

OECD holds public consultation on review of minimum standard on dispute resolution under BEPS Action 14

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Executive summary

On 1 February 2021, the Organisation for Economic Co-operation and Development (OECD) held a public consultation with respect to the review of the minimum standard on dispute resolution under Action 14 of the Base Erosion and Profit Shifting (BEPS) project. The proposals on which the OECD was seeking comments were outlined in an earlier [Consultation Document](#) (which was the subject of an [EY Global Tax Alert](#) published in November 2020).

While the majority of comments made by panelists and other participants in the public consultation were broadly in line with the recommendations made by the OECD, there was some divergence in opinion on key proposals relating in particular to their implementation in developing countries.

Detailed discussion

Background

On 18 November 2020, the OECD released the Consultation Document, seeking stakeholder input on proposals for the review of the Action 14 minimum standard in three key areas:

- ▶ Experiences with, and views on, the status of dispute resolution and suggestions for improvement, including experiences with the Mutual Agreement Procedure (MAP) in those jurisdictions that obtained a deferral of the peer review process

- ▶ Additional measures that may strengthen the Action 14 minimum standard
- ▶ Additional measures that may strengthen the MAP Statistics Reporting Framework

EY was one of 33 professional service providers, businesses, industry associations, and individuals that provided [comments](#) on the Consultation Document. EY submitted a [comment letter](#) and a global team from EY participated in the consultation.

The public consultation

The virtual public consultation on 1 February 2021 was opened by the Chair of the MAP Forum of the OECD Forum on Tax Administration; the Head of the International Co-operation and Tax Administration Division (ICTAD) of the OECD Centre for Tax Policy and Administration; and the Chair of the Tax Committee of Business at the OECD (BIAC).

The Head of the ICTAD noted that while case closure rates have increased in the past four years, significant increases in the number of MAP cases opened over the same period has resulted in net MAP inventory trending upwards, with increases between 2016 and 2019 of 90% for transfer pricing (TP) cases and 75% for all other cases. This increase is not, however, entirely negative as it indicates increasing confidence among taxpayers in the MAP process. While MAP remains a key part of the OECD's tax certainty agenda, there is also an acceptance that a broader, holistic approach to dispute resolution and prevention is required, including a greater focus on Advance Pricing Agreements (APAs) and the International Compliance Assurance Programme (ICAP). Going forward, dispute resolution and prevention will be increasingly important given the BEPS 2.0 project¹ and the increasing need for tax certainty, which means that continued work on Action 14 will remain critical.

Key themes identified by the OECD in the comment submissions include:

- ▶ Continued strong support for work on dispute resolution and prevention under BEPS Action 14
- ▶ Support for pre-MAP work including APAs, training and coordination between MAP and audit functions
- ▶ Observation of improvements in availability of MAP, but also persistent issues with access, either explicit or implicit
- ▶ Timelines a continuing concern, with support for making improvements in effective and timely resolution and implementation of MAP

- ▶ Domestic law issues persisting, with need for a more collaborative approach with MAP Forum lead
- ▶ Support for mandatory, binding arbitration for more tax certainty

The Inclusive Framework MAP peer review process has encouraged competent authorities (CAs) to focus on meeting the minimum standard, with active steps taken to address recommendations and areas of improvement identified. Instrumental to this continued improvement is relationship management by CAs resulting in more regular communication at every level, from senior leadership down to the individual case managers. It was also noted that taxpayers have a central role in the MAP process and it is critical that they assist the involved CAs equally, including by being responsive to information requests as well as by being proactive and regularly consulting on whether further assistance is needed to facilitate the timely resolution of disputes.

The public consultation then proceeded to five panel discussions involving representatives from advisory firms, businesses, industry associations, and tax authorities. Each panel session focused on proposals from the Consultation Document centered around particular themes from the Action 14 review.

Preventing disputes: Proposals 1 and 2

The first panel session addressed proposals 1 and 2 of the Consultation Document, targeted at the prevention of cross-border tax disputes. Prevention is key in managing the trending increase in MAP case inventory. Streamlining the APA process through a more efficient and effective network of APA programs, potentially allowing bilateral APAs (BAPAs) on the basis of treaty articles alone even if the program is not implemented in domestic law and also extending APAs to non-TP related issues, would help to reduce the number of cases which wind up in MAP.

With respect to the increase in the use of BAPAs under Proposal 1, panelists were broadly in agreement that APAs are important tools in preventing potential cross-border disputes with BAPAs increasingly becoming the optimum choice for both taxpayers and tax authorities. In countries with developed APA programs, BAPAs have been positively received, with participants regarding them as more constructive and efficient than resolving domestic audit adjustments through MAP. However, the negotiation of APAs was described as a prolonged, complex and highly involved undertaking - with many CAs lacking the requisite

resources or experience to handle them. This was considered to be particularly true of countries with nascent APA programs, including multiple jurisdictions in Africa, where the local tax authority can end up devoting significant, sometimes exclusive, attention to a single complex APA case while having to suspend other cases due to a lack of resources. Consequently, applying a single consistent standard for BAPA programs across all jurisdictions is likely to prove difficult. Panelists and other consultation participants presented mixed views regarding thresholds for establishing BAPA programs and preliminary assessments before entering BAPAs. Further guidance and work from the OECD on procedural aspects and implementation of BAPA programs would be welcome.

For both MAP processes and APA programs, panelists generally agreed that improved training regimes for auditors are required to raise awareness of the international impact of domestic adjustments and penalties. For MAP, an increased understanding of international standards and procedures would encourage audit teams to form reasonable and principled adjustments in an internationally standardized way and minimize the likelihood of inappropriate adjustments, thereby reducing the cases entering MAP and the time it takes for CAs to reach a resolution. Further, the panelists recognized the need for a more coordinated approach between CAs and audit teams, preserving the independence of audit teams, but allowing them to consult regularly on the negotiation of both APAs/MAPs as well as to share feedback on cancelled tax assessments. The audit team could, as a standard procedure, consult with the CA team prior to closing a case to reduce the risk of erroneous adjustments that lead to MAP cases.

Availability and access to MAP: Proposals 3, 4 and 5

The second panel session addressed proposals 3, 4 and 5 of the Consultation Document, which broadly addressed the standardization of access and documentation requirements for MAP requests; the suspension of tax collection during MAP negotiations; and aligning interest charges and penalties with MAP outcomes. It was recognized that there are still numerous barriers to accessing MAP, with particular concern over an increasing trend of access being denied where domestic legislation concerning non-deductibility is applied to related party services and royalty payments (such as “fairness” tests). This was an issue that was specifically raised in EY’s comment submission, reflecting particular concerns

about this trend, especially in light of the BEPS 2.0 Pillar Two Blueprint. Panelists agreed that standardized documentation requirements for MAP applications would both reduce the administrative burden for CAs and increase ease of access for taxpayers while also minimizing required time and resources in coordinating MAP applications. The strong support for these proposals in the comment submissions on the Consultation Document was echoed by the panelists.

On the suspension of tax collection during MAP, concerns were raised that the current proposals did not do enough to adequately address the complexities this issue raises. In particular, the lack of suspension was viewed as causing both liquidity and financial reporting issues for taxpayers and playing a part in dissuading some taxpayers from engaging with the MAP process. Additionally, concern was raised over the alignment of suspension of tax collection under MAP with domestic rules on suspension due to disparities in the domestic suspension rules in different jurisdictions (with some countries lacking any domestic equivalent provisions at all). Further, there is concern among some jurisdictions, particularly developing countries, that suspension of collection during MAP could result in an increase in MAP inventories and a greater drain on tax authority resources. This is because of concern that mandatory suspension of collection under MAP could be used by some taxpayers as a tax deferral mechanism and that the existing proposals do not contain sufficient countermeasures to prevent such abuse - for example, a requirement for taxpayers to provide guarantees while negotiations are ongoing.

Resolution of MAP cases: Proposals 7 and 8

The third panel session focused on proposals 7 and 8 of the Consultation Document, which addressed the multi-year resolution in MAP and the implementation of MAP arbitration and other dispute resolution mechanisms. Consistent with the comment submissions on the Consultation Paper, the panelists indicated strong support for these proposals - in particular the importance of mandatory binding arbitration in moving forward CA discussions and MAP timelines. While there was broad consensus among the panel that further work is needed on reforming the dispute resolution mechanisms for MAP cases, there were some divergences in opinion on the best way forward for improvement.

One panelist advocated the use of supplementary dispute resolution (SDR) mechanisms originally proposed under the Manual on Effective Mutual Agreement Procedures. Unlike

the current proposals around mandatory binding arbitration, the use of SDR mechanisms (e.g., mediation) would not involve putting a case forward for final resolution, but rather would involve clarifying the positions of the various stakeholders early in the dispute process to prevent matters forming into disputes. In a similar vein, another panelist advocated the creation of a panel of CAs to provide non-binding input, on an anonymous and confidential basis, into cases where the CAs involved have reached an impasse.

