KPMG

Memo

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

From KPMG International

cc Sharon Katz-Pearlman, Head of Global Tax Dispute Resolution and Controversy, KPMG in the US
Chris Morgan, Head of Global Tax Policy, KPMGI

Date January 8, 2021

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

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

1. Introduction - Opening Comment

Professionals in the member firms of KPMG International ("KPMG") welcome the opportunity to comment on the Action 14 consultation paper released on November 18, 2020.

Multinational entities and revenue authorities are facing a proliferation of disputes, confirmed by the continually rising inventory in all jurisdictions. Addressing this trend requires a truly global commitment and engagement, with a keen focus on increasing efficiencies in dispute avoidance and dispute resolution. Especially now, as taxpayers (and revenue authorities) struggle to deal with the uncertainty and disruption caused by COVID-19, it is even more critical that dispute resolution methods work efficiently and well. Both taxpayers and revenue authorities need certainty, particularly with respect to double taxation.

The mutual agreement procedure ("MAP") provides an excellent framework for achieving that certainty, and for the most part, we have had positive experiences resolving cases in MAP. In identifying areas where improvements are needed, it is important not to lose sight of the strong progress that has already been made, and of the commendable work tax authorities have undertaken to improve and maintain their MAP programs. The expansion of the minimum standard, as set forth in the consultation paper, offers an opportunity to make MAP even more effective in providing certainty efficiently and effectively.

While we welcome the consultation paper's proposals for strengthening the Action 14 minimum standard, we would stress the importance of continuing to abide by the existing elements of the minimum standard, and particularly minimum standard 2.5, which requires jurisdictions to ensure adequate resources are provided for MAP. Increasing MAP inventories and long timeframes for case resolution suggest that additional resources may be needed for countries to fully comply with this standard.

Many of the consultation paper's proposals, including with regard to improving the reporting of MAP statistics, will help address these issues, but are unlikely to be wholly successful absent a renewed commitment to ensure that adequate resources are made available for MAP programs to function as intended. As developing and low-

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income countries play a key role in today's global tax landscape, it is important that the OECD also consider these jurisdictions and the resource challenges which they face in implementing and maintaining MAP programs.

We appreciate the OECD's continuing focus on this area, and the recognition of the need for greater certainty in a timelier manner for multinationals around the world.

2. Proposals to Strengthen the Minimum Standard

Proposal 1: Increase the use of bilateral APAs.
Response to Question 2

We agree that incorporating APA programs into the Action 14 minimum standard would be very helpful and would help to facilitate effective dispute resolution in a way that would benefit both taxpayers and tax administrations and would ultimately also bolster MAP relationships. We recognize that some jurisdictions' competent authorities face resource constraints and would therefore recommend that the minimum standard only require that APAs be available for difficult and/or complex cases, as is the policy in the United Kingdom.

Proposal 2: Expand access to training on international tax issues for auditors and examination personnel.
Response to Question 3

We have had experience with inappropriate adjustments that are ultimately withdrawn in MAP. While training is indispensable, we believe that requisite active consultation with the competent authority is a critical and necessary component in preventing inappropriate adjustments and may be the best and most direct way to prevent such adjustments. We therefore recommend that the Inclusive Framework expand the minimum standard to incorporate a competent authority consultation requirement. Under this requirement, auditors would have to consult with local competent authority personnel prior to formally proposing adjustments in cases that would be eligible for MAP. This would provide auditors with a better appreciation of the ramifications of a contemplated adjustment and its likelihood of being sustained in MAP. In turn, this would reduce the number of MAP cases that are withdrawn by the competent authority of the jurisdiction proposing the adjustment, which unnecessarily burden MAP inventories. The examination function would retain the final authority to determine whether to propose an adjustment, following consultation and consideration of the competent authority's views on the issue.

In addition, we would note that in certain egregious (though rare) cases, auditors have refused to withdraw adjustments related to transactions with counterparties in non-treaty jurisdictions, even after adjustments to the same issues involving treaty jurisdictions have been fully eliminated in MAP, and even after the local competent authority has communicated its view that the adjustments have no merit. In our experience, these cases have always been resolved by the elimination of all adjustments, but only after pursuing additional administrative appeals or docketing the case for litigation, contributing to inefficiency in the overall dispute resolution process. Accordingly, we recommend that the Inclusive Framework also embrace a best practice under which tax administrations would not continue to pursue non-treaty adjustments after parallel adjustments covered by tax treaties have been fully eliminated by the tax administration's competent authority in MAP.

Response to Question 4

We agree that creating an obligation to roll out a Global Awareness Training Module would assist in efforts to ensure consistent understanding and training of auditors around the world. We also agree with the proposal to elevate the training to a minimum standard; it should not simply be a best practice. Auditors can be unaware of,

or unfocused on, the ultimate impact of their adjustment on a multinational enterprise ("MNE") as a whole and this is particularly true in cases involving low or negative system profits, where an adjustment may push the counterparty into a loss position or increase an existing loss. Similarly, auditors may not be aware that their adjustments are subject to review in a bilateral MAP case. An increased understanding of these factors may cause an auditor to reconsider a contemplated adjustment.

In addition, auditors may experience internal pressure to make adjustments in cases to which they have devoted substantial time, regardless of the merits of the case. This pressure can also lead to inappropriate or incorrect adjustments. The inappropriate assertion of penalties may also result from similar pressures on auditors. We are aware of situations in which auditors have imposed penalties and should not have, as well as situations in which the penalty has been withdrawn by the competent authority because it was incorrectly asserted. Our suggestion that a consultation with the competent authority should be required prior to finalizing an adjustment extends to the assertion of penalties. Nonetheless, training should also include a discussion of how penalties impact the MAP process.[1] Incorrectly asserted penalties further erode the efficiencies of the dispute resolution process, by resulting in wasted time either during the MAP or in a subsequent administrative proceeding.

Likewise, we have experienced cases where auditors inappropriately and deliberately seek to preclude taxpayers from seeking MAP relief by conditioning proposed settlement offers on the taxpayer's agreement to waive its rights to MAP. Training should stress that seeking waivers of access to MAP is a violation of the minimum standard. In addition, tax authorities should commit to eliminating waiver requests by adopting an official, publicly promulgated policy that their competent authorities must and will accept all eligible cases into MAP, notwithstanding the terms of any purported waiver of MAP rights sought or obtained by auditors. This would eliminate the incentive for auditors to violate the minimum standard by seeking to preclude access to MAP.

Training modules should include actual case studies, which should provide examples of cases in which an adjustment was fully withdrawn, providing a detailed walkthrough of the consequences, including the relevant timeframe. It should also promote awareness of the financial and/or resource impact to both the taxpayer and the revenue authority, with an emphasis on the fact that time, resources, and money may be wasted in advancing a matter that will ultimately be withdrawn or substantially conceded. Consultations with the local competent authority, as recommended above, would help auditors refine their understanding of the risks and benefits of pursuing a case, with the aim of devoting resources to cases that pose greater compliance risk with higher likelihoods of resulting in sustained adjustments. Thus, risk-tiering should play an important role.

Training should also cover the country's MAP statistics, and the impact that an auditor's adjustment has on the MAP inventory. More MAP cases are opening than closing, creating a resource issue for governments; if adjustments are made only where appropriate, this would contribute to inventory control. In our experience, field auditors do not focus on this, and a broader understanding of the "big picture" would ultimately help tax authorities effectively manage their audit and MAP cases.

Appropriate and meaningful training is important in all jurisdictions but can have an even larger impact in developing jurisdictions, which may have less experience with MAP cases and are therefore less familiar with the processes. Additional training on the impact of adjustments, and their likelihood of being sustained in MAP proceedings, could also be incorporated into the Tax Inspectors Without Borders program.

[1] As described below in response to Proposal 5, we believe that penalties should be addressed in MAP cases.

