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International Co-operation and Tax Administration Division
Centre for Tax Policy and Administration
Organisation for Economic Co-operation and Development

Sent via email to: taxpublicconsultation@oecd.org

Subject: Comments on Public Consultation Document – *BEPS Action 14: Making Dispute Resolution Mechanisms More Effective – 2020 Review*

Ladies and Gentlemen:

We appreciate the opportunity to submit these comments on behalf of EY on the public consultation document *BEPS Action 14: Making Dispute Resolution Mechanisms More Effective – 2020 Review*, dated 18 November 2020 (*Consultation Document*).

We recognize that there has been significant work done to date by the OECD and member jurisdictions of the Inclusive Framework on BEPS on making dispute resolution mechanism more effective. That said, we strongly agree with the statement in the Consultation Document that *"more needs to be done*."

As levels of tax controversy increase, particularly with respect to cross-border transactions, accessible *and* effective dispute resolution mechanisms, such as the mutual agreement procedure (*MAP*), are critically important to ensuring the facilitation of cross-border trade and the maintenance of a stable investment environment. The introduction of unilateral measures by numerous countries, coupled with increased audit activity, unprincipled approaches by some tax authorities, instances of new interpretations of existing rules, and the increasing application of subjective standards, makes it essential for taxpayers to be able to access MAP to best ensure international consensus on treaty provisions, for the procedures to operate in a timely and effective manner, and for taxpayers to have confidence in such procedures.

The same is true for access to effective dispute avoidance mechanisms, such as advance pricing agreements (*APAs*). Increasing levels of transfer pricing audit activity, evolving interpretations and applications of transfer pricing rules, and increasingly complex business models, mean that the need for taxpayers to be able to proactively engage in constructive and transparent dialogue with tax authorities is greater than ever. Use of APAs should be encouraged by tax administrations. In this regard, countries without formal APA programs should take steps toward allowing for APAs where the necessary legal basis already exists (i.e., where there

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are treaty provisions based on Article 25(3) of the OECD Model Tax Convention), and the countries with APA programs should minimize limitations on access to the program and allocate the appropriate level of resources to the program.

In addition to the changing tax landscape, we recognize that the COVID-19 pandemic has presented new challenges with respect to cross-border dialogue between Competent Authorities, especially because of the limitations on physical meetings. Nevertheless, there are many examples where pragmatism has prevailed, and technology has been used effectively. This is encouraging. However, as recognized in the 2020 Forum on Tax Administration (*FTA*) Amsterdam Plenary Communiqué, there is "*a gap in the ability of tax administrations to have secure multilateral discussions where physical meetings are not possible*." The commitment to "*explore the development of more secure channels for multilateral interactions between tax administrations when discussing confidential taxpayer information"* is therefore critical and urgent. In this regard, we encourage tax administrations to explore all possibilities for using technologies that can increase the efficiency and efficacy of cross-border dialogue, while at the same time keeping taxpayer information confidential and secure. We also encourage tax administrations to engage with service providers, including EY, who are developing and using technologies to achieve these same aims.

Finally, with respect to taxpayer confidence in MAP and the importance of MAP being effective, we strongly encourage continued dialogue around the inclusion of mandatory binding arbitration as part of the Action 14 Minimum Standard. The effectiveness of MAP would be greatly enhanced through mandatory binding arbitration and every effort should be made to find a way to reach consensus on this. Moreover, any measures that provide taxpayers with enhanced legal certainty and help ensure that "*mechanisms for dispute resolution are comprehensive, effective and sustainable*", such as Council Directive (EU) 2017/1852 of 10 October 2017 on tax dispute resolution mechanisms in the European Union (*EU Tax Dispute Directive*), are positive developments.

With the background of these overall comments on dispute resolution matters, we have set out below our comments on the specific proposals and questions in the Consultation Document.

Proposals to strengthen the Minimum Standard

Proposal 1: Increase the use of Bilateral APAs

Introduce the obligation to establish a bilateral APA programme except for jurisdictions with a low volume of transfer pricing MAP cases.

Please share your views on this proposal.

EY has wide-ranging experience assisting clients in obtaining APAs, and we can categorically state that APAs are an extremely effective tool for avoiding international tax disputes and achieving tax certainty over extended periods.

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We agree with this proposal. However, we would note that we have reservations as to the proposed exclusion of jurisdictions with a low volume of transfer pricing MAP cases. The number of transfer pricing MAP cases a jurisdiction has may not be indicative of whether access to bilateral APAs (including multilateral APAs) would be beneficial or not, as there are a variety of reasons why there is (or historically has been) a low volume of MAP cases. In our view, all jurisdictions with tax treaties that contain equivalents of Article 9 and Article 25 of the OECD Model Tax Convention should provide for the possibility of bilateral APAs.

EY recognizes however that competing tax authority agendas and limited resources may deter certain countries from establishing a comprehensive bilateral APA program. In this context, the development and publication by the OECD of basic guidance and a procedural framework for countries to accept and process bilateral APA applications may be beneficial. Jurisdictions could implement a bilateral APA program on this basis within a short period of time. The development and publication of guidance and a procedural framework will particularly benefit countries that historically have had limited or no experience with bilateral APAs, including countries with low volumes of MAP cases and limited resources. Moreover, the OECD could provide support for countries in applying the guidance and procedural framework.

In terms of implementation, making the establishment of a bilateral APA program a Minimum Standard would allow for consensus among countries on specific aspects of the program, such as requiring Competent Authorities to hold discussions within certain timeframes, providing for greater involvement of taxpayers in technical discussions, and the potential for rollback periods.

Beyond the development of the necessary guidance and framework, the resource requirements for the country to facilitate a bilateral APA with respect to an issue should be no more, and would be likely less, than for conducting an audit and managing a subsequent MAP in relation to that issue. In contrast to the audit and MAP route, a bilateral APA would allow the country to work in a transparent and cooperative way with the taxpayer and the Competent Authority of the other country in addressing the issue, both for past years (where a rollback period is provided for) and prospectively.

In addition to incorporating the establishment of a bilateral APA program into the Minimum Standard, a further adjustment to the Minimum Standard to help ensure access to bilateral APAs should be considered. This is necessary because the denial of access to APA programs, either formally (rejection of application) or informally (at the time of prefiling or expression of interest meetings) on the basis of transactions being “too routine” or, at the other end of the spectrum, “too complex or contentious”, runs counter to the encouragement of transparency and proactive engagement by taxpayers with tax administrations and does not promote tax certainty. Additionally, in our experience, there can be instances where access to the APA program is restricted until the taxpayer puts forth a transfer pricing method that the Competent Authority agrees with, as a means of limiting options for alternative transfer pricing methods or ensuring that the APA is resolved in that Competent Authority’s favor.

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In this regard, the Minimum Standard should provide that, similar to MAP, applications for bilateral APAs can be filed with the Competent Authority of either contracting state, and, if one of the Competent Authorities accepts the application, then the other Competent Authority would be obligated to enter into bilateral APA discussions with the objective of reaching agreement.

In addition to this proposed Minimum Standard, we also recommend as a best practice (with the eventual aim of it becoming a Minimum Standard) a requirement that other treaty issues that are related to the subject matter of a bilateral APA be able to be addressed and covered by the bilateral agreement (e.g., the existence of a permanent establishment or the application of withholding taxes). There has been positive experience with Competent Authorities that are willing to address such issues concurrently, but the current practice is limited.

Proposal 2: Expand access to training on international tax issues for audits and examination personnel

Introduce the obligation to roll-out the Global Awareness Training Module or a similar training programme.

Do you have experience with inappropriate adjustments reflecting lack of experience on international tax matters that would later need to be withdrawn in MAP? **If so, what do you think would be the best way to address this situation? For instance, would you support elevating the best practice into the Minimum Standard?**

Based on our experience, there are cases of adjustments that are later re-assessed and withdrawn in MAP. Similarly, there are cases of adjustments that one would expect would be re-assessed if they were to go to MAP, but where access to MAP is effectively blocked. For these practices, we refer to the proposal on access to MAP. These cases often result from a lack of experience on international tax matters on the part of the local audit teams, but also sometimes from a lack of willingness to consider the international implications of domestic re-assessments. Examples include withholding taxes levied on services where the applicable treaty does not contain a source country taxing right, assessments based on “virtual” or “deemed” permanent establishments where the relevant permanent establishment definition in the applicable treaty has not been met, one-sided approaches to transfer pricing analysis, and transfer pricing adjustments based on an incorrect understanding of the facts.

A better understanding by audit and examination personnel of the application of tax treaties, their interpretation under international law and, in particular, the MAP article and the role of the Competent Authority would help avoid such situations. Existing training and outreach programs could be increased or enhanced (and mandated) to fulfill this need. Ensuring appropriate governance procedures are in place and are applied within (and also outside) the tax administration involved would have a positive impact. In this regard, further consideration should be given to establishing “best practice” procedures in respect of transfer pricing audits, without being too prescriptive, and recommending an appropriate appeals process.

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Finally, in order to address such issues, the Competent Authority function needs to be appropriately staffed and resourced and should be proactive and diligent in the initial assessment of MAP filings in order to avoid having cases that could be solved unilaterally take up time in bilateral discussions. It should be reiterated that independence of the Competent Authority is essential to effective and efficient cross-border tax dispute prevention and resolution. This is particularly important when a country's domestic dispute resolution processes – administrative and/or judicial – are perceived as not offering a realistic chance of success for a taxpayer. In such situations, ensuring accessible and effective MAP is critical.

Do you have suggestions on how tax administrations can increase awareness on international taxation in the relevant audit and examination staff?

A governance framework securing global awareness of the auditors focusing on issues that likely lead to adjustments covered by tax treaties is essential. The performance indicators on which auditors are being evaluated should be taken into account in this regard. Access to and independence of the Competent Authority function are also key aspects of this framework. Finally, it would be extremely helpful if businesses could provide anonymous input into the FTA MAP Forum on instances of double taxation incurred due to such a lack of global awareness, or alternatively, could provide input on a named basis to an Ombudsman who would treat this information confidentially and present his or her findings to the FTA MAP Forum in an aggregated, anonymized form.

A proactive feedback cycle from Competent Authorities to audit and examination staff would lead to better quality adjustments and fewer instances of recurring issues escalated to MAP. This could be achieved through Competent Authorities sharing case studies within the tax administration, as well as working with policy makers to publish guidance explaining the application of treaty provisions to specific situations.

Moreover, transparency with the taxpayer and tax audit team regarding the Competent Authorities' analyses and discussions in reaching MAP solutions would help in situations where inappropriate adjustments are raised in future years, by providing a reference point and greater efficiency in reaching a solution without the need to enter into MAP.

When it is anticipated during a tax audit that there may be a cross-border adjustment eligible for MAP, consideration should be given to requesting review by the tax authority of the other state, with a view to eliminating any double taxation without the need to enter into MAP. Thresholds and timing requirements may need to be considered and established in this respect.

Proposal 3: Define criteria to ensure that access to MAP is granted in eligible cases and introduce standardised documentation requirements for MAP requests

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Provide criteria for determining whether access to MAP should be given as well as to define what information taxpayers (as a minimum) should include in their MAP requests. Jurisdictions should reflect both items in their MAP guidance.

Based on your experience, are there any particular situations or circumstances in which access to **MAP was inappropriately denied and that are currently not covered by the Action 14 Minimum Standard**? In addition, are there circumstances where you did not submit a MAP request because access would be denied according to available information? If so, please specify these situations or circumstances.

In our experience, there continue to be situations where access to MAP is inappropriately denied, including cases that are covered by the existing Minimum Standard. These typically involve settlement arrangements that prohibit access; application of domestic anti-avoidance rules or domestic non-deductibility provisions; cases where the applicant is not the taxpaying entity; a purported lack of information; and, cases in which the application is filed in a country other than the country of residence.

Despite the Minimum Standard for providing access to MAP in cases of audit settlement, we continue to see cases where taxpayers are explicitly or implicitly restricted from accessing MAP as part of settlement arrangements. This ranges from offers to reduce settlement amounts if MAP is not pursued to threats (implied or actual) of harsher assessments and future audits if MAP is pursued. Taxpayers often feel pressure to accept settlements in such cases, particularly in jurisdictions where penalties are levied on the full assessment amount (regardless of the MAP outcome) or there is the threat of unjustifiable penalties for negotiation purposes and in situations where there is no binding arbitration or a poor track record of MAP resolution. Unfortunately, often for the same reasons that taxpayers do not pursue MAP in such cases (the threat of reprisals), they typically do not report these practices through the peer review process.