As for the arbitration process itself, it was noted that several countries have expressed concerns over the lack of accountability and transparency in the process. Most notably, the inability for arbitration decisions to be subject to judicial review coupled with the lack of reasoning provided by some arbitration bodies were both considered impediments to widespread adoption of mandatory binding arbitration in developing countries. In contrast, panelists representing both the business community and the United States (US) advocated for the expansion of mandatory binding arbitration - with the latter considering it a critical mechanism in reducing MAP inventories and freeing up CA resources.

On multi-year resolution, the Accelerated Competent Authority Procedure (ACAP) was highlighted as an existing mechanism in the US and Canada. Panelists had multiple suggestions for other ways this can be achieved in practice. On prospective resolution, one panelist advocated the "roll-forward" of MAP resolutions becoming a minimum standard, with potential disputes over changing facts and circumstances to be resolved in a similar fashion to APAs (e.g., through the use of critical assumptions). Retrospective application would predominantly be achieved through APA rollback programs, with CAs encouraged to come together on resolving multi-year disputes in a proactive fashion.

Implementation of MAP agreements, MAP statistics and other suggestions: Proposal 6 and proposals on MAP statistics

The final panel session focused on the introduction of legal frameworks to ensure the implementation of MAP agreements as well as proposals on expanded reporting requirements for MAP and APA statistics. The panel, which included an EY representative, unanimously agreed that further work was required to ensure access to MAP and implementation of MAP agreements, with a focus on removing or overriding domestic time limitation periods.

On statistics, a broad range of potential reporting criteria was outlined by the panelists, with at least one panelist noting that there should be a concerted effort to ensure consistency on MAP and APA reporting. While the administrative burden on CAs was noted, panelists generally seemed to favor more transparency around dispute resolution outcomes in line with the recommendations in the Consultation Document and in the comment submissions.

It was also suggested that reporting could be used to identify potential areas for further reform, including identifying CAs which were not reporting their statistics in a timely manner, jurisdictions that had failed to implement MAP agreements, and the time taken to implement MAP agreements. Further, the need for transparency on domestic law issues that could affect availability or implementation of MAP negotiations was highlighted as a key area for improvement.

Closing remarks and next steps

In closing, the OECD Secretariat noted that the impact of Action 14 and its stated aims have already started to permeate through the relationships between CAs and the way in which MAP and APA negotiations are handled. The Chair of the MAP Forum noted the importance of taxpayers as a key stakeholder in dispute resolution processes and stated that the OECD welcomed all the comments from participants, particularly the comments concerning difficulties with the implementation of some of the proposals in developing countries. He indicated that the Forum on Tax Administration would incorporate these considerations into its continued work on improving cross-border tax dispute resolution.

Implications

The public consultation on improving dispute resolution was held at a time of increasing complexity in tax audits and disputes as well as the disruption wrought by the COVID-19 pandemic - the latter of which has already had wide-ranging impacts on transfer pricing generally.² In such circumstances, the need to increase the accessibility, efficiency, and efficacy of cross-border dispute resolution programs is critical to the proper operation of the international tax system. As the OECD considers the comment submissions, we expect more material on Action 14 and further proposals for improvement to be produced over the coming months. To prepare for navigating this ever-changing landscape, multinationals should take action to ensure that their global tax controversy approach is fit for the future.³

Endnotes

1. See EY Global Tax Alert, [OECD Inclusive Framework political leaders promote global consensus following OECD's public consultation on Pillar One and Two Blueprints](#), dated 1 February 2021.
2. See EY Global Tax Alert, [OECD releases guidance on transfer pricing implications of COVID-19 pandemic](#), dated 23 December 2020.
3. See EY article, [Why multinationals need a tax controversy function fit for the future](#), dated 8 December 2020.

For additional information with respect to this Alert, please contact the following:

Ernst & Young Solutions LLP, Singapore

- ▶ Luis Coronado luis.coronado@sg.ey.com

Ernst & Young LLP (United States), Washington, DC

- ▶ Barbara M. Angus barbara.angus@ey.com

Ernst & Young LLP (United Kingdom), Global Tax Desk Network, London

- ▶ Joel Cooper joel.cooper@uk.ey.com

Ernst & Young Belastingadviseurs LLP, Rotterdam

- ▶ Ronald van den Brekel ronald.van.den.brekel@nl.ey.com
- ▶ Marlies de Ruiter marlies.de.ruiter@nl.ey.com

Ernst & Young LLP (Canada), Ottawa

- ▶ Paul Mulvihill paul.f.mulvihill@ca.ey.com

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