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**TO** OECD
International Co-operation and Tax Administration Division, Centre for Tax Policy and Administration
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**SUBJECT** **Public comments on the 2020 Review of the BEPS Action 14: Making Dispute Resolution Mechanisms More Effective**

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## Introduction

This document is addressed to the OECD International Co-operation and Tax Administration Division, Centre for Tax Policy and Administration and includes Chiomenti public comments as to the 2020 review of the document "*BEPS Action 14: Making Dispute Resolution Mechanisms More Effective*" published on 5 October 2015.

The comments below are provided based on the table of content indicated in the public consultation document issued by the OECD seeking stakeholders input on proposals for the 2020 review of the Action 14 Minimum Standard.

## Proposal 1. Increase the use of bilateral APAs

***2) Please share your view on this proposal.***

In our view, all jurisdictions should have a bilateral APA program in place, regardless of the number of active transfer pricing MAP cases. Indeed, also the jurisdictions that have a reduced number of transfer pricing cases should introduce an APA programme, for the reasons summarised below.

This approach ensures to achieve the real purpose of the APA instrument from a global perspective. Indeed, bilateral (and multilateral) APAs are the most effective tool to avoid any transfer pricing disputes, since – unlike unilateral APAs – they ensure a higher level of tax certainty in all the jurisdictions involved, reducing the actual risk of double taxation and, hence, actually prevent transfer pricing disputes.

The real effectiveness of the APA instrument is reached only to the extent that all the relevant jurisdictions are in the position to achieve a bilateral (or multilateral) APA, whenever they are suitable and needed by multinational groups operating therein. The need of bilateral APAs cannot be measured by the number of transfer pricing MAP cases.

Moreover, this approach, whereby all the OECD jurisdictions have a bilateral APA program in place, ensures consistency and uniformity at the OECD level, improving the business environment for multinational groups.

In addition, all the OECD jurisdictions should allow for roll-back of the effects of bilateral APAs. In this respect, it should be noted that, for the time being, certain jurisdictions have not allowed the applicability of a full roll-back of the outcomes of bilateral APAs, as the effects would be limited only up to the fiscal year in which the taxpayer filed the request of bilateral APA, so excluding the fiscal years still open to tax assessment under the ordinary statute of limitation preceding the one in which the APA request was filed.

With respect to Italy, please note that, based on certain recent amendments to Italian tax laws, the application of a roll-back mechanism up to fiscal years still open for tax assessment has been approved, under certain conditions.

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

***5) 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.***

Based on our experience, in certain countries the access to MAP can be denied in case the taxpayer applies for self-adjustment following a tax audit covering only certain tax years, in order to amend the tax return(s) already filed for the fiscal year(s) not covered by the said tax audit[1].

[1] In general, after a tax audit carried out in a jurisdiction in relation to certain fiscal years, it is important to deal with the recurring implications that the audit may have in relation to the following fiscal years. In this respect, in order to avoid the application of additional penalties, the taxpayer may decide – as part of its defensive strategy – to: (i) file the application to initiate a MAP in relation to the fiscal years covered by the tax audit; and (ii) apply self-adjustments in order to amend the tax returns already filed with respect to fiscal years not covered by the tax audit.

In such a case, due to the lack of a formal tax assessment issued by the tax authorities in relation to the year(s) covered by the self-adjustment, the access to MAP would be denied even if such self-adjustment has been made according to the same rationale and principles underlying the previous tax audit and also due to the latter (see also our answers below to questions 6) in relation to this Proposal 3 and 17) in relation to Proposal 7).

In the author's view, the Action 14 Minimum Standard should ensure the access to MAP also when the relevant taxpayer has performed self-adjustments to amend its tax returns following a tax audit. The access to MAP should be granted also considering that in the lack of any self-adjustments the tax authorities could start, at a later stage, audit or assessment activities giving rise to taxation not in accordance with the applicable Tax Treaty, relating to the tax years not covered by the original tax audit that may lead to a new MAP. Therefore, the direct access to MAP in these situations (*i.e.*, when a taxpayer has performed self-adjustments to amend its tax returns following a tax audit), would prevent: (i) the possible initiation of different procedures relating to the same question in dispute; as well as (ii) the duplication of costs.