Proposal 3: Define criteria to ensure that access to MAP is granted in eligible cases and introduce standardized documentation requirements for MAP requests.
Response to Question 6

We believe that there should be an expanded list of circumstances in which MAP access should be granted to make clear when MAP access is appropriate and when access must be granted.

First, the minimum standard should clarify that MAP is appropriate in situations where an issue that has a cross-border impact can be characterized as *either* a denial of a deduction or a transfer pricing adjustment. We frequently encounter situations in which auditors seek to cast issues as domestic deductibility issues to preclude their eligibility for MAP. This results in disagreement with the other competent authority and significant expenditure of time and resources on threshold issues, rather than the merits of the case.

Second, the Inclusive Framework and the OECD should clarify through both the Action 14 minimum standard and the commentary on the OECD Model Convention that treaty notification provisions do not apply to the tax authority that is making or proposing an adjustment, and that failure to give treaty notification to that tax authority does not provide grounds for denying access to MAP. Some countries argue that MAP access is predicated on providing treaty notification to the local competent authority, even though the local tax authority is the one making the adjustment. In addition to contradicting the clear language of the tax treaties in question in many cases, this is not logical. Treaty notification requirements ensure that the tax authority that is not making the adjustment is aware that a potential MAP case exists, within a set period of time. The tax authority making the adjustment, on the other hand, knows about the potential MAP case, and thus there is no reason for treaty notification to be made to that tax authority. To the extent there is a need to coordinate internally between the local competent authority office and the local examination team, that coordination responsibility rests with the tax authority, not the taxpayer, and thus should not provide a reason for denying MAP access.

Third, the list should reinforce that double taxation is not a prerequisite to MAP, which extends to all cases involving taxation not in accordance with an applicable treaty, including dual residency issues and discrimination. The minimum standard should cover the specific fact patterns listed in paragraph 13 of the consultation paper, including cases where a permanent establishment no longer exists at the time the MAP request is filed and cases in which there has been a final court decision or other final settlement and correlative relief is sought.

Response to Question 7

We believe that providing a specific list of items to be provided in a MAP submission would improve the minimum standard. This would be particularly helpful for facilitating MAP requests in developing countries.

Response to Question 8

The consultation paper indicates that listing affirmative circumstances in which access to MAP should be granted may create ambiguity (paragraph 14). We believe that, if appropriately framed, such a list would promote, rather than reduce, clarity and understanding, and would also encourage taxpayers to use MAP in situations where they previously may not have realized MAP is available. Providing examples will be especially critical for developing jurisdictions that have less experience applying MAP.

However, in publishing such a list, it will be necessary to take care to clearly specify that the situations described are illustrative only, that no inference is intended regarding the admissibility of similar situations not listed, and

that any case involving taxation not in accordance with an applicable treaty (whether or not it involves double tax, and whether or not it falls into one of the enumerated categories) must be admitted into MAP.

Proposal 4: Suspend tax collection for the duration of the MAP process under the same conditions as are available under the domestic rules.
Response to Question 10

Suspending the collection of tax, including requirements to post bond for all or a portion of an alleged deficiency, while a MAP case is pending would be an important and helpful development, and we agree that this should be elevated to a minimum standard. Many countries have difficulty providing refunds of tax paid, and this can become a barrier to MAP resolutions. Suspending the collection of tax would significantly improve the practical availability of MAP in these jurisdictions. The obligation to suspend tax collection during MAP should not be limited to cases where pursuing domestic remedies would also result in suspension. Access to MAP prior to any payment obligation should be ensured even where domestic remedies would not be available prior to payment.

We note that that statute of limitations issues are unlikely to pose issues for later collection. Due to the OECD's model treaty language concerning the implementation of MAP settlements notwithstanding domestic limitations, we do not believe that statute of limitations issues are likely to pose issues for later collection.