The fact that this is not an incidental issue is illustrated by a survey EY undertook in 2019. The survey drew more than 700 responses by finance and tax officials from companies in 43 countries. In response to one question, 20% of the respondents indicated they were confronted with double taxation that would be covered by tax treaties but had chosen not to pursue MAP. As to the reasons for not pursuing MAP, 22% of these respondents indicated that the authorities — either orally or in writing — had actively indicated that accepting the audit settlement would mean the company should not seek MAP resolution. In addition, 16% indicated that their experience and knowledge of the country involved suggested that going to MAP would have negative implications outside the MAP case itself (e.g., higher probability of audit or scrutiny of tax returns in the future).

To address this issue, we strongly encourage the OECD:

- to continue to support and communicate the Minimum Standard regarding access to MAP and to take action to ensure that Competent Authorities are communicating this within their tax administrations;

- to update the Commentary to Article 25 of the OECD Model Tax Convention to state unambiguously that such provisions in audit settlement agreements are null and void and not binding on Competent Authorities for the purposes of MAP; and
- to provide a mechanism for the anonymous reporting of these types of practices as part of the peer review process.

Similarly, despite the Minimum Standard of providing access to MAP in relation to the application of anti-abuse provisions (both treaty and domestic), we continue to see cases where access to MAP is denied, or is permitted without any prospect of resolution, due to the application of domestic anti-abuse rules. The political commitment to eliminate taxation not in accordance with a tax treaty will not be successful if access to MAP is denied (or *a priori* the matter cannot be resolved) in cases where such provisions are applied in a way that is contrary to the treaty.

Another area that continues to be a challenge is denial of access to MAP in cases where adjustments (that are for all practical purposes transfer pricing adjustments) are structured through domestic non-deductibility provisions. Taxpayers should be able to access MAP in such cases. In this regard, we also encourage the careful consideration of the potential tax certainty consequences of the statement in Section 10.4 of the Pillar Two Blueprint, which seems to suggest that jurisdictions are free to introduce unilateral limitations on deductibility of intercompany payments without tax treaties limiting the application of these unilateral rules, even in cases where these payments are clearly commercial in nature, priced at arm's length and a tax treaty that includes Article 9 of the OECD Model Tax Convention is in place. We do not agree with this position. Any deduction limitation rule that is applied to related party payments only should be tested against the object and purpose of tax treaties and the arm's length principle, which is that double taxation should be prevented by ensuring that the taxable amount on the one side of the transaction is the same as the deductible amount on the other side of the transaction, unless a situation of abuse or avoidance has been established.

Further, we have experienced some situations where access to MAP is limited because the taxpayer making the application is not the entity that pays the tax in the jurisdictions due to the application of a fiscal unity regime or similar rule. This is due to the limiting wording of Article 25 of the OECD Model Tax Convention that requires that a person can only apply for MAP if the actions of one or both of the Contracting States result or will result in taxation not in accordance with the treaty "for him." In particular, the situation of fiscal unity parents in the form of partnerships with foreign shareholders may result in the denial of MAP despite profit adjustments at the level of the controlled corporation. Broadening the wording of Article 25, for example to "for a person or enterprise" or to be similar to the provisions of Article 6(1) of the EU Arbitration Convention that does not require taxation not in accordance with the treaty "for him" in order to be eligible for MAP, would help ensure access to MAP is not limited in such cases.

Another situation we have observed where access to MAP is frustrated involves cases where there are functionally routine intermediaries in a supply chain. In such cases, the bilateral nature of MAP can result in

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access to effective MAP not being available because of the limited incentive for the Competent Authority of the intermediary country or countries to engage in the process. Increasingly, such cases are dealt with prospectively through multilateral APAs; however, the process for multilateral MAPs is much less developed. Guidance on how such situations should be handled and on the process for multilateral MAPs would be welcome.

