

European Business Initiative on Taxation (EBIT)

**Comments on the OECD Public Discussion Draft entitled “Make
Dispute Resolution Mechanisms More Effective” 18 December
2014 – 16 January 2015**

At the time of writing this submission, EBIT Members included: AIRBUS, BP, CATERPILLAR, DEUTSCHE LUFTHANSA, DIAGEO, INFORMA, JTI, LDC, MTU, NUTRECO, REED ELSEVIER, ROBECO, ROLLS-ROYCE, SAMSUNG ELECTRONICS, SCA, SCHRODERS and TUPPERWARE.

EBIT comments on the OECD Public Discussion Draft on BEPS Action 14 entitled: “Make Dispute Resolution Mechanisms More Effective” 18 December 2014 – 16 January 2015

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Submitted by email to: taxtreaties@oecd.org

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Dear Marlies,

EBIT is grateful for this opportunity to provide comments on the OECD Public Discussion Draft on BEPS Action 14 entitled: “Make Dispute Resolution Mechanisms More Effective” 18 December 2014 – 16 January 2015 (hereinafter “the Discussion Draft”).

General comments

EBIT Members welcome the work done by the OECD to try to make existing dispute resolution mechanisms more effective through a preliminary inventory and identification of existing obstacles to the current Mutual Agreement Procedure (MAP) and offering potential solutions to address those obstacles. This issue is highly relevant and extremely important to us.

As businesses working across borders every day, we see this as an important and necessary first step, yet more needs to be done to make a real difference. We urgently need significant and material improvements to the MAP system that will really eliminate double taxation in practice, create more legal certainty and predictability for business and, importantly, allow for definitive resolution and final closure of cases within acceptable time-frames.

EBIT notes that apparently no consensus could be reached within the CFA around universal mandatory and binding arbitration, which is disappointing from our perspective. Whilst we welcome the many options for improving MAP offered in the Discussion Draft, for the Members of EBIT, mandatory and binding arbitration is the preferred and most effective solution for resolving the still growing number of deadlocked MAP cases, and for eliminating double taxation. Mandatory and binding arbitration could also help speed up MAP timelines (e.g. binding, compulsory arbitration after a 12-month no breakthrough period). Binding arbitration, with no ‘get-outs’ for tax authorities, should in our view therefore surely be a key recommendation of the OECD.

In addition, some of the proposed language revisions mentioned in the Discussion Draft are in our view unfortunately too non-committal. We believe that standards should also be seen as mandatory (i.e. “shall” rather than “could”). In the absence of this direct language, EBIT Members are concerned that the dispute resolution process going forward will not ensure a single level of tax nor reduce double taxation.

EBIT’s Members welcome the proposed “specific measures” to adopt “minimum standards” for all BEPS-44 to commit to but it will be essential that the standards be mandatory and as practical as possible so they can be easily adopted and built on by all tax administrations. Mere political commitments will not suffice in our view to ensure implementation of specific measures. We believe that the OECD needs to take this approach one step further and ensure that the highest tax policy officials of BEPS-44 tax administrations collectively support and implement the specific measures and that they also be held accountable for the results. For EBIT’s Members, the new FTA MAP Forum is the preferred dedicated vehicle for taking this to the next level. The “monitoring of the overall functioning of the MAP procedure, including assessment of the measures to which countries will have committed” envisaged in the Discussion Draft, should be carefully set up. It is essential that such monitoring ensures full transparency and accountability in order to boost companies’ confidence in the dispute resolution system and the elimination of double taxation going forward.

Specific comments

1. ENSURING THAT TREATY OBLIGATIONS RELATED TO THE MUTUAL AGREEMENT PROCEDURE ARE FULLY IMPLEMENTED IN GOOD FAITH

EBIT welcomes the obstacles and corresponding options presented to ensure that treaty obligations related to MAP are fully implemented in good faith. With regard to Option 1, we do not see a material difference between the phrases “shall endeavour to resolve” and “to seek to resolve.” EBIT therefore recommends removing the words “to seek,” so as to stress that competent authorities are under an obligation to resolve MAP cases.

