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To: Centre for Tax Policy and Administration, OECD/CTPA

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EBIT comments on the OECD public consultation document: BEPS Action 14: Making Dispute Resolution Mechanisms More Effective – 2020 Review

Brussels, 11 January 2021

Dear Ms Knaepen,

EBIT Members[1] thank the OECD for the opportunity to provide comments on the OECD's public consultation document: BEPS Action 14: Making Dispute Resolution Mechanisms More Effective – 2020 Review - 18 November 2020 – 11 January 2021. Below are a number of issues and comments that EBIT believes are important for the OECD to consider.

We feel that access to MAP must be encouraged and facilitated and not be hampered in any way. The suspension of tax collections as well as of interests and penalties until the MAP process has been concluded is important. Further, we believe that both the taxpayers and tax authorities concerned would benefit from enhancing the transparency of the MAP and APA processes further through the publication of statistics and anonymised Competent Authority decisions. In addition, we believe that mandatory arbitration as a tool for Competent Authorities to take timely decisions is the way forward.

General comments

As a general comment, EBIT Members believe that the use of existing bilateral and multilateral dispute resolution tools and measures, such as joint audits / simultaneous controls and the International Compliance Assurance Program (ICAP) pilots, and also the prospective EU cooperative compliance framework initiative, should be actively supported and encouraged and optimised. Such mechanisms reduce the risk of double taxation for MNEs and will encourage the different tax authorities concerned to reach a compromise much quicker. Joint audits should also be made available to MNEs concerned at their request and access to joint audits should not only be decided by the tax authorities of the jurisdictions involved. In particular, in the international tax arena the current generally adversarial mindset regarding MNE tax compliance and dispute settlement should shift toward a more problem-solving oriented, interactive and cooperative one.

In our view, the major weaknesses of the MAP are that the MNEs concerned currently only have a limited role to play and there is limited transparency on the part of the tax authorities during the process. The MNEs concerned ought to be granted the right to be heard (orally and

[1] EBIT Members include Airbus Group, BP, Caterpillar, Constellation Brands, Diageo, GSK, Huawei, International Paper, JTI, Naspers, PepsiCo, Pfizer, P&G, Raytheon Technologies, RELX, Schroders and SHV Group. For more information on EBIT see: www.ebit-businesstax.com

in writing) during the process and be allowed to interact in the discussions during the negotiation phase.

EBIT Members urge the OECD to update the Manual on Effective Mutual Agreement Procedure (MEMAP), which should become part of the Commentaries of the Model Tax Convention. We also respectfully ask for the introduction of binding and as short as realistically possible deadlines for tax authorities to adhere to (for example the deadline for the delivery of position papers).

Strengthening the minimum standard

Proposal 1: Increase the use of bilateral APAs

EBIT Members support the suggested obligation to establish bilateral APA programmes. Although it is recognised that it may not be very beneficial for jurisdictions with a low volume of Transfer Pricing MAP cases to design specific bilateral APA programmes, such jurisdictions should still commit to entering into BAPA negotiations (or as the case may be, multilateral APA negotiations) upon request, either requested by the MNE concerned or by the other jurisdiction(s) involved. EBIT Members are also of the opinion that not only the use of bilateral APAs should be increased, but the use of multilateral APAs should be encouraged as well.

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

In our day-to-day practice, we see that upon audit there is sometimes still an adversarial atmosphere and that audit results at times can give rise to tax adjustments which do not stand up in courts or in the MAP. This should be avoided as much as possible as it is a waste of resources and time for both tax authorities and taxpayers concerned. In particular, in the international tax arena the mindset should change from adopting an adversarial position towards one of problem-solving and cooperative interaction. Field auditors should be aware of the cross-border effects of the tax assessments performed and training should not be limited to how the domestic law must be applied.

The Competent Authority should act (more than is the case today) as a filter for inappropriate adjustments. This could be achieved by the Audit Team informing the Competent Authority, and, where relevant, the Competent Authorities concerned informing each other, of (major) tax assessments likely to trigger cross-border effects, before the notice of tax assessment is sent to the MNE concerned.

