BUSINESS at OECD

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BUSINESS AT OECD INPUT ON 2020 REVIEW OF BEPS ACTION 14

Dear Secretariat Team,

Business at OECD (BIAC) thanks the OECD for the opportunity to submit comments on the 2020 review of the BEPS Action 14 Minimum Standard, and specifically, to relay taxpayers' experiences with cross-border dispute resolution and suggestions for improvement, including as relates to additional elements to strengthen the Action 14 Minimum Standard and the MAP Statistics Reporting Framework. The concept and operation of the Action 14 standards and review mechanism has been a notable success of the BEPS project, and we congratulate the OECD on the successful implementation of this program.

We believe, following several years of operation that, this process can be made even more effective, and we are glad to be part of that. But it is also worth noting that ongoing dialogue with the business community on their experiences and suggested improvements in this area is more critical than ever, particularly given that the the OECD's most recent statistics indicate that cross-border tax disputes have increased and will continue to do so in the context of the development of a global tax framework under the OECD's digital tax proposals.

Business at OECD looks forward to continuing to provide feedback and support on the BEPS Action 14 Minimum Standard and the OECD's work more generally on cross-border dispute resolution.

Sincerely,

Will Morris
Chair, Taxation and Fiscal Policy Committee,
Business at OECD (BIAC)

Comments

1. We welcome the OECD's commitment to soliciting taxpayers' input on their experiences with existing procedures to improve access to effective and timely cross-border dispute resolution. The central objectives of mandatory binding arbitration in the mutual agreement procedure ("MAP") are to ensure that double taxation is not suffered and to guarantee the timely and effective resolution of cases, while providing taxpayers with as much certainty and legal clarity as possible.

2. In this respect, we begin by noting that the effectiveness of dispute prevention and resolution tools will become even more important with the OECD's work to address tax challenges arising from the digitalization of the economy, as this work represents a fundamental shift away from relatively well-established profit allocation principles that likely will result in a proliferation of bilateral cases the current dispute mechanisms are not sufficiently equipped to address. While the Pillar One and Pillar Two frameworks envisage new forms of collaboration (i.e., multilateral panels), the smooth and efficient operation of existing bilateral mechanisms remains crucial, as the OECD's most recent statistics indicate that cross-border tax disputes have increased and will continue to do so. While many of the recent MAP cases may relate to implementation of the BEPS rules (and thus the rate of increase may slow in coming years), there is no indication that the number of annual cases will not continue to increase into the future, which will place ever greater strain on the process unless new mechanisms are introduced and/or additional capacity is created in tax administrations. For this reason, we also strongly encourage Inclusive Framework members that have not yet included arbitration clauses in their treaties to urgently do so and to also take part in the OECD's BEPS Action 14 peer review process.

3. For MAP to be seen as a useful tool to avoid double taxation and resolve controversy, rather than as a lengthy process that does not always yield guaranteed outcomes, we suggest several potential improvements to existing processes based on taxpayers' experiences.

4. First, in terms of ensuring access to MAP, we begin by identifying what appears to be an unfortunate, growing trend where jurisdictions sometimes may only agree to audit settlement negotiations with taxpayers on the condition the taxpayer agree not to pursue MAP. This has the effect of inappropriately limiting or even denying access to MAP. Consideration should be given to developing appropriate disincentives and possible sanctions for countries that adopt such an approach, as doing so undermines both the spirit and intent of the MAP process.

5. Another noted challenge in this regard is that some jurisdictions require upfront payment of all or part of an asserted assessment to engage in domestic or cross-border dispute resolution, which likewise limits taxpayers' access to MAP where required payment is financially burdensome or impossible and by reducing – or completely eliminating – tax authorities' incentive to engage in the MAP process, as assessed amounts have been collected upfront and any agreement reached under MAP may ultimately require a refund of amounts collected. To ensure taxpayers have full access to MAP, jurisdictions should be discouraged from requiring full or part payment of a disputed assessment where such assessments potentially trigger double taxation with a treaty partner and should amend their local laws where such

provisions are an impediment to effective dispute resolution. Similarly, we strongly support alignment of interest charges and/or penalties in proportion to the outcome of the MAP process, with an appropriate cap.

6. Likewise, access to MAP is limited when a country adopts disqualifying criteria, which may incentivize tax authorities to assert such criteria against a taxpayer to prevent commencement of the MAP process. For example, under the E.U. Arbitration Directive, a Member State can deny MAP access if a taxpayer faces certain types of penalties. Based on anecdotal evidence, some taxpayers feel that tax authorities pursue unwarranted application of qualifying penalties simply to block access to MAP. Clear guidelines should exist to ensure that tax authorities fairly apply disqualifying criteria and do not do so simply to deny access to MAP.

7. Introducing standardized documentation requirements for MAP requests will also help improve access to MAP. We note that documentation requirements should be as streamlined and consistent as possible to avoid misalignment or different approaches across countries and to guarantee and safeguard the rights of taxpayers similarly, everywhere. Countries should ensure that taxpayers that meet the requirements of paragraph 1 of Article 25 can access MAP.

8. Once a MAP request is accepted or denied, it could be helpful to require sending a taxpayer written notification of the acceptance or denial within a specified timeframe, as is consistent with the practice of many competent authorities. This is important in situations where, for example, a domestic appeal needs to be filed in addition to a MAP request or deferral of a tax payment is sought. It would also be useful if there was a mechanism where, in the absence of this notification, the MAP request would be considered accepted by default.

9. Even if a MAP request has been accepted, cross-border resolution may be inhibited where there is no (or very little) functional separation between the examination personnel issuing an assessment and the competent authority staff undertaking the MAP process.[1] This can be problematic and force any elimination of double taxation on the MAP partner to accept the outcome of the assessment. Therefore, true independence of MAP personnel from the examination personnel is critical to ensure open negotiations between competent authorities.

10. Resolution likewise may be hindered under the current framework where treaty partners adopt varying interpretations of treaty definitions, for example, by carrying definitions from their respective domestic legislation into the treaty definition that are not consistent with a treaty partner's position. This could prevent elimination of double taxation through MAP, as the treaty partners are taking differing approaches to what should be a uniform, treaty-based definition. Clarity in rules and guidance and strong political agreement are the most important ways of preventing disputes in this respect.

11. It is broadly acknowledged that resource constraints on the part of the tax authorities significantly limit the effectiveness of existing dispute resolution mechanisms, most notably

[1] These instances occur despite the requirement in section 2.3 of the BEPS Action 14 Minimum Standard for separation between MAP staff and assessment personnel.

by extending the timeframe within which resolution can be achieved. To ensure dispute resolution mechanisms achieve their stated aims and provide taxpayers a forum to ensure timely relief from double taxation, jurisdictions should be encouraged to allocate adequate resources and appropriately trained staff to help handle growing case volumes.

12. In this respect, we welcome the proposal to expand access to training on international tax issues for auditors and examination personnel and support raising this from a best practice into the Minimum Standard. Improving the capabilities of the tax personnel responsible for the examination process that ultimately results in assessments potentially subject to dispute increases access to MAP by enhancing the quality and integrity of the examination function. This should both reduce the number of cases ultimately brought to MAP by eliminating unsupported cases and also enhance tax certainty for those cases that progress to MAP.

13. Relatedly, as OECD guidance frequently deals with principal structures rather than other types of entities, tax authority personnel are sometimes unequipped to understand transfer pricing issues regarding complex business structures. Therefore, it is important for any offered OECD training to address application of the arm's length principle to non-principal structures and to emphasize that while methodologies may not be universally applied depending upon the taxpayer's configuration, there nevertheless needs to be consistency across jurisdictions on how methodologies are applied. Training materials should also emphasize the need for common interpretation on tax treaty articles (when in line with the Model Tax Convention), which would contribute to fewer disputes.