From our experience, we also see problems caused by MAP delays, often stemming from independence of the Competent Authority from audit teams. Independence is essential, but further guidance should be given on boundaries of such independence in order to help move forward audit and MAP processes. Rather than the complete absence of Competent Authority involvement, for cases likely to proceed to MAP the Competent Authorities could provide relevant advice to audit teams based on their experience. Further, rather than a requirement that audit processes should be fully exhausted before the audit team takes the action that triggers MAP, where it is clear that there is a range of possible outcomes with the point in the range likely to be determined by MAP, it should be possible to expressly provide for a without prejudice outcome to be formalized as a trigger for MAP, even if there are some audit consequences (e.g., consideration of penalties) that are deferred until the MAP outcome is known.

Again, despite the Minimum Standard on this issue, we still see cases where access to MAP is limited to residents. This in particularly problematic in situations where taxpayer requests for MAP filed in the jurisdiction of residence are not adequately addressed and the other country is never notified.

Please share your views on whether there should be additions to the list of situations/circumstances in which access to MAP should be granted.

While we appreciate that an explicit list of situations or circumstances in which access to MAP should be granted could be helpful, it is important to be clear that such a list should be *indicative* only. First and foremost, we strongly encourage the OECD to reiterate as part of the Minimum Standard that access to MAP should be available for all cases of taxation not in accordance with the applicable treaty, and, where an equivalent to the last sentence of Article 25(3) is in the treaty, for any cases of double taxation not provided for in the OECD Model Tax Convention. In addition, where there is uncertainty or disagreement as to whether a case is MAP eligible, that very issue should be able to be dealt with as part of the MAP.

In addition to continuing to strengthen and ensure compliance with the existing Minimum Standard concerning access to MAP and emphasizing the above, we recommend that the following situations/circumstances be specifically added to the Minimum Standard:

- where domestic tax provisions such as non-deductibility rules are applied to transactions between associated parties and the practical outcome is an adjustment akin to a transfer pricing adjustment that would otherwise fall within tax treaty provisions based on Article 9 of the OECD Model Tax Convention and be eligible for MAP;

- alignment of interest on amounts refunded with the interest due on the adjustment or with interest rates applied to amounts refunded in other circumstances; and
- issues of recharacterization of income that effectively leads either to denial of deductions or to application of withholding taxes on the payments.

Further details on reasons for denial of access to MAP or delays in its progress should be provided by Competent Authorities to taxpayers. Consideration also should be given to establishing a process under which taxpayers that have been denied access to MAP can raise this with the OECD, the FTA MAP Forum or other appropriate body. Acting as a facilitator, the OECD, the FTA MAP Forum or other appropriate body could hear the complaint and discuss the denial of access with the relevant Competent Authority.

We recognise differences between jurisdictions in the documentation that needs to be provided when a MAP request is filed. Have these differences led to problems in practice? If so, would a common list of minimum information that needs to be provided solve these problems? If so, please specify:

a. Whether any particular items should or should not be included in such list; and

b. Whether there is a need to align the content of such (to be developed) list with any other international rules relating to tax-dispute resolution procedures. If so, please specify which rules and what items in particular.

We continue to see cases where access to MAP was denied on the basis of insufficient information, despite the required information having been submitted. Furthermore, we have experience with situations where the notice of assessment (and supporting documents) issued by the tax administration that leads to the MAP does not contain sufficient information regarding the position of that tax administration. This is problematic for several reasons. It can place the onus on the taxpayer to try to explain the adjustment in the MAP application in order to meet the minimum information requirements, which can be challenging, if not impossible. Furthermore, there are situations where the deficiencies in the notice of assessment (and supporting documents) are such that it is difficult (and in some cases impossible) to determine which transaction or transactions are subject to the actual adjustment and therefore what is the correct respective counterparty Competent Authority. In addition, inadequate assessments issued by the tax administration can in turn lead to poor position papers and delays because the Competent Authorities have to rework the audit.

To address this, we encourage the OECD to develop guidance on the minimum level of information to be set out in a final assessment if the taxpayer has notified the tax administration that it intends to pursue MAP. Alternatively, a requirement could be established for the Competent Authority of the jurisdiction taking the action that results in the MAP either to: (i) source this minimum level of information from within their tax administration and present it in a position paper provided both to the taxpayer and the other CA; or (ii) instruct their tax administration to prepare such information and provide it to the taxpayer.

