

Joint Opinion Statement FC 3/2015
on making dispute resolution mechanisms more effective
(BEPS Action 14)

Prepared by CFE and AOTCA
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The CFE (Confédération Fiscale Européenne) is the umbrella organisation representing the tax profession in Europe. Our members are 26 professional organisations from 21 European countries (16 OECD member states) with more than 100,000 individual members. Our functions are to safeguard the professional interests of tax advisers, to assure the quality of tax services provided by tax advisers, to exchange information about national tax laws and professional law and to contribute to the coordination of tax law in Europe.

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AOTCA (The Asia-Oceania Tax Consultants' Association) was founded in 1992 by 10 tax professionals' bodies located in the Asian and Oceanic regions. It has expanded to embrace 20 leading organizations from 16 countries/regions.

Introduction

The following comments relate to the OECD's Public Discussion Draft "*BEPS ACTION 14: Make Dispute Resolution Mechanism More Effective*"¹ (hereinafter "*OECD Report*"), published on 18 December 2014.

We will be pleased to answer any questions you may have concerning our comments. For further information, please contact Mr. Piergiorgio Valente, Chairman of the CFE Fiscal Committee, or Rudolf Reibel, Fiscal and Professional Affairs Officer of the CFE, at brusselsoffice@cfe-eutax.org.

General comments

We find that a proper dispute resolution mechanism on treaty-related disputes is a key issue, as well as the actual enforcement of treaty provisions which represents a key element for building trust on taxpayers and in their effectiveness and real avoidance of the double taxation. The lack of trust may negatively impact cross border transactions.

As admitted in the OECD Report, in spite of several attempts to make dispute resolution mechanisms work better, further progress remains to be achieved. The current BEPS Action 14 is a unique opportunity to improve it and make some progress. [But such mechanism will only be successful if it is able to facilitate final and binding decisions to be reached within an acceptable time frame.](#) These issues become more important in these days when the number of MAP cases is constantly increasing² and there is no indication that this trend will change in the near future.

We appreciate that the OECD Report precisely acknowledges some of the current problems with MAP procedures. Nevertheless, we are of the opinion that the proposed changes will not entirely secure in a satisfactory manner the removal of the existing problems. Even if the recommendations are followed, the initiative in solving the disputes will remain primarily with the States represented by their competent authorities. The taxpayer's role is currently rather limited, and their involvement in the procedure should be further improved. The scope of the proposal should be expanded, so as to ensure the desired certainty and effectiveness.

Grounding the dispute resolution mechanism on the expectation that the two parties in the dispute will reach an agreement relying upon their acting in good faith will hardly reach a positive outcome and the desired certainty. In addition, the majority of the suggestions in the OECD Report refer to existing recommendations (e.g. MEMAP) which have not brought the satisfactory solution so far.

As indicated in the CFE opinion FC 15/2014 dated 19 December 2014³, we favour the idea of introducing a dispute resolution mechanism through multilateral instrument. Such mechanism containing mandatory and binding arbitration represents a unified, effective and immediately applicable mechanism that will offer a real progress in dealing with treaty disputes.

Proposing a mandatory and binding dispute resolution mechanism would demonstrate the OECD's commitment to making the BEPS Action Plan a truly balanced undertaking to improve the international tax landscape for both tax administrations and taxpayers. Failing a real trade-off for the added compliance duties and tighter legislation resulting from the implementation of other BEPS

¹ <http://www.oecd.org/ctp/dispute/discussion-draft-action-14-make-dispute-resolution-mechanisms-more-effective.pdf>

² OECD Map Statistics 2006-2013: <http://www.oecd.org/ctp/dispute/map-statistics-2006-2013.htm>

³ <http://www.cfe-eutax.org/node/4087>

measures and an effective tool to provide double taxation, the BEPS exercise risks becoming lopsided.

We note that there is no consensus within OECD on moving towards universal mandatory binding MAP arbitration. Nevertheless, we believe that whenever the parties are not able to reach an agreement within reasonable time (e.g. 2 years), there is no better way to reach the resolution of the case than by mandatory arbitration. Even if this solution is not accepted by all countries from the beginning, considering the history of other multilateral agreements it may be expected that after certain period of time the majority of countries will accede.

In our view, an effective approach to committing many more countries to arbitration would be through a multilateral instrument providing for binding procedures (under BEPS Action 15).

Absence of an obligation to resolve MAP cases presented under Article 25(1)

We agree with the necessity to clearly state the obligation of the competent authorities to resolve a case by mutual agreement (par. 10). The words “shall endeavour” as stated in par. 2 of Article 25 do not provide the legally binding undertaking to resolve the dispute and the practice shows that this delays effective solution of MAP cases. The change of the commentary may create certain pressure on the competent authorities but we doubt that such a change alone will secure the final resolution of the case.

Ensuring resolution of the cases

As it is admitted in the OECD Report (par. 36), the work on BEPS may lead to more stringent standards to be adopted and competent authorities will be called upon to develop common interpretations of the new tax treaty and transfer pricing rules. In other words, more disputes involving the interpretation and application of treaties may be expected.

The application of suggested measures such as principled approach to the resolution of MAP cases as well as an increase of co-operation, transparency or good competent authority working relationships may, to a certain extent, positively contribute to the resolution of MAP cases. We however doubt that it will be a significant improvement that will lead to a satisfactory solution of identified problems.

