



Comments on the OECD Public Discussion Draft on BEPS Action 14:
Make Dispute Resolution Mechanisms More Effective
Paris, 16 January 2015

1. The TUAC welcomes the opportunity to comment on the OECD Discussion Draft “Make Dispute Resolution Mechanisms More Effective” (hereafter “the draft”) for public consultation regarding implementation of Action 14 of the Base Erosion Profit Shifting (BEPS) initiative. The mandate of Action 14 is to “address obstacles that prevent countries from [re]solving treaty-related disputes under Mutual Agreement Procedures (MAP)” including arbitration. The OECD draft consists of amendment proposals to the OECD Model Tax Convention article 25 and its commentary and of additional proposals to strengthen access to MAP, including many references to the 2007 OECD Manual on Effective MAP (MEMAP). Compared with the other action points of the BEPS initiative, Action 14 is distinct in so far as it is more concerned with the risk for double taxation of MNEs, than with the opposite risk of “double non-taxation”, which is at the heart of the BEPS initiative.

2. Overall, the TUAC welcomes the proposals contained in the draft. Tax compliance is a source of risk for companies. That risk needs to be managed and mitigated like other forms of risk: financial, market, social and environmental. This is particularly true for MNEs operating across several tax jurisdictions. Better access to MAP would increase the predictability of tax treatment of MNEs and, as such, would thereby facilitate the management of tax risk. We have a number of observations to share on the OECD draft, however.

Current and “post-BEPS” obstacles

3. Action 14 is concerned with obstacles that *currently* prevent MNEs to access MAP. Looking from a statistical perspective however¹, we note that the number of MAP that are triggered at the request of MNEs across OECD countries has grown on average by some +9% per year since 2006. This figure is three times faster than the growth of global trade. Importantly, the growth of the “stock” of MAPs at year end has not grown faster than the number of new cases. And while the average time for the completion of MAP cases increased between 2006 and 2010, it has dropped sharply since then. These figures suggest that MNEs are (i) making increasing use of MAPs, and that (ii) tax authorities are doing a reasonable job of handling the fast growing number of cