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BDI comments regarding the public consultation on BEPS Action 14: Making Dispute Resolution Mechanisms More Effective – 2020 Review

Dear Sir or Madam,

As the umbrella organization of German industry and industry-related services we thank the OECD for the opportunity to bring forward taxpayers' experience in the dispute resolution mechanisms ('MAP') under BEPS Action 14 and to take this experience into consideration in order to improve the measures in an effective and timely manner.

We are convinced that, especially against the background of the OECD initiative towards reaching a consensus-based long-term solution to the tax challenges arising from the digitalisation of the economy, effective and timely international dispute resolution will become more important in the future and therefore welcome the initiatives to improve the mutual agreement procedure to resolve double taxation issues.

The OECD's own, most recent statistics indicate that cross-border tax disputes have increased. In addition, the envisaged reform of the international taxation system will lead to an increase in mutual agreement procedures, meaning it is essential for Germany's industry to have internationally uniformly implemented measures that lead to rapid dispute resolution and tax certainty.[1]

In order to improve the MAP, we are pleased to share some comments and suggestions based on the experience of Germany's industry.

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[1] As regards double taxation risks arising from the currently prepared reform of global taxation of multinational companies, we want to reiterate the importance of simultaneously eliminating double taxation instead of solely relying on mechanisms within the context of MAP. Further details can be found in BDI's comments on the OECD / G20 Inclusive Framework's Pillar One Blueprint and Pillar Two Blueprints.

1. In our view, the predominant issue is the duration of dispute resolution procedures, which averages to about 26 months according to the OECD MAP statistics 2019 but can exceed up to five or more years. To put it in a nutshell, the timeline is much too long. Some businesses report of bilateral APA cases where they had already four rounds of meetings between the states and where the case has still not been settled. The long commitment of personnel and numerous changes of personnel on all sides (business, advisors, administrations) inevitably leads to high costs incurred for both tax administrations and taxpayers alike, causing tax uncertainty for years.

   Increased taxpayer involvement and more transparency of tax administrations during the process could contribute to more effective information gathering by all actors involved and thereby increase tax certainty for taxpayers through ongoing participation in the decision-making process. There is currently a lack of transparency for the taxpayer in getting information on positions that are exchanged between National Tax Authorities (NTAs). It is important that there is a possibility for discussion and interaction, e.g. in cases of re-qualifications of transactions.

2. To address the issue of inappropriate adjustments reflecting lack of experience on international tax matters that would later need to be withdrawn in MAPs and in order to support the transparency and joint work of tax authorities and taxpayers, the goal of Proposal 2 on expanding access to training on international tax issues for auditors and examination personnel could be achieved by including local panels within the local audit process, e.g. a local panel within the local tax administration.

   For example, some businesses report that MAPs became necessary due to a lack of experience by the local auditor combined with a strict deadline to close the audit. In this case, one TP issue was brought up very late in the audit process and subsequently there was no chance to explain the TP principles applied in detail, resulting in a burdensome (unilateral) APA process. In another case, a MAP became necessary since a local auditor was not able or willing to check new facts and circumstances on a historical TP position that was taken by the tax audit over years. In this case, no meaningful TP arguments could be exchanged in the local tax audit.

   Another proposal could be to increase also unilateral corresponding adjustments after a TP adjustment of another country. Countries should implement this option in local law (which is already foreseen in double tax treaties “DTT”). Such request could be handled by a trained national TP expert team of the NTA and information on adjustment could be collected and exchanged with the NTA of the other country. It should be reflected in the statistics of each country in order to complement the overview of adjustments

made by each country. This would include another layer on prevention of double taxation without running through the formalistic MAP or APA process.

Furthermore, joint tax audits on a specific TP topic with local and higher administration levels and cross-border audits can increase awareness of international taxation issues and limit MAP cases. Such cross-border tax audits have the advantage that both tax administrations exchange information and opinions on the tax issues already apart from the formal and protracted dispute resolution and thus, if necessary, neutralize double taxation risks already beforehand.

3. In order to ensure that access to MAPs is granted in eligible cases, the formal hurdles for opening such procedures should be harmonized internationally and not hindered by hardly feasible and different formal rules. A consistent legal framework would ensure taxpayers the certainty of being able to initiate a MAP at any location. Another noted challenge by German industry is that many tax administrations require the taxpayer to exclude the possibility for a MAP to close tax audits. This practice is disadvantageous and should be forbidden.

   Some businesses also reported a case where access was denied due to a very formalistic approach (regarding access to the treaty reduction on withholding taxes for dividends). In this case, the business was (partly) hindered in a timely filing and the applications made by the business were interpreted in the most disadvantageous way. Businesses report that in some cases, very strict local administrative rules combined with an over-formalistic approach of the tax administration can exclude the access to the MAP and override them.

4. To guarantee access to MAP arbitration or other dispute resolution mechanisms to guarantee the timely and effective resolution of cases through the mutual agreement procedure, arbitration and dispute resolution mechanisms should be included within double tax treaties to ensure a mandatory and legal forceable access to MAP. In cases where double tax treaties do not foresee arbitration/mandatory resolution mechanisms, the initiation of a mutual agreement procedure is associated with high administrative hurdles and uncertainties and therefore taxpayers often refrain from initiating a MAP. As a result, unintended additional tax burdens or double taxation can occur. MAP arbitration should be included into the minimum standard since the need will increase.

5. Considering the duration of MAP/APAs, appropriate interest and penalty payments should be linked to standardized rules that cover interest on both tax refunds and tax arrears. Due to the duration of dispute resolution processes, many taxpayers face extraordinary interest on back payments that are not proportionate to the initial

tax claim. The uncertain outcome of a MAP/APA also makes it almost impossible for taxpayers to make advance payments to prevent or reduce interest on back taxes. An option to prepay or suspend interest accrual during a MAP/APA would enhance taxpayer certainty and strengthen dispute resolution mechanisms. A consistent legal framework for interest and penalties within the minimum standard is appreciated.

Furthermore, interests can lead to extraordinary high costs and in one case, the NTAs had no willingness to include the interest in the APA case (with rollback). The disadvantage is not only due to differences in interest rates, but in this case the other country also had a different practice with respect to interest refunds and interest payments after the closure of a MAP/APA (In case of refunds the interest calculation starts only when the tax assessments after MAP closure are made (as a result there is no interest refund) while for interest payments the calculation starts with retroactive effect from the respective underlying tax year). In addition, due to the uncertainty of the adjustment amount finally agreed it is not possible to escape from high interest payments with "voluntary tax pre-payments". Withholding tax and other secondary adjustments should be included in the MAP/APA (rollback period) process with the aim to avoid the double taxation.

6. German businesses welcome the approach to introduce an obligation to establish bilateral advanced pricing agreements. APA are the combination of an advance pricing agreement between countries on transfer pricing and an advance commitment based on that agreement. By entering into APAs, the countries involved establish arm's length transfer pricing methods between the related parties concerned. We suggest the introduction in all countries, including those where few transfer pricing MAP cases occur, in order to create uniform rules globally.

7. BDI proposes to strengthen MAP statistics and reduce barriers to entry for MAPs by including more detailed (anonymized) information on MAP cases, with categories of affected subjects (e.g. royalty rates, interest rates, burdensome numerous or different transactions, stipulated interest rates). For businesses, it is very important to have an overview on APA (also unilateral) statistics and information. Providing APA information and statistics is crucial for reducing APA entry barriers. APA reporting should include multi-lateral, bilateral and unilateral APA case information as well as provide categories of affected issues.

Yours sincerely

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