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Do you have any other comments on this proposal?

As indicated above, we believe it would be valuable to have a process for presenting the case to the OECD, the FTA MAP Forum or other appropriate body if access to MAP is denied due to not providing sufficient information.

Proposal 4: Suspend tax collection for the duration of the MAP process under the same conditions as are available under domestic rules

Introduce the obligation that tax collection is suspended during the period a MAP case is pending, under the same conditions as are available to taxpayers under domestic rules.

Has the lack of suspension of tax collection in MAP cases created problems in specific cases? Should the best practice be elevated to a Minimum Standard?

We believe this best practice should be elevated to a Minimum Standard. In this regard, we note the importance of the Competent Authorities being able to collaboratively discuss and agree on the correct position before any tax payments are made and without the prospect of having to refund amounts collected. The suspension also provides an incentive for the Competent Authority of the audit country to resolve MAPs efficiently. This in turn builds taxpayer confidence in dispute resolution systems and helps achieve tax certainty. The administrative burden of tax payments and collection for taxpayers and tax administrations is also reduced as the need for multiple payments or tax refunds is avoided.

Elevating this best practice to a Minimum Standard would encourage jurisdictions that do not already do this to implement the necessary domestic changes to be able to do so.

If you support the elevation to a Minimum Standard, what can be reasonably expected from taxpayers to ensure that taxes due can be collected if the outcome of the MAP process confirms the taxes imposed?

Certain countries may require a form of assurance to safeguard against non-payment. This may only be a cause for concern in certain situations, for example for taxpayers with insolvency issues. Currently, some countries do grant suspension of tax payments in return for assurance by way of security, however this often discourages taxpayers from engaging in MAP depending on the level of and nature of security required. For countries considering safeguards against non-payment, consideration should be given to circumstances when this would be warranted, including options to achieve this (e.g., group guarantees).

Where there is not a significant disparity in the tax rates of the jurisdictions involved, by agreement with the taxpayer, provisions could be put in place for payment directly between the countries upon resolution, mitigating the need for security.

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Proposal 5: Align interest charges/penalties in proportion to the outcome of the MAP process

Jurisdictions should ensure that penalties/interest charges are aligned in proportion to the outcome of the MAP process.

Have you experienced cases where interest and penalties have not been aligned with the outcome of the MAP process? If so, is this an important issue and should aligning interest charges and penalties with the MAP outcome become part of the Minimum Standard?

We have experienced cases where the imposition of penalties and interest is prohibitive of a successful outcome under the MAP. For example, there are situations where the penalties and interest imposed on the initial adjustment are as much as, or even more than, 100% of the original adjustment. And then, upon resolution of the MAP, despite the outcome being a significant reduction to the original adjustment, the penalties and interest remain aligned with the original adjustment. In such cases, the taxpayer might have achieved a much more favorable outcome by pursuing a domestic remedy and not seeking to resolve the double taxation through MAP. From our experience, these situations arise most frequently in relation to the imposition of penalties.

To avoid such situations, the alignment of interest and penalties with the outcome of the MAP process should be part of the Minimum Standard. In addition, addressing interest and penalties as part of the MAP process itself should be a best practice, particularly if collection of taxes pending the MAP has not been suspended. In such cases, there should ideally be alignment on interest charged and interest received by the taxpayer from the two jurisdictions. In relation to our above comments on Proposal 3, this should help reduce the number of cases where the potential for penalties and/or interest charges deter taxpayers from accessing MAP. Moreover, withholding tax implications arising from transfer pricing adjustments (e.g., withholding tax on deemed dividend distributions), where applicable, should also be addressed as part of the MAP process.

Finally, to help promote timely resolution of MAP cases, waiver of interest for periods of undue delay during the MAP process (which could be considered anything beyond 24 months) that are not caused by the taxpayer (i.e., no outstanding reasonable information requests) should be considered.

Do you have any other comments on this proposal?

Currently some jurisdictions do not provide for any interest on refunds made following MAP. Countries should commit to interest being levied or paid in the same way as for tax demands or refunds that are not connected with a MAP claim in their territory.

