OECD BEPS Action 14 - 2020 Review

Proposal 8 and Question 21- Observations and Response

Introduction

This Paper has been prepared by Peter Nias (the Writer),a U.K. based international tax barrister and CEDR accredited mediator who welcomes the opportunity to submit:

- **Observations** on **Proposal 8** to strengthen the Minimum Standard regarding the implementation of MAP arbitration and the dispute resolution mechanisms to assist the better resolution of MAP cases, and a
- **Response** to **Question 21** setting out his views and suggestions regarding alternative approaches to dispute resolution of unresolved MAP cases.

The Writer is grateful to Sarah Blakelock (independent international tax consultant) for her input and comments on this Paper.

Proposal 8 Observations

The OECD Public Consultation Document setting out the 2020 Review shows a substantial amount of work has already been carried out in the five years since its Final Report on Action 14.

However, it also states that whilst the Peer Reviews show that significant progress has been made in the area of dispute resolution, "*more needs to be done to improve the effectiveness of MAP*" and that this 2020 Review presents an opportunity to examine what could be further improved in the MAP process.

When the original Action 14 Proposals were being developed the Writer led the submission to the OECD of a Paper setting out a recommendation for the development of a Collaborative Dispute Resolution (CDR) Programme (see Appendix) to focus on establishing a collaborative working environment not only between Competent Authorities but also taxpayers and their advisers.

Then, and now, the Writer believes the largest single obstacle to the **effective prevention and resolution of disputes** is the absence of a **holistic approach to dispute management**.

The Writer attended the public consultation meeting at the time and made a presentation in which he recommended that attention should be given to improving the whole "dispute experience" including:

- risk assessment for the selection of cases for audit;
- the audit experience pre- MAP;
- the MAP experience (including barriers to the entry to MAP and the conduct of MAP processes); and
- the ultimate resolution of international tax disputes.

In the last 5 years there have been significant improvements in the MAP processes including, as the 2020 Review indicates, the introduction of more mandatory binding arbitration procedures both formalised in Tax Treaties and on an ad hoc basis.

However, the inventory of double tax disputes continues to grow with the attendant costs in time and expense not only for the Contracting States involved but also for the multinational taxpayers for whom the protracted uncertainty of their final tax positions does little to encourage their support for the

international tax regime developments which are generally accepted as being necessary e.g. "*the tax challenges arising from the digitalisation of the economy"*.

Many of the recommendations set out by the Writer 5 years ago remain good today. A summary of them is attached to this Note.

In the Writer's opinion the holistic approach to tax dispute resolution management should focus on the journey of a tax dispute identifying its potential existence at an early stage when it could still be considered an **issue** to be shared by all the stakeholders for resolution jointly and long before it becomes a **dispute** in a formal sense with parties taking positions which get more entrenched and harder to resolve over the passage of time.

Although it is appreciated that not all countries presently allow MAP to proceed in advance or conjunctively with domestic remedies, there is increasing tension between such domestic constraints and the ambition set out in the OECD Action 14 2015 Final Report and reflected in a series of its **Best Practices** "*for a strong political commitment to the effective and timely resolution of disputes through the mutual agreement procedure and to further progress to rapidly resolve disputes*".

The interaction therefore between MAP and domestic administrative court procedures should be sufficiently flexible to allow a taxpayer who wishes to do so to make a choice between MAP and any domestic remedy (if still available) with any domestic remedy being suspended whilst MAP proceeds or with any MAP delayed until such domestic remedies are exhausted, depending on the choice made by the taxpayer.

That early identification of a potential cross-border tax dispute could also assess whether it raised issues that could be better resolved in MAP rather than through domestic processes.

There is no reason why the MAP process cannot take into account the period of time before formal MAP proceedings are commenced: the MAP GAP, as the Writer has called it, being the period between when an "issue" is identified, usually first by the multinational taxpayer, as being one with bilateral (or multilateral) consequences, often as part of a domestic audit in one only of the countries potentially involved, and long before the prospect of formally activating the MAP process is considered.

Article 25(3) of the OECD Model Convention provides another MAP mechanism. This enables the Competent Authorities to "*endeavour to resolve by mutual agreement any difficulties or doubts arising as to the interpretation or application of the Convention*".

The focus of these provisions, which do not require any formal engagement by the taxpayer, nor have the same timing issues as Article 25(1), is to look at difficulties of a general nature that concern, or which may concern, a category of taxpayer. This should happen even if the matter has arisen in connection with an individual case normally coming under the procedure set out in paragraph (1) of Article 25.

The OECD Commentary on these provisions notes (at paragraph 52) that the Competent Authorities can "*where a term has been incompletely or ambiguously defined in the Convention, complete or clarify its definition in order to obviate any difficulty*". It allows Competent Authorities to "*consult together as a way of ensuring the Convention as a whole operates effectively, so that the Mutual Agreement Procedure should result in the effective elimination of the double taxation which could otherwise occur in such a situation*".