14. Greater access to training might also discourage tax authorities from pursuing unsupported positions or conducting overly aggressive tax audits to produce tax assessments intended to mitigate declines in tax revenues caused by the COVID-19 pandemic. A further roll-out of the Global Awareness Training Module or a similar training program – particularly one that accounted for these underlying issues – could further support this effort. In this regard, particularly in recent years, the OECD Secretariat has already invested significant effort into evaluating how to improve audit capacity and training and developing taxation-related training and e-learning programs.[2] Recent case studies, such as *Learning by doing in Georgia: Building tax audit capacity in the Georgia Revenue Service*, highlight particularly relevant topics, such as the impact of human resources and organizational issues on tax audits and the perception that auditors have increased competence when trained under OECD programs.

15. Another helpful suggestion in this regard could be to increase training on and use of mediation during the MAP process, which does not seem to have much visibility – even among tax authorities – and could present a meaningful improvement to the process. Use of mediation could also minimize misunderstandings between competent authorities in the MAP process, if introduced as an option to allow a taxpayer to bring in a mediator at its own cost to facilitate dialogue and mediate toward an amicable solution.

16. In taxpayers' experience, after a MAP case is accepted, resolution regularly takes upwards of five or more years, and throughout this period, communications from tax authorities and

[2] See for instance: http://www.oecd.org/tax/tax-global/e-learning.htm.

visibility into the process is generally extremely limited. The 2013 FTA MAP Forum recognized the need to keep taxpayers better informed throughout the MAP process. We encourage the OECD to continue to amplify this message. Practical ways for countries to keep taxpayers informed include inviting taxpayers to the competent authority meeting to provide additional information to all involved competent authorities at the same time and directly answer the questions raised, or alternatively, hold a prefiling meeting with the taxpayer in difficult cases.

17. During the resolution of a MAP case, in situations where bilateral tax authorities are handling multiple MAP cases on similar issues, some members note experiences in which the perception becomes one of being a bargaining chip in the larger resolution process, rather than having the merits of an individual MAP case fairly determined. Tax administrations should treat each MAP case independently, without results dependent upon outcomes in other cases, while still striving for consistency in the way that different cases are dealt with so that outcomes among similar cases are generally of a similar nature.

18. We note that, as relatively few cases enter into arbitration, it may be informative to include "cases in arbitration" in MAP statistics reporting.[3]

19. We welcome the introduction of a proper legal framework to ensure the implementation of MAP agreements and also note the need to standardize this framework to avoid misalignment or different approaches across countries. Once MAP resolution is reached, it may be useful to have a standardized implementation mechanism so that as soon as a competent authority signs an agreement, implementation kicks in. This would reduce instances of domestic time limits preventing implementation.

20. We welcome the proposal to strengthen the Minimum Standard and to introduce an obligation to establish a bilateral advanced pricing agreement ("APA") program, except for jurisdictions with a low volume of transfer pricing MAP cases, with the noted emphasis that, to be effective, this proposal must accompany a commitment from jurisdictions to appropriately resource these programs. Bilateral and multilateral APAs are essential tools to ensure advanced tax certainty and reduce controversy, but to achieve this stated objective and offer efficient timelines, adequate resources are needed within tax administrations.

21. Taxpayers report that the most significant barrier to agreeing APAs is the time it takes for them to be agreed. In this respect, efficiencies likewise could be gained if there were a mechanism for rolling forward MAP resolutions into an APA where the same issue clearly continues for future years, as doing so would leverage time and resources invested to eliminate double taxation with respect to historic, audited issues to provide forward-looking certainty for both taxpayers and tax authorities. Similarly, once an APA is negotiated, it would be helpful to have a rollback mechanism to resolve open years under audit or in dispute.

[3] For reference, see statistics prepared for the E.U. Arbitration Convention (e.g., FY 2018 MAP Statistics).