Proposal 6: Introduce a proper legal framework to ensure the implementation of all MAP agreements

Jurisdictions should ensure that all MAP agreements can be implemented notwithstanding the expiration of domestic time limits.

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Based on your experience with the implementation of MAP agreements, has such implementation been prevented by the expiration of domestic time limits in any of the jurisdictions involved in the process? Alternatively, have you experienced cases where competent authorities did not come to an agreement because an agreement could no longer be implemented as a result of domestic time limits?

While the majority of MAP agreements are implemented without issues, there are certain countries where difficulties arise due to expiration of domestic time limits. This undermines the effectiveness and attractiveness of MAP.

There are also instances where the target 24-month timeframe to resolve MAP cases has led countries to introduce domestic laws that require review and potential closure of MAP cases that extend beyond 24 months. This strict interpretation of the 24-month timeframe effectively results in Competent Authorities agreeing to disagree without proper progress of the MAP case.

Based on your experience with the implementation of MAP agreements, have you experienced cases where solutions were found to implement the agreements despite domestic time limits having expired? If yes, please describe those solutions.

In our experience, multi-year resolution through MAP has allowed resolution for years where domestic time limits have expired, through use of telescoping adjustments/relief provided in later years.

Do you have any other comments on this proposal?

Countries should continue to be encouraged to amend treaties to include a “notwithstanding” clause or to amend domestic law provisions to overrule any statute of limitations in case of MAP agreement implementation.

Proposal 7: Allow multi-year resolution through MAP of recurring issues with respect to filed tax years

Jurisdictions should implement appropriate procedures to permit, in certain cases and after an initial tax assessment, requests made by taxpayers which are within the time period provided for in the tax treaty for the multi-year resolution through the MAP of recurring issues with respect to filed tax years, where the relevant facts and circumstances are the same and subject to the verification of such facts and circumstances on audit.

Please share any experience with the multi-year resolution of recurring issues through the MAP process, in particular whether this was possible and, if so, under what circumstances.

A number of countries already allow for multi-year resolution for recurring matters under MAP, subject to limitation provisions of the relevant treaty. In addition, certain countries that have recently introduced MAP as part of their commitment to Action 14 have included the option of multi-year resolution. Experience to date, where this is available, has been largely positive.

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Elevating this best practice to a Minimum Standard would be a positive development for both taxpayers and Competent Authorities, who would all benefit from the efficiencies and optimal use of resources that this practice can provide.

Are there any other options – based on your experience – that would allow recurring issues to be dealt with in MAP or another dispute prevention/resolution process (e.g. a roll-forward of the MAP agreement to future years via bilateral APA)?

The US and Canada Accelerated Competent Authority Procedure (*ACAP*) sets out the conditions upon which multi-year resolution is possible. ACAP allows taxpayers to request that a MAP agreement for specific year(s) be extended to cover subsequent years for which the taxpayer has filed tax returns. We have extensive experience in MAP where ACAP was requested and applied by tax administrations; this procedure has permitted an expedited resolution to repeated disputes such as recurring transfer pricing issues. Other jurisdictions should be encouraged to implement similar procedures.

The possibility to roll forward MAP outcomes into bilateral APAs should be part of the Minimum Standard in cases where the facts and circumstances are materially the same. This aligns with the Minimum Standard concerning access to MAP and the proposed obligation for countries to establish a bilateral APA program (see comments above).

Proposal 8: Implement MAP arbitration or other dispute resolution mechanisms as a way to guarantee the timely and effective resolution of cases through the mutual agreement procedure

Based on your experience, how do tax disputes under treaties with MAP arbitration compare to tax disputes under treaties without MAP arbitration in terms of resolution time, effectiveness of the solution and costs of proceedings?

In our experience, while MAP cases are often resolved without the need for arbitration, the mere possibility for arbitration focuses minds on reaching agreement and as such actively encourages timely resolution of cases and a principled approach to the negotiations and, importantly, provides taxpayers with more confidence in the process. The effectiveness of MAP is therefore greatly enhanced by having access to binding arbitration measures and every effort should be made to elevate this to a Minimum Standard.