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

The Action 14 Minimum Standard should include to the list of situation/circumstance in which access to MAP should be granted also the case whereby the starting of the MAP derives from a self-adjustment performed by the taxpayer (see above).

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

***9) 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?***

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For instance, according to applicable tax laws in certain jurisdictions (*e.g.*, Italy, Germany), if the taxpayer, after submitting the relevant tax return, becomes aware – before the expiry of the statute of limitations – that a tax return is incorrect or incomplete and has led or may lead unpaid taxes, the taxpayer may have the interest to amend that tax return. Moreover, if the taxpayer is aware, during a tax audit, that the tax returns previously submitted for fiscal years which are not subject to that tax audit are incorrect or incomplete, the taxpayer may have the interest to amend the relevant tax returns. Also, in certain cases, the applicable tax laws may require that, with regard to tax returns that are submitted after the completion of the tax audit, the taxpayer is required to reflect the results of the tax audit in such tax returns, if the findings raised by the competent tax authority have ramifications also with respect to these years. In all the above -mentioned cases, the taxpayer may have interest (or may be obliged) to amend the tax returns already filed so that a self-adjustment increasing the taxable income would be performed on a voluntary basis.

In our view, in the lack of effective provisions granting the suspension of the tax collection, the starting of a MAP could be prevented or limited due the significant hardship/financial burdens on taxpayers, also because the MAP process usually takes a long time to be completed and the taxpayers have no specific influence on its duration.

Pursuant to the Italian laws currently in force, a taxpayer may require the suspension of the tax collection through an administrative procedure handled by the Italian tax authorities or, following the filing of an appeal before a tax Court, based on a judicial procedure. However, both the administrative and the judicial procedures require the taxpayer to prove that the tax assessment underlying the collection of taxes is null and void based on a preliminary analysis (s.c. '*fumus boni iuris*') and that the taxpayer may suffer a damage from the payment of the requested taxes due (s.c. '*periculum in mora*'); this inevitably results in complex procedures that may in practice lead to the suspension of the tax collection only in case of relevant amount of taxes due.

The Legislative Decree No. 49 dated 10 June 2020, implementing the Council Directive (EU) 2017/1852 of 10 October 2017 on tax dispute resolution mechanisms in the European Union has now introduced the automatic suspension of the tax collection in case, prior to the filing of the appeal before a tax Court, the taxpayer has started a MAP procedure under the Council Directive (EU) 2017/1852 of 10 October 2017 and the taxpayer has filed a request for the suspension of the judicial proceedings pending the MAP. Such procedure will clearly facilitate the access to the MAP procedure by eliminating any costs or uncertainty deriving from the previous regime related to the suspension of the tax collection. However, such provisions are applicable only in case of a MAP started under the Council Directive (EU) 2017/1852 of 10 October 2017, thus not being available in case of MAP started under a Tax Treaty.

That said, the best practice should be elevated to a Minimum Standard by also introducing an automatic suspension of the tax collection in case a MAP is started.

***10) 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?***

It could be envisaged to obtain an automatic suspension of the tax collection upon request of the taxpayer that will be conditional upon the granting of adequate and standardised guarantees released by third-parties (such as a bank guarantee) in case the total amount of taxes whose suspension is requested is higher than a given ratio – such as assessed taxes /net equity ratio (thus avoiding the release of the guarantee in case of requests of suspension for small amount or in case the assets of the taxpayer offer an adequate guarantee to the tax authorities that taxes due can be collected if the outcome of the MAP process confirms the taxes imposed).

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

***12) 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?***

As a general principle, penalties and interest are not covered by the agreement entered into by the competent authorities in the context of a MAP.

In this respect, with particular reference to the Italian tax law system, penalties and interest would be applied taking into account the final outcome of the MAP and the Italian tax authorities will be required to execute the MAP by providing, as the case may be, for the refund or the relief on the tax not due or for the levy of the taxes due together with interest and penalties[2].