2. ENSURING THAT ADMINISTRATIVE PROCESSES PROMOTE THE PREVENTION AND RESOLUTION OF TREATY-RELATED DISPUTES

EBIT Members fully agree with the proposed solutions and with the concept that administrative “best practices” are critically important to ensuring competent authorities are able to effectively and efficiently carry out their mandates and treaty obligations. We do have some concerns and recommendations regarding the best way in which some of the solutions and specific measures can be implemented.

C. Lack of independence of the competent authority and inappropriate influence of considerations related to the negotiation of possible treaty changes

In EBIT’s view, participating countries should commit to adopting the best practices currently included in the OECD Manual on Effective Mutual Agreement Procedures (MEMAP) concerning the independence of a competent authority. We therefore recommend replacing the verb “could” with “shall” in the proposed revision under OPTION 3.

D. Lack of resources of a competent authority

With regard to OPTION 4 “Provide sufficient resources to a competent authority”, EBIT recommends replacing “could” with “shall” in the proposed revision text.

E. Performance indicators for the competent authority function and staff

With regard to OPTION 5 “Use of appropriate performance indicators”, we recommend replacing “could” with “shall” in the proposed revision text.

H. Lack of advance pricing arrangement (APA) programmes

EBIT welcomes OPTION 8 in the Discussion Draft and the assessment that bilateral APAs provide an increased level of tax certainty in both treaty jurisdictions, make double taxation less likely and may proactively prevent transfer pricing disputes. EBIT strongly recommends that all BEPS-44 participating countries implement bilateral APA programmes, and also urge the OECD to identify and promote best practices.

I. Failure to consider the implications of a taxpayer’s MAP or APA case for other tax years

We support the implementation of appropriate procedures by participating countries provided such procedures are kept as simple, efficient and business-friendly as possible.

3. ENSURING THAT TAXPAYERS CAN ACCESS THE MUTUAL AGREEMENT PROCEDURE WHEN ELIGIBLE

EBIT generally agrees with the obstacles identified and solutions offered by the Discussion Draft.

J. Complexity and lack of transparency of the procedures to access and use the MAP

With regard to OPTION 10 – Improve the transparency and simplicity of the procedures to access and use the MAP, EBIT welcomes the solution offered and recommends replacing “could” with “shall” in the proposed revision.

K. Excessive or unduly onerous documentation requirements

EBIT’s Members welcome the options and solutions proposed by the CFA in the Discussion Draft. If indeed implemented across the board by participating countries, they would take away most of the excessive and unacceptable obstacles which some of our Members are increasingly being confronted with today in certain countries when they flag a desire to commence a MAP procedure. However, this remains a persistent and fundamental problem in practice in certain countries. EBIT recommends that competent tax authorities develop and adopt consensus guidelines for addressing practical and legal impediments to MAP access.

L. Right to access MAP may be unclear where domestic or treaty-based anti-abuse rules have been applied

We welcome OPTION 12: clarify the availability of MAP access where an anti-abuse provision is applied per the Discussion Draft. Companies urgently require much-needed certainty and predictability as to what the objective standards on the application of such anti-abuse provisions will be, especially in the context of BEPS Action 6, which may result in a proliferation of domestic anti-abuse rules to deny treaty benefits.

EBIT therefore recommends formally adding to the Commentary to Article 25 that the competent authority of the country which believes that its domestic laws preclude the application of a treaty benefit should fully inform their treaty partner counterpart of this fact, and also that the interpretation and/or application of that rule falls within the scope of the MAP.

EBIT Members consider that the denial of the discretionary grant of treaty benefits should also be within the scope of MAP and recommend to include this formally in Article 25 as a bilateral resolution of a proposed denial of treaty benefits under the discretionary grant provision. The Commentary related to Article 25(2) should be amended to say clearly that the interpretation and application of domestic laws are subject to the MAP negotiations.