With regard to training and awareness raising, EBIT Members see merit in organising bilateral or multilateral information exchange programs and meetings involving practitioners and speakers from different tax authorities and from the business, consulting and academic worlds, to enable auditors to hear a different set of views.

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

Our Members have encountered the following reasons for having been denied access to MAP:

- Filing of the request outside the three-year time period because of different calculations of the starting periods in different jurisdictions;
- Alleged incomplete documentation (more guidance is required);
- No double taxation has occurred in case of a loss situation;

- Recharacterizing of a tax reassessment from a Transfer Pricing-issue to disallowing certain costs under domestic law.

EBIT Members are of the opinion that those jurisdictions that disallow access to MAP in case of an audit settlement (even though this should be discouraged) should be more transparent about their position. For example, when the jurisdiction concerned does not grant access to MAP in case of an audit settlement, the (draft) audit settlement should contain a clear reference in that respect to allow the MNE concerned to take a well-informed decision on whether to accept the audit settlement and waive its rights of access to MAP.

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

The lack of suspension of tax collection in MAP cases may lead to liquidity issues and may have an impact on the financial reporting (tax position) of the taxpayer concerned. EBIT Members are concerned that lack of suspension of tax collection is not an incentive for timely resolution. Suspension of tax collection during MAP should be elevated to at least best practice.

Regarding ensuring that taxes due can be collected, EBIT Members believe the following solutions are worthwhile to consider:

- The statute of limitation for tax collection could be blocked;
- Statement from the taxpayers concerned that the tax obligation resulting from a binding MAP will be honoured;
- Creation of an escrow account or a letter of guarantee (for example from a financial institution or another group member, i.e. a parent company).

Another issue is that in certain cases tax authorities take a long time before repaying tax in accordance with the solutions agreed under MAP. Some best practices should be developed for this situation, for example, that tax shall be repaid within [X] months after an accepted MAP.

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

EBIT Members believe that the alignment and relief of interest and penalties should be mandatory during the MAP. Alternatively, a provision introducing the treatment of interest and penalties could be introduced in the MTC. See, for example, Article 26(3) of the US – UK tax treaty:

> *"The competent authorities of the Contracting States shall endeavour to resolve by mutual agreement any difficulties or doubts arising as to the interpretation or application of this Convention. In particular the competent authorities of the Contracting States may agree:*
> *[…]*
>
> *h. to the application of the provisions of domestic law regarding penalties, fines, and interest in a manner consistent with the purposes of this Convention.*
> *[…]"*

Further, as a general rule, EBIT Members consider that interest and penalty calculation and collection should be suspended during the MAP.

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

EBIT Members strongly believe that the MAP agreements should be executed in their entirety, even when statutory limitations could be applicable under domestic law.

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

The experience of some EBIT Members is that some Competent Authorities regularly resolve MAP cases through a multi-year resolution, and this is welcomed. Under certain circumstances, tax assessments may relate to a similar element during several years, for example, cases relating to recurring payments such as a yearly royalty or interest payment. The multi-year resolution presents an elegant solution in addressing the common issues that gave rise to the MAP case concerned.

EBIT Members are of the opinion that in addressing recurring issues flexibility is key. The best solution – which can be a roll-forward – should be determined based on the facts of the case and in agreement with all stakeholders concerned, i.e. Competent Authorities and taxpayers. Alternatively, the Competent Authorities, in concertation with the taxpayers concerned, could decide to convert the roll-forward into a bilateral or multilateral APA.

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

EBIT Members support the existence of mandatory arbitration clauses in treaties. Overall, the experience of EBIT Members with mandatory arbitration is, however, still fairly limited. That said, in our opinion, the mere existence of an arbitration clause in a treaty will accelerate the resolution of the MAP case as Competent Authorities in general do not want to use the arbitration possibility. So, the existence of an arbitration clause is a useful tool for a timely and effective resolution of MAP cases.