However, under the Legislative Decree No. 49 dated 10 June 2020 implementing the Council Directive (EU) 2017/1852 of 10 October 2017 on tax dispute resolution mechanisms in the European Union, any higher taxes due as a result of the recalculation pursuant to the decision taken under a MAP or a dispute resolution procedure shall be subject to both: (i) interest from the date of the decision taken under a MAP or a dispute resolution procedure; and (ii) penalties, **except** where the higher taxes due have already been settled in accordance with the provisions of domestic law (*e.g.*, in Italy through the '*accertamento con adesione*' procedure). In this latter case, and only to the extent that the original tax claim/assessment put forward by the Italian tax authorities is **fully annulled** as a result of the MAP, the refund of the penalties is allowed upon presentation of a special application by the relevant taxpayer[3]. Conversely, where the agreement entered between the competent authorities in the context of the MAP does not lead to a full annulment of the original tax claim/assessment (*i.e.*, the tax claim/assessment is only partially upheld), no refund of the exceeding penalties paid by the taxpayer is allowed. This would give rise to a mismatch between the penalties potentially due under the MAP and the penalties determined according to the domestic settlement agreement.

That said, the Minimum Standard should expressly state that the total amount of penalties finally paid by the taxpayer should always be aligned with the taxes due under the outcome of the MAP, irrespective of the circumstance that a tax settlement procedure has been executed according to domestic legislation; this would increase the appeal of MAPs and reduce costs for multinational groups.

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[2] See Circular No. 21 of 5 June 2012 issued by the Italian tax authorities, setting out the guidelines and procedures in relation to MAPs.
[3] See Article 19(3) of Legislative Decree No. 49 dated 10 June 2020.

In addition, the Minimum Standard should expressly state that (i) where a jurisdiction grants a reduction of penalties according to a given settlement regime based on its domestic laws and (ii) the access to the MAP can be denied in case of a settlement procedure, the same penalty reduction should be granted if, as a result of the MAP, the original claim is confirmed, even in part. This would allow the taxpayer to benefit from the same penalties reduction which it would have been accorded if the settlement agreement had been executed without the initiation of the MAP.

Indeed, there might be cases where the benefit deriving from the penalty reduction under domestic law may be more convenient to accept a tax settlement rather than initiating a MAP procedure, since it would allow the taxpayer to benefit from an immediate reduction of the overall amounts to be paid (due to penalties reduction), without starting a lengthy procedure such as a MAP. In order to encourage the MAP process, the taxpayer opting for the MAP should be entitled to the same penalty reduction that would have been applicable in case he had entered the settlement agreement under domestic laws (in other words, the outcome of the MAP should be used as the basis for calculating the penalties finally due overriding the effects of domestic tax settlement).

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

***17) 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.***

Generally speaking, after a tax audit carried out in a given jurisdiction in relation to certain fiscal years, it is important to deal with the recurring implications that the audit may have with respect to the following fiscal years.

In this regard, in order to avoid the application of additional penalties, the taxpayer may decide – as part of his/her defensive strategy – to: (i) file the application to initiate a MAP in relation to the fiscal years covered by the said tax audit; and (ii) apply for a self-adjustment procedure in order to amend the tax returns already filed with respect to the fiscal years not covered by the tax audit[4].

[4] For example, after a tax audit carried out by a competent authority with reference to fiscal years 2014-2017, the taxpayer should (or may have the interest to) adjust the tax return relating to fiscal year 2018 in accordance with the principles set out in the notice of assessment issued in 2019 for fiscal years 2014-2017.

In such cases, it should be possible to file a request to start a MAP under a Tax Treaty in case the taxpayer has performed self-adjustments to amend the tax returns previously filed. Indeed, the Commentary on Article 25 of the OECD Model Tax Convention provides that the access to a MAP should be granted also in the case of '*bona fide taxpayer-initiated adjustments which are authorised under the domestic laws of some countries and which permit a taxpayer, under appropriate circumstances, to amend a previously filed tax return in order to report a price in a controlled transaction, or an attribution of profit to a permanent establishment, that is, in the taxpayer's opinion, in accordance with the arm's length principle*'[5]. Therefore, the taxpayer may ask for an extension of the MAP – which was originally started in relation to the fiscal years subject to the tax audit – to the fiscal years in which the taxpayer performed the self-adjustment.