Proposal 5: Align interest charges/penalties in proportion to the outcome of the MAP process.
Response to Question 13

The proposal that interest and penalties be reduced in proportion to the underlying adjustment is helpful, but does not go far enough. Contrary to statements in paragraph 24 of the consultation paper, penalties and interest are not necessarily outside the scope of a treaty. Many treaties, either expressly or through the official positions of the treaty partners, do cover penalties and interest. For example, at least 29 U.S. treaties address this, either in the treaty itself or in the U.S. Treasury's Technical Explanation.

Even where a treaty does not cover penalties and interest, the Inclusive Framework should embrace reconsideration of these matters, where permitted by domestic law, as part of the minimum standard. Where a taxpayer's position is supported in whole or part by one competent authority, this is strong evidence that the position is reasonable and should not be subject to any penalties that involve a reasonableness test. Our experience is that in many cases, there is no actual impediment to negotiating on penalties apart from an unwillingness on the part of the competent authorities, and we believe that embracing the use of MAP as a means to address these issues would protect taxpayers and promote reasonable outcomes.

Proposal 6: Introduce a proper legal framework to ensure the implementation of all MAP agreements.
Response to Question 16

We agree that the current system does not adequately guard against the risk that a MAP resolution may fail to be implemented due to domestic limitations issues. Cases where MAP resolutions are agreed to and not implemented waste the resources of both competent authorities, and act as a deterrent to taxpayers considering MAP.

While we believe that including the second sentence of Article 25(2) (which ensures that MAP agreements can be implemented notwithstanding domestic time limits) would be the simplest solution, we recommend that the minimum standard embrace all the options described in paragraph 27 of the consultation paper for ensuring time limitations do not restrict implementation, in order to provide maximum flexibility. In addition, we would note that

options that rely on administrative changes, where possible, may be implemented more quickly than options that require treaty revisions, and thus should be available to tax authorities under the minimum standard.

Proposal 7: Allow multi-year resolution through MAP of recurring issues with respect to filed years.
Responses to Questions 17 and 18

Allowing multi-year resolution through MAP of recurring issues should be incorporated into the minimum standard, as it would contribute to efficiencies in case resolution and obviate the need for an APA in some circumstances. We believe that the accelerated competent authority procedure ("ACAP") available in the United States and Canada provides the most effective means of rolling forward MAP resolutions.[2] Unfortunately, almost no countries have this option.

We have experience with cases in which a competent authority has refused to make multi-year resolution available as part of a MAP resolution. We support expanding the minimum standard to encompass the roll-forward of MAP resolutions to all filed years for which the relevant circumstances are materially the same as those pertaining to the MAP year(s), and we believe that this would be best accomplished by including ACAP as part of the minimum standard. Some such cases may be resolved if the taxpayer obtains an APA for prospective years with rollback to the intervening years, but requiring taxpayers to pursue separate APAs entails significant additional costs, and generates inefficiencies for both taxpayers and tax administrations. Moreover, some jurisdictions do not permit rollback, and even for those that do, an APA with rollback will not be available if a taxpayer's facts have materially changed and the issues present in the years covered by a MAP case and the potential roll-forward of the MAP resolution are not present in prospective years. In such cases, the taxpayer would have to seek separate MAP resolutions for each year, needlessly increasing already overloaded MAP inventories with cases that have already been resolved in principle.

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.
Response to Question 22

We firmly support including an arbitration requirement in the minimum standard. However, simply elevating arbitration to a minimum standard will not address all the related issues, and accordingly, we suggest that other issues should be considered. First, our experience has been that competent authorities subject to an arbitration requirement frequently extend the time period before arbitration by mutual consent, which is generally allowed by treaties. The ability to extend the time limit in this way eliminates the benefits of arbitration in many cases. The Inclusive Framework should commit, as part of the minimum standard, to not extending the case at all in most cases, and to limiting extensions to a single six-month extension where an extension is necessary.

Second, we recommend that the Inclusive Framework adopt a best practice in which competent authorities operating under a treaty that does not expressly provide for arbitration may nonetheless engage in arbitration, perhaps through an OECD-sponsored protocol. This option could be used for difficult cases on a case-by-case basis and recognizes that the negotiating authority of competent authorities under Article 25 is inherently flexible and includes authority to undertake arbitration where it would be useful in a particular case.