N. The use of domestic law remedies may have an impact on the use of the MAP

With regard to proposed OPTION 16, one of our Members has seen first-hand instances in which the overseas competent authority has not been able to take forward/resolve a MAP application on account of their hands being tied by a domestic ruling (leaving them with double taxation). In our view it is fundamental that competent authorities are free to undertake MAP discussions free of the constraints of any domestic rulings.

4. ENSURING THAT CASES ARE RESOLVED ONCE THEY ARE IN THE MUTUAL AGREEMENT PROCEDURE

Universal mandatory and binding arbitration is the preferred and most effective approach from our perspective but we understand that unfortunately there is no consensus among countries.

R. Lack of a principled approach to the resolution of MAP cases

EBIT Members strongly agree with the notion that competent authorities should enter every single MAP case negotiation based on a “fair and principled” approach. We welcome Option 20 but we suggest that best practices should also be considered and addressed by the FTA’s MAP Forum.

S. Lack of co-operation, transparency or good competent authority working relationships

EBIT considers that competent authorities must take responsibility for the MAP process i.e. ensure the proper functioning of MAPs, implementation of specific measures and full transparency. The language proposed under OPTION 21 is very non-committal in our view and would depend solely on the willingness and reasonable behaviour of the relevant competent authorities in practice, without any accountability for the implementation of specific measures and adherence to minimum standards. EBIT’s Members strongly believe that the FTA’s MAP Forum has a role to play in proactively promoting better cooperation, transparency and good competent authority working relationships, e.g. via training programmes and pooling and stimulating best practices. We also believe it is essential that policy officials at the highest levels of tax administrations subscribe to this and agree on specific procedures and protocols to set appropriate expectations amongst competent authorities and taxpayers. Ensuring convincing moves towards full transparency and accountability in the short run will certainly help boost and restore our Members’ confidence in the MAP system and the elimination of double taxation going forward.

T. Absence of a mechanism, such as MAP arbitration, to ensure the resolution of all MAP cases

EBIT Members find it disappointing that the OECD seems to have for now given up on the prospect of a consensus on mandatory and binding arbitration, particularly when the other

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BEPS Actions and proposals will undoubtedly lead to a significant increase in the need for dispute resolution. Binding arbitration, with no ‘get-outs’ for tax authorities, should surely be a key recommendation of the OECD. In this respect bilateral investment treaties are a good example of where access to arbitration has been agreed between treaty partners, and, importantly, have shown to be effective. Helpfully, each BIT sets out the arbitration mechanism in detail and gives countries the ability to agree the arbitration process around some key principles.

Mandatory and binding arbitration could also help speed up MAP timelines (e.g. binding, compulsory arbitration after a 12 month period with no breakthrough). Whilst the timelines for access to MAP are discussed in the Discussion Draft, there is no commentary on possible solutions to ensure a faster resolution process. We do appreciate that other suggested measures may assist here, e.g. improved expertise, clear documentation requirements, etc.

EBIT recommends that at a minimum those participating countries which aspire to best practice, agree to a mandatory arbitration process (so that where two countries have signed up to mandatory arbitration it will create more certainty bilaterally). This should encourage the contracting states that currently dissent, to adopt the same approach later so as to be in line with best practice.

Whilst there are helpful suggestions in the Discussion Draft to improve the treaties themselves, EBIT Members note that there is no comment on concrete improvements to the treaty network which is becoming increasingly important as MNCs expand into new markets globally. Given the time it would take to negotiate all treaties, a supra-national agreement would achieve this.

Role of the taxpayer

EBIT believes that taxpayers should have a material role in the arbitration process. In certain cases, the taxpayer may be in the best position to assist the arbitration panel in understanding the relevant facts and economic analyses. We agree with the recommendation in Option 30 yet encourage the OECD to more explicitly consider and embrace the role of the taxpayer in the arbitration process.

EBIT trusts that the above comments are helpful and will be taken into account by the OECD in finalising its work in this area. We are committed to a constructive dialogue with the OECD and are always happy to discuss.

Yours sincerely,

European Business Initiative on Taxation – January 2015

For further information on EBIT, please contact its Secretariat via Bob van der Made, Tel: + 31 6 130 96 296; Email: bob.van.der.made@nl.pwc.com).

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