Moreover, as to the starting point of the three-year period within which the taxpayer is required to file the request to start a MAP pursuant to provisions drafted along the lines of Article 25(1) of the OECD Model Tax Convention, it should be noted that the Commentary on said Article 25 of the OECD Model Tax Convention provides that, in self-adjustment cases, the date on which the taxpayer files the self-adjusted return would be the starting point for the three-year period to run[6].

In certain recent experiences, the Italian competent authority refused to enter into an agreement under a MAP having as object transfer price adjustments which gave rise to double taxation not originated from an adjustment made by the foreign competent authority but from self-adjustments performed by the taxpayer[7]. Indeed, according to the Italian competent authority, a self-adjustment autonomously performed by a taxpayer does not constitute an 'action' undertaken by a State within the meaning of Article 6 of the European Union Convention 90/436/EEC (the s.c. Arbitration Convention)[8].

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[5] See paragraph 14 of the Commentary on Article 25 of the OECD Model Tax Convention.

[6] In addition, the Commentary clarifies that, where a taxpayer pays additional tax in connection with the filing of an amended return reflecting a bona fide taxpayer-initiated adjustment, the starting point of the three-year time limit would generally be the notice of assessment resulting from the amended return.

[7] In light of the position taken by the Italian competent authority, in order to avoid a possible rejection of the application to open a MAP, one possible practical solution may consist in filing a refund request of the higher taxes paid in connection to the amended tax returns filed voluntarily by the taxpayer. Such tax refund application should be addressed by the taxpayer to the tax authority of the State in which the self-adjustments have been performed. As presumably the competent authority will reject the tax refund application filed by the taxpayer, the request to start a MAP could be based on the rejection of the tax refund issued by the competent tax authority (*i.e.*, an 'action' undertaken by a State within the meaning of Article 6 of the Arbitration Convention) and not only on (mere) self-adjustments performed by the taxpayer.

[8] More in detail, according to the Italian competent authority, a self-adjustment autonomously performed by a taxpayer does not constitute a transfer pricing adjustment within the meaning of Point 4 of the Code of Conduct of the European Union Convention 90/436/EEC. Indeed, Italy made a reservation to Point 4 of the Code of Conduct stating that the application of the EU Convention 90/436/EEC should be limited to those cases where there is a transfer pricing adjustment.

In light of the foregoing, we suggest to include in the Minimum Standard adequate language pursuant to which recurring issues can be dealt also through self-adjustments performed by taxpayers and, on the basis of such self-adjustments, it should be possible to: (i) start a MAP only on the basis of those self-adjustments; and/or (ii) extend a MAP – previously started – in relation to fiscal year(s) for which the relevant taxpayer has performed self-adjustments due to the tax audit which covers previous fiscal year(s) (see also our answers above to questions 5) and 6) in relation to Proposal 3).

***18) 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)?***

Multinational groups are keen to properly answer the necessity of avoiding (or at least mitigating) double taxation in relation to fiscal years not covered by a MAP where the outcomes of the MAP may have a recurring impact also on the future fiscal years.

One practical solution could be to file a bilateral APA in order to cover the fiscal years not covered by the MAP. This would allow taxpayers to manage issues deriving from potential recurring double taxation and reduce uncertainty.

However, the combination of a MAP and a bilateral APA could provide a full coverage only if it is allowed, under the applicable law framework, that the APA effects could be rolled back to cover all the fiscal years still open for tax assessment not covered by the MAP, where the relevant facts and circumstances in these tax years are the same as those of the year(s) covered by the MAP. In this respect, to increase the effectiveness of the MAP and bilateral APA combination, it should be provided under the Minimum Standard that the same committees of each competent authority should discuss, jointly and at the same time, both the MAP and bilateral APA or provide an effective coordination between the two procedures.

Another way to deal with recurring issues is represented by the possibility to start both a MAP and a bilateral APA through one and only one application asking for: (i) the initiation of a MAP for the fiscal years subject to tax assessment; and, at the same time (ii) the initiation of a bilateral APA for the fiscal years not covered by the MAP (provided that that the APA effects could be rolled back up to the fiscal years still open for tax assessment not covered by the MAP). This approach would allow multinational groups to reduce costs and increase effectiveness, as well as full coverage without leaving certain fiscal years not covered by either a MAP or a bilateral APA.

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