Mediation

Regarding alternative dispute resolution mechanisms, EBIT Members do not see merit in the use of mediation for large and complex cases (such as TP or allocation of profit cases). However, there may be merit in mediation for (minor) cases and mediation that is limited to domestic tax issues.

Early information / consultation of the Competent Authority

One alternative approach could consist of informing / consulting the Competent Authority for cross-border cases exceeding a certain amount and/or relating to a certain topic such as the existence of a PE, allocation of profit issues and beneficial ownership tests. Care should be taken, however, that the Competent Authority maintains its independent status and does not get involved in the actual tax (re)assessment.

International dispute resolution panel

When the two-year period for resolution under MAP has expired, the case should be automatically brought before an international dispute resolution panel, comparable to an arbitration panel. The dispute resolution panel could be a permanent panel, or, alternatively,

be composed of members of other Competent Authorities, and could vary per case. Its rulings should be awarded the same value as court rulings.

EBIT Members believe that the following could strengthen the Minimum Standard under BEPS 14:

- Recognition that variations in the Statute of Limitations in the different jurisdictions do not impact on the access to MAP. In other words, those variations should not hamper the access to MAP because the Statute of Limitations in the jurisdiction with the shortest Statute of Limitations has been passed.
- Presenting a MAP case should be made possible to either jurisdiction involved.
- In some cases, the double taxation finds it origin in a third state. MAP should therefore not be limited to bilateral cases but should have the potential to include more than two Competent Authorities in the negotiation or deliberations (see in that context the Reports of the former EU Joint Transfer Pricing Forum (JTPF) on triangular cases).[2]

Proposals to strengthen the MAP Statistics Reporting Framework

EBIT Members welcome the three data points mentioned in the public consultation document:

- which jurisdiction made the adjustment or took the action at issue;
- the time taken to close MAP cases per type of outcome; and
- the year the MAP cases pending at year-end were initiated.

Reference can be made to the data points under the MAP reporting as initiated by the EU JTPF.

EBIT Members suggest the (anonymised) publication of the (initial) country position as well as the outcome the MAP cases. This approach will lead to a principled resolution of the case and to more transparency vis-à-vis taxpayers and other tax authorities.

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

EBIT Members welcome the proposal to publish statistics on APA and the data points suggested. We feel that publication of APA statistics would be beneficial in light of the current trend to focus on MAPs to the detriment of APAs, possibly because MAP statistics are published, and APA statistics are not. Further, it could be a helpful instrument in monitoring APAs. Reference can be made to the JTPF statistics on APA with regard to relevant data points.

As possible alternatives for APAs, EBIT Members suggest considering the more frequent use of bilateral / multilateral safe harbours for certain low risk activities (see also Annex I to Chapter IV - Sample Memoranda of Understanding for Competent Authorities to Establish Bilateral Safe Harbours).

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[2] See COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL AND THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE on the work of the EU Joint Transfer Pricing Forum in the period April 2009 to June 2010 and related proposals 1. Guidelines on low value adding intra-group services and 2. Potential approaches to non-EU triangular cases - https://ec.europa.eu/taxation_customs/sites/taxation/files/resources/documents/taxation/company_tax/transfer_pricing/forum/c_2011_16_en.pdf

Finally, we believe that the following information could enhance the transparency of the MAP statistics framework:

- Statistics on the completion of the Competent Authority position papers, allowing to speed up the finalization of those papers;
- Total amount of corrections or disputes at stake under MAP.

EBIT Members trust that the above comments are helpful and are taken into account. We are keen to continue to engage in discussions which will help drive this project forward and in the further consultations that will be required if matters are to be implemented successfully.

Yours sincerely,

European Business Initiative on Taxation – January 2021

For further information on EBIT, please contact EBIT's Secretariat via Bob van der Made, Telephone: + 31 6 130 96 296; Email: bob.vandermade@pwc.com).

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