Article 25(4) of the OECD Model Treaty goes on to provide guidance as to how Contracting States should engage. This can include direct communication, meaning it would not be necessary to go through diplomatic channels and to do so by letter, fax, telephone, direct meetings "*or any other convenient means and, if they wish, formally establish a joint commission for that purpose …*".

The combination of these existing Treaty provisions and Commentary Guidance, including guidance on the use of Supplementary Dispute Resolution ("SDR")mechanisms (in paragraphs 86 and 87), as well as the MEMAP Working Party recommendations from 2007, should now be brought together.

The MAP process should be seen as part of a collection of measures for the parties to consider using for dispute management not alone and separate from other measures. In that respect although Question 21 refers to "alternative" approaches, the use of the word "alternative" should not be construed in a narrow sense – literally as an alternative to MAP – but complementing it as one of a number of approaches – "alternate", "supplementary", "additional" and "appropriate" – from which a selection is made of the appropriate tool to address the issues that need resolution.

In summary, a holistic approach to tax dispute management would bring significant benefits: help to prevent the development and escalation of disputes at the outset, promote the more timely and effective resolution of disputes in the both the MAP GAP period and once MAP has commenced, all with consequent savings in time and cost as well as improvements in relationships both between the Competent Authorities and with the taxpaying community.

Question 21 Response

The 2020 Review asks for views or suggestions regarding "alternative approaches " to the full and timely resolution for tax payers in tax dispute cases that "*remain unresolved in the MAP "*.

The Writer sets out below his views and suggestions to this Question but does so in the more ambitious context of providing solutions which not only can achieve that result but go further in assisting in the prevention of the matter becoming a "dispute" in the first place and expediting it's resolution both in the MAP GAP phase and during MAP itself.

In 2004, the OECD first recognised the need to improve the process for resolving international tax disputes and produced a report that was followed in February 2007 by further recommendations and the publication of a 'Manual on Effective Mutual Agreement Procedures' (MEMAP).

In the 2007 Report (at paragraph 16), the OECD committed to developing a proposal for examining the feasibility of implementing the mandatory submission (not mandatory resolution) of unresolved MAP cases to a form of supplementary dispute resolution (SDR) mechanism which would include:

- An evaluation of the various forms of SDR and the situations to which they would be suitable;
- The timeframe or "triggering" device that would result in the required submission of the unresolved issue to SDR;
- The role of the taxpayer in the SDR process including the agreement to the submission and the circumstances in which the taxpayer could be denied access to SDR;
- The direct participation of the taxpayer and the SDR process;
- The relation between the SDR decision and the taxpayer's domestic law remedies;
- The relation between the SDR decision and the MAP process generally;
- The form and publication of the SDR decision; and
- The operational and procedural details for carrying out the SDR process.

In that Manual, there was a short section (paragraph 3.5.2) noting the beneficial use that could be made of **mediation** (as a form of SDR) where the use of a mediator or facilitator "*could help provide a perspective on the discussions, identify process hindrances, and in some cases bring more of a problem solving focus to discussions*". In 2008, those recommendations were recognised in changes to the OECD Commentary on Article 25 introducing in paragraphs 86 and 87 two SDR mechanisms: the use of mediation and expert determination.

As an administrative law matter, SDR can therefore legitimately already be used by those countries that adopt the OECD Model Tax Convention.

Supplementary dispute resolution procedures (known in the UK as alternative dispute resolution or ADR) were introduced in the UK ten years ago to assist in tax dispute resolution management as part of HMRC's litigation and settlement strategy and is now an integral part of the way HMRC (the UK Tax Authority) does business.

According to HMRC, the intention is to try and minimise the scope for disputes and, wherever possible, handle them without confrontation and by working collaboratively with the taxpayer and its advisers. Discussions of risk in transactions occur on a "real time" basis, applying an "openness and early dialogue" approach between all concerned jointly agreeing on a timetable with key milestones and target dates for establishing facts, providing information and documentation, reviewing documentation, reaching decisions and testing conclusions.

At the heart of this approach is a shared "resolution" mindset that is likely to lead to a satisfactory outcome for both parties. This approach also extends to joint ownership and control of the dispute.

Such a collaborative approach also lends itself to the resolution of international tax disputes between contracting states and can apply holistically from the very outset of a dispute, rather than when the MAP is formalised which to everyone's frustration often is many years after the dispute has arisen.

A significant amount of work has already been undertaken in this area - not least by the OECD itself.

In its 2007 MEMAP Report at para 16 the OECD Working Party at the time made a recommendation to:

> "*.. develop a proposal examining the feasibility of implementing the mandatory submission (not mandatory resolution) of unresolved MAP cases to a form of supplementary dispute resolution mechanism in the light of the general international law obligation to apply and interpret the treaty in good faith*".