We recognize that some developing countries have expressed concern regarding the use of mandatory binding arbitration. Rather than accept these concerns as a reason for excluding mandatory binding arbitration from the

[2] The ACAP procedure allows a taxpayer to include, as part of its MAP request, a request that the terms of the competent authority resolution be extended to cover subsequent taxable periods for which the taxpayer has filed tax returns and the relevant facts have not changed from the prior periods.

minimum standard, the OECD should assuage these concerns by providing support to developing countries participating in arbitration.

3. Proposals to strengthen the MAP Statistics Reporting Framework

Proposal 1: Reporting of additional data relating to pending or closed MAP cases.
Response to Question 23

We agree that requiring jurisdictions to report data on the three items identified in the proposal would advance the objectives of Action 14. These data would promote efficient case resolution by competent authorities and would allow taxpayers to better gauge the effectiveness of MAP processes in specific jurisdictions.

Identifying which jurisdiction took the action that led to a MAP case will enable users of the MAP statistics to better assess how the recorded timeframes reflect each competent authority's speed in processing and negotiating cases. Moreover, publishing such jurisdiction-specific data will further incentivize jurisdictions to maintain positive and efficient MAP relationships with all their treaty partners.

Providing timing data for cases by outcome would also be helpful. This would not only provide needed insight into how long jurisdictions take to resolve cases in the bilateral phase of MAP, but would also provide taxpayers with information that may be relevant to their determination of whether to seek MAP relief.

Providing information on the year in which pending MAP cases were initiated is particularly important. While efforts to attain case resolutions within an average of 24 months are laudable, an unfortunate side effect of this focus may be a relative inattention to older cases. In some cases, jurisdictions may even be reluctant to process older cases. This is unfortunate, and results in extremely inequitable results for taxpayers whose cases are left to languish in MAP inventories.[3] While publishing data is an important step towards addressing this problem, we recommend that the Action 14 minimum standard also be revised to require arbitration after cases have spent a specified amount of time in inventory, as described above. Even if arbitration is not adopted, however, the minimum standard should require jurisdictions to seek to resolve all cases before they reach 48 months in inventory, and to devote particular efforts to clearing older cases.

Response to Question 24

It is important to taxpayers and tax practitioners to know when MAP provides a viable means for resolving cases. For taxpayers and practitioners in countries with expansive MAP networks, it may be difficult to discern whether MAP cases with certain treaty partners are likely to be resolved. In some cases, MAP cases may only arise under a treaty once every few years, and few taxpayers will be aware when they do. In our experience, the lack of available information on the occurrence of MAP under a given treaty has sometimes been mistaken for evidence that MAP under that treaty is not practically available, which can cause taxpayers to forgo what would have been viable MAP requests, exacerbating double tax strains.

The MAP Statistics Reporting Framework should be expanded to require that jurisdictions list all treaty partners with which they have MAP cases, rather than apply the current *de minimis* rule and exclude countries with fewer than five cases. Where a jurisdiction has fewer than five cases with a treaty partner, the framework could simply require that the jurisdiction report there is at least one case with that treaty partner. Further detail should not be provided in the interest of protecting taxpayer privacy, but indicating that there is at least one case in inventory

[3] As discussed during the November 18, 2020 Tax Certainty Day, certain jurisdictions have made a concerted effort to address their old case inventory. We commend these efforts and we encourage other jurisdictions to take similar action.

would help taxpayers understand whether there is an active MAP relationship between the jurisdictions, and make informed choices about whether to pursue MAP relief.

Proposal 2: Providing relevant information on other practices that impact MAP-APA statistics.
Responses to Questions 25 and 26

As noted above, we strongly endorse the proposal to incorporate bilateral APAs into the Action 14 minimum standard, and we believe that that addition would be logically and helpfully complemented by an expansion of the standard to cover statistical reporting related to APAs.

Many jurisdictions currently publish excellent APA statistics in the form of annual reports and should be encouraged to continue doing so in addition to any standardized reporting done through the MAP Statistics Reporting Framework. However, not all jurisdictions publish APA statistics, and for those that do, it may not be clear to taxpayers and practitioners in other countries that such statistics are available. These statistics are very helpful to taxpayers when determining whether to pursue an APA in a given jurisdiction, as they provide important insight into the experience of the jurisdiction in question and the likely timeframe for an APA resolution.

Reporting APA statistics through the MAP Statistics Reporting Framework would thus provide a helpful complement to existing APA statistical reporting by individual jurisdictions. The information identified in paragraph 44 of the consultation paper would be useful, but should be expanded to include information similar to that made available (or contemplated to be made available) for MAP statistics, including information on completion timeframes broken down by treaty partner. In addition, countries should be required to report any applicable user fees or other costs of their APA programs, in order to make that information available in a centralized repository.

APA statistics could also include aggregated information on the ranges that were agreed to in certain categories of cases, subject to the requirement that a certain number of cases exist in each category in order to safeguard privacy. This would be extremely helpful and would advance efforts to promote standardized benchmarking approaches.

Additional Comments
Response to Question 27

In addition, we recommend that the OECD publish MAP statistics data in a raw format in addition to the PDF files currently made available. The OECD makes other data sets available using an application programming interface (API) based on the SDMX-JSON standard.[4] Making the MAP statistical data available in the same format would help to facilitate analysis of the MAP statistics and improve transparency, without imposing any additional burden on tax administrations.

The OECD should incorporate into the minimum standard a requirement that the resolution of any case resolved via full or partial bilateral agreement be appropriately implemented in both jurisdictions before those jurisdictions can include that case in their MAP statistics as a successfully resolved case. Resolutions that are not implemented in one or both jurisdictions should be reported through a new category in the statistics. We have had experience with a case where the competent authorities came to agreement, and one of the tax authorities subsequently refused to implement the agreement. There was no successful resolution in this case, nor was there any procedural barrier under the treaty that would have prevented resolution. The refusal of a tax administration to implement a resolution it agreed to undermines the MAP process, and the MAP statistics should

[4] https://data.oecd.org/api/sdmx-json-documentation/

clearly reflect any such cases, rather than reward the jurisdiction in question by allowing it to report a case that resulted in a bilateral agreement. Cases where agreements cannot be implemented because of domestic time limitations should also be reported in the statistics otherwise than as agreed cases, though it may be helpful to distinguish these cases from cases in which a tax authority is simply unwilling to implement a resolution.

Similarly, the OECD should revise the MAP outcomes categories to provide greater insight into how many cases result in acceptable outcomes. While separate categories exist for bilateral agreements fully eliminating taxation not in accordance with the treaty and bilateral agreements partially eliminating such taxation, no distinction is drawn with respect to cases that are resolved via a domestic remedy or through unilateral relief. Distinguishing which cases in these categories result in full and in partial relief of taxation not in accordance with the treaty would increase the transparency provided by the MAP statistics.

Lastly, the OECD should more prominently provide information describing the categories of MAP outcomes in the statistics. Taxpayers and practitioners will be better consumers of the MAP statistics if they have at their fingertips clear descriptions of the differences between, e.g., cases that are resolved via domestic remedy and those resolved via a grant of unilateral relief.

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KPMG Contacts	Firm	E-mail
Thomas Bettge	KPMG in the US	tbettge@kpmg.com
Manal Corwin	KPMG in the US	mcorwin@kpmg.com
Sean Foley	KPMG in the US	sffoley@kpmg.com
Sharon Katz-Pearlman	KPMG in the US	skatzpearlman@kpmg.com
Mark Martin	KPMG in the US	mrmartin@kpmg.com
Christopher Morgan	KPMG in the UK	christopher.morgan@kpmg.co.uk
Nicholas Stevart	KPMG in the UK	nick.stevart@kpmg.co.uk

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