should be imposed.

Q11: Do you have any other comments on this proposal?

Any measures in respect of the suspension of tax collection for the duration of the MAP process should be independent of and without reference to limitations under domestic law.

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

Q12: Have you experienced cases where interest and penalties have not been aligned with the outcome of the MAP process? If so, is this an important issue and should aligning interest charges and penalties with the MAP outcome become part of the Minimum Standard?

The alignment of interest charges and penalties to the outcome of the MAP process is appropriate and should form part of the Minimum Standard. Interest on repayments following resolution under MAP should be paid in the same way as interest is charged on late payment of tax (albeit that there may be a rate differential based on commercial lending/borrowing rates). The approach taken should be consistent with the usual domestic regime for interest payments or repayments in relation to tax that is unrelated to a MAP claim – currently some countries differentiate and do not include any interest on repayments made following MAP.

Q13: Do you have any other comments on this proposal?

The publication by tax authorities of their interest and penalty regimes as they relate to treaty matters, with a clear statement about whether they can be reduced if the assessment is reduced under MAP, would improve transparency and clarity for businesses.

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

Q14: Based on your experience with the implementation of MAP agreements, has such implementation been prevented by the expiration of domestic time limits in any of the jurisdictions involved in the process? Alternatively, have you experienced cases where Competent Authorities did not come to an agreement because an agreement could no longer be implemented as a result of domestic time limits?

Q15: Based on your experience with the implementation of MAP agreements, have you experienced cases where solutions were found to implement the agreements despite domestic time limits having expired? If yes, please describe those solutions.

Q16: Do you have any other comments on this proposal?

The implementation of BEPS Action 14, and the adoption in many double tax treaties of the second sentence of Article 25(2) of the OECD Model Treaty has reduced the significance of this issue. However, adoption is not comprehensive and there are still cases where the expiration of domestic time limits prevents the implementation of MAP agreements.

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

Q17: Please share any experience with the multi-year resolution of recurring issues through the MAP process, in particular whether this was possible and, if so, under what circumstances.

Q18: Are there any other options – based on your experience – that would allow recurring issues to be dealt with in MAP or another dispute prevention/resolution process (e.g. a roll-forward of the MAP agreement to future years via bilateral APA)?

Q19: Do you have any other comments on this proposal?

Multi-year resolution through MAP of recurring issues is already permitted by some tax authorities where facts and circumstances remain unchanged. However, some tax authorities consider even limited changes in the business to mean that facts and circumstances have changed such that multi-year resolution would not be available. Multi-year resolution of recurring issues is more efficient for both tax authorities and businesses and its wider use should be encouraged.

Similarly, the roll-forward of MAP agreements to future years via bilateral APAs also increases efficiency for both tax authorities and businesses, and wider adoption would be helpful.

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

Q20: Based on your experience, how do tax disputes under treaties with MAP arbitration compare to tax disputes under treaties without MAP arbitration in terms of resolution time, effectiveness of the solution and costs of proceedings?

MAP and mandatory binding arbitration remain the best and only way of ensuring double taxation is alleviated and countries should be encouraged to adopt binding arbitration in their double tax treaties. The inclusion of binding arbitration in a tax treaty is very effective in reducing the number of unsustainable positions taken in tax authority audits. In addition, the requirement to move to arbitration after a set period of time adds impetus to the MAP process which leads to improved timeframes and encourages resolution prior to arbitration.

It would be helpful if the OECD could consider programmes (similar to Tax Inspectors Without Borders) to help countries that have difficulties with mandatory binding arbitration see the process in action in order to learn and gain comfort from others' experiences.

In the absence of a country's ability to agree to full binding arbitration, because of issues of law or principle, then the flexibility to adopt a modified version (e.g. binding arbitration restricted to some Articles of the double tax treaty) is desirable.

Q21: Separately, do you have views or other suggestions regarding alternative approaches to dispute resolution that could provide taxpayers full and timely resolution of cases that remain unresolved in the MAP?

Non-binding arbitration risks causing delays and consuming resources of businesses and tax authorities without achieving agreement and is no substitute for a mechanism that has a time limit for a binding outcome to be produced. Mediation does not add the same impetus to the MAP process and does not provide businesses with the necessary certainty and clarity.

Other suggestions

Q22: Do you have other suggestions to strengthen the Action 14 Minimum Standard? In your response please also mention whether there are any other best practices that you think should be elevated to elements of the Minimum Standard.

One point that tax authorities may wish to consider further is whether in some cases joint audits with an in-built MAP and/or APA agreement at conclusion would be appropriate in terms of efficiency for tax authorities and certainty for businesses. For example, this could be considered in situations where the transfer pricing profit split method is applied.

3. Proposals to strengthen the MAP Statistics Reporting Framework

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

Q23: Please share your views on the three proposals for the reporting of additional data under the MAP Statistics Reporting Framework, in particular whether they will provide more transparency and clarity on jurisdictions' MAP inventory.

All three suggested data points would increase clarity. In particular, reporting which country made the adjustment or took the action at issue could help identify countries whose audit outcomes do not achieve a suitable level of sustainability (i.e. those making a disproportionate number of adjustments which are subsequently overturned).

As with any reporting, there is a risk that behaviour could be distorted if, for example, tax authorities are reluctant to settle certain cases because of the impact on that year's statistics.

The requirement for additional data points could also discourage jurisdictions from signing up to treaties with MAP provisions. A compromise may therefore be to implement different data requirements depending on the volume of MAP cases in a jurisdiction.

Q24: Are there any other items that could be reported under the MAP Statistics Reporting Framework to provide further transparency or to allow a more meaningful assessment of jurisdictions' progress toward meeting the 24-month target timeframe to resolve MAP cases?

It would be helpful if tax authorities were required to inform businesses of the MAP start date and corresponding deadline for commencement of arbitration in order to improve transparency.

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

Q25: Please share your views on the proposal to also publish statistics on APAs, including the data categories being considered for publication.

Q26: What, if any, other items should be added to the data categories for reporting of statistics on APAs to increase transparency?

Q27: Do you have other suggestions on how the MAP Statistics Reporting Framework could be supplemented or modified to provide increased transparency?

Statistics are an important tool to encourage tax authorities to prioritise improvements in their processes and timescales, and public visibility reinforces taxpayer confidence in the process. Introducing requirements to publish APA statistics in a consistent format into the Minimum Standard would help inform business decisions on whether to apply for a bilateral APA.