The MAP case is a result of different interpretations of competent authorities of two or more States on the interpretation and application of tax treaty provisions.

It is questionable to what extent the suggested “soft” measures (e.g. changing the commentary, commitment of parties to increase independence of competent authorities or to change performance indicators for competent authorities) will be sufficient to motivate a competent authority to give up its position, in particular in a situation when each party is persuaded that its view is objective and its claim is justified. Even if both sides undertake their best endeavours in order to take the objective view and to apply the treaty provision in good faith, it is very difficult to reach the change of one’s standpoint on the basis of the negotiation between two competent authorities. The competent authorities are part of state administration having their budgetary interests in mind, which even complicates the process of reaching an agreement. If the agreement between the disputing parties is not reached within reasonable time, the setting up of the dispute resolution with involvement of a third party leading them to a final and binding resolution is a must.

In this respect, [we support the idea of setting up a permanent arbitration tribunal for international tax disputes that could not only facilitate the arbitration process but may provide the support in a pre-arbitration phase as well.](#)

Lack of cooperation, transparency, resources or good working relationship

As mentioned in the OECD Report (par. 39), the lack of co-operation, transparency or good working relationship between competent authorities also creates difficulties for the resolution of MAP cases.

In our view it is of the utmost importance to focus and improve transparency and relationship building between taxpayers and tax authorities. Regular updates to taxpayers in connection with a MAP case would be desirable (Option 21 is most welcome).

In addition, further information and data on resolved cases should be disclosed.

In our opinion the lack of expertise or proper training of tax authorities can also increase the difficulties found on the resolution of MAP cases. Further and specific training should be ensured (for developing countries outsourcing some of the MAP function, it could probably be an option to consider at least for short period of time while local officers lack the necessary expertise to deal with such cases).

Exchange of existing best practices among countries and Tax Administrations is welcome, since it could contribute to help identifying trends in disputes.

We believe that if there is a “threat” of involving a third party in order to reach the final decision (in case of mandatory arbitration), it may help to motivate the competent authorities to cooperate better and reach agreement in a pre-arbitration phase.

As far as the proposal to provide additional guidance on the minimum contents of a request for MAP assistance (Option 11 of the Discussion Draft), we welcome any measure that would contribute to improve clarity and reduce any unnecessary burden on taxpayers in terms of documentation.

Sovereignty issue

According to the OECD Report (par. 42), one of the main policy concerns with mandatory binding MAP arbitration relates to national sovereignty. We do not fully understand this argument. In the area of international public law, arbitration is generally recognized as an appropriate method of dispute resolution. The area of international tax law seems to be the only exception. We do not see any reasons for this. In the absence of consensus, it must be clearly recognised that the mechanism ensuring the binding resolution of the MAP case is necessary to achieve real progress. An appeal to good faith will not bring the desired results.

The scope of arbitration

We do not support the limitation of the arbitration’s scope as it may lead to uncertainty and in further delay in reaching a decision. In practice the limitation may trigger practical complications as to determination whether the particular case falls within the scope covered by the arbitration, in particular in cases involving application of provisions falling both within and outside the scope.

Form of decision

We do not find the “Final Offer” approach (used in baseball arbitration) to be appropriate. As indicated above and admitted in the OECD Report, as a result of BEPS there may be an increased need for development of common interpretations of the new tax treaty and transfer pricing rules.

However, the decision resulting from baseball arbitration does not state the reasons supporting it and as such will not help develop a common interpretation as these decisions cannot be used as an interpretation instrument for future cases involving the same issues. In addition, under this approach the arbitrators may choose only from the two offers presented by the parties. In cases when none of the presented offers represents a fair and objective resolution, this may lead to distorted interpretation of tax treaty provisions. Albeit we understand that the motivation behind the “Final Offer” approach may be cost and time effectiveness, unreasoned decision may undermine the trust in resolution of treaty cases. Therefore we prefer the “conventional” or “independent opinion” approach.

We believe that there are other techniques to achieve timely and cost effective arbitration, e.g. the permanent arbitration tribunal for international tax disputes, if established, could provide us with clear rules how the arbitration fees and other costs are to be determined as well as provide for time limits for reaching resolution.

Multilateral MAPs

The dispute resolution mechanism agreed in multilateral agreement will also enable to properly address the resolution of multijurisdictional international tax disputes (par. 57 and 58 of the Discussion Draft), which substantially increased in recent years.

The position of the taxpayer

Establishing a mandatory dispute resolution mechanism would be in our view crucial to prevent economic or juridical double taxation. In practical terms, we suggest as a possible solution to help improving the current framework, as well as to enhance the current position of the taxpayer while a dispute is pending.

The existing MAP procedure is usually a lengthy process. The taxpayer will probably be required to pay the tax (often in both countries) under their provisions which require it to act in very short periods – often as little as 60 days. [A new alternative/provision allowing a taxpayer to interplead, pay the higher of the two amounts of tax and any applicable penalties arising from underpayment of that amount only, and then leave it to the competent authorities to work out which of them would be entitled to receive the amount, would in our opinion bring further fairness to the current framework.](#) This would not in any case affect the Taxpayer’s interest in the MAP procedure, in the sense that the proper tax position might be the lower of the amounts in question.

Penalties should only be assessed on the basis of a tax default in one state. Therefore, only penalties arising from underpayment of the higher amount of tax claimed should have to be paid. No sanction should apply if the taxpayer has attempted to pay the tax to the right country.