That said, it is important to ensure that mandatory binding arbitration does not alter the rules, conditions, or practices for access to MAP. We have observed that in some cases, albeit a limited number, the existence of mandatory binding arbitration causes the Competent Authorities to give further consideration to whether the case should have access to MAP in the first place. We have also seen cases where a Competent Authority has sought to “exit” from the MAP process in order to avoid arbitration.

Separately, do you have views or other suggestions regarding alternative approaches to dispute resolution that could provide taxpayers full and timely resolution of cases that remain unresolved in the MAP?

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Mediation or other Supplementary Dispute Resolution approaches could support the resolution of treaty disputes ahead of arbitration. Due consideration should be given to using these mechanisms more broadly, preferably in the earliest phase of the process that identifies potential double taxation or other taxation not in line with tax treaties as being probable. In particular, we believe such mechanisms could be made mandatory if Competent Authorities cannot agree to a solution that resolves the (full) double taxation, for example where they agree to disagree and therefore close the case.

Proposals to strengthen the MAP Statistics Reporting Framework

Proposal 1: Reporting of additional data relating to pending or closed MAP cases

Support a more meaningful assessment of the progress toward meeting the 24-month target timeframe to resolve MAP cases by also requiring jurisdictions to report data on: (i) identification of the jurisdiction(s) that made the adjustment or took the action at issue, (ii) breakdown of the time taken to close MAP cases per type of outcome and (iii) identification of the year when MAP cases were initiated for those cases pending at year end.

Please share your views on the three proposals for the reporting of additional data under the MAP Statistics Reporting Framework, in particular whether they will provide more transparency and clarity on jurisdictions' MAP inventory.

We agree with the proposals and encourage their timely implementation. These three proposals will provide greater transparency and further build on the work undertaken to date to improve the effectiveness of MAP for all jurisdictions.

Are there any other items that could be reported under the MAP Statistics Reporting Framework to provide further transparency or to allow a more meaningful assessment of jurisdictions' progress toward meeting the 24-month target timeframe to resolve MAP cases?

In addition to the proposals above, we recommend that the following items be reported under the MAP Statistics Reporting Framework:

- A breakdown of all statistics at the treaty partner level;
- Further details as to the specific treaty articles that MAP cases relate to (i.e., further breakdown of the "other" category by treaty article); and
- Median time to resolve MAP cases, in order to provide a fuller assessment of the performance of the Competent Authorities.
- Further details in reasons for denial of access to MAP.

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Higher levels of transparency should be encouraged. By breaking down the data by treaty partner, outliers can be identified and addressed. Furthermore, taxpayers can then make informed decisions as to their use of MAP for a particular case.

Besides considerations for enhancing MAP statistics, the FTA MAP Forum could also consider issuing a business survey at regular intervals (e.g., once every two to three years) in which questions are asked about the tax certainty environment, such as business perspectives on the global awareness of tax administrations, experiences of businesses on access to MAP and reasons for businesses to either use or not use APAs and MAPs. This would help the OECD and FTA MAP Forum gain insights on the status of the international tax environment and the frictions and positive practices experienced by business.

Proposal 2: Providing relevant information on other practices that impact MAP – APA Statistics

Please share your views on the proposal to also publish statistics on APAs, including the data categories being considered for publication.

Numerous countries already provide comprehensive reporting of APA statistics. In the interests of transparency and providing taxpayers with a level playing field in terms of information upon which to base their decision regarding whether to seek an APA, similar statistics concerning APAs, including the additions outlined above, should be published.

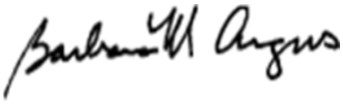
What, if any, other items should be added to the data categories for reporting of statistics on APAs to increase transparency?

The statistics to be reported should be similar to those for MAP, taking into account the additions outlined above. In addition, statistics concerning the transfer pricing method applied and the industry should be included, carefully balancing the need for transparency with any risks to taxpayer confidentiality.

* * * *

The global EY team that prepared this submission would welcome the opportunity to discuss these comments in greater detail. If there are questions regarding this submission or if more information would be helpful, please contact Barbara Angus (barbara.angus@ey.com) or Luis Coronado (luis.coronado@sg.ey.com).

Yours sincerely, on behalf of EY,



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