The Writer believes the time has come for this recommendation to be taken up with the establishment of a multi stakeholder Working Group to engage in this work not only in respect of unresolved MAP cases but also to complement the process of managing all MAP disputes from their inception.

The Working Group could consider developing a form of model MOU similar to the one in the Annex to Article 25(5) for MAP arbitration trialling it in a series of pilot structures between willing IF Members.

The model MOU could include an SDR Process Protocol which would set out a voluntary non-binding process and timetable for identifying and managing the issues and providing a menu of SDR techniques for that purpose including facilitation, non-binding expert determination as well as formal mediation and even, by agreement, arbitration of single or multiple issues.

The Writer has drafted such a Protocol for discussion purposes and made it available to various organisations involved in international tax dispute management.

The Writer has spent the last 10 years in his capacity as a Mediator engaged in the use of ADR processes in the successful management and resolution of tax disputes. He was concerned therefore to understand that in its October 2020 Report on the Pillar One Blueprint the OECD released for public consultation, the IF Members decided to withdraw from the section on *Tax Certainty: Dispute Prevention and Resolution* the passages describing a Phase 3 step in the process involving voluntary mediation.

In the Writer's experience there is a significant misunderstanding of what "mediation" is and how it can assist and complement the other dispute management processes. It's very voluntary nature can be a strength in bringing the parties together without impacting on sovereignty or constitutional/administrative law restrictions and with the catalyst of a trained third party independent professional (e.g. a single, joint or co-mediator) clarify if not resolve at a very much earlier stage the issues that are in dispute and explore with the relevant Competent Authorities potential solutions to the shared issues.

Concluding Remarks

The international business community needs something more than the option of mandatory binding arbitration and the long period of uncertainty whilst that process takes its course.

The use of SDR mechanisms as part of a CDR Programme could hold the answer.

The Writer is grateful for this opportunity to share his thinking based on his experience in international tax dispute resolution over a number of decades and would also welcome the opportunity to engage further in this matter presenting more detailed thinking of how his suggestions could work in practice.

8th January 2021

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OECD BEPS Action 14 – Make Dispute Resolution Mechanisms More Effective Response to OECD Public Discussion Draft ("Action 14 Paper")

Appendix

1 Collaborative Dispute Resolution (CDR) Programme

1.1 We believe the largest single obstacle to the effective resolution of disputes is the absence of a holistic approach to dispute resolution management, starting from risk assessment and on through tax audits and on again into MAP.

1.2 We recommend the development of a suitable programme to focus on establishing a collaborative working environment not only between Competent Authorities but also taxpayers and their advisers. This would include a voluntary best practice protocol covering the 'whole journey' from the time the dispute arises to its resolution building on the MEMAP recommendations (in particular paragraph 3.5.2 of the 2007 Report). The programme would incorporate the full range of SDR techniques including: facilitated structured negotiations involving mediation techniques, facilitative (and evaluative) mediation, non-binding expert determination and similar techniques.

1.3 The programme would be non-binding but all Member States would be encouraged to adopt its principles, all designed to enhance not replace MAP practices (including arbitration, where agreed) and be seen as part of MAP (potentially enlarging its ambit as a result) to reduce the delays in resolving disputes which are currently experienced.

1.4 The CDR Programme would establish a range of best practices taking into account also the work of the FTA Forum and its recently published '*Multilateral Strategic Plan on Mutual Agreement Procedures: A Vision for Continuous MAP Improvement*' and its adoption, operation, application and output would be monitored by an appropriate Forum (see para. 2.7 above) as the Action 14 Paper suggests (at paragraph 8; pages 5 and 6).

1.5 The application of the CDR Programme could start no later than the point at which any party feels the 'dispute' has reached, or is likely to reach, a point when the introduction of the formality of MAP needs to be considered. It should not be a process left, say, for the two year period of a MPA case being accepted. It should be seen as part of the MAP process, or the MAP process being part of it (see Action 14 Paper para 40; page 20).

1.6 By way of example, in the UK such a programme has been successfully developed for managing certain domestic tax disputes (between Tax Authority and taxpayer), and we see no reason why such principles and procedures could not be used in cross-border Tax Treaty disputes (between Tax Authorities where the taxpayer is also involved) with similar results including significant savings in time, cost, efficiency and enhancement of relationships.

1.7 We believe that one of the principal benefits would be to enable countries to make better and more efficient use of their existing Competent Authority resources.

1.8 The techniques rely on mediation principles and often use a third party mediation-trained facilitator being either one person appointed by both parties or two individuals acting one for each party.

1.9 We note the OECD has already identified the potential of some of these techniques in its 2007 MEMAP Report (at paragraph 3.5.2).

1.10 There are a number of detailed considerations that would need input to develop a CDR programme and we would be very pleased to make available to the OECD our experience in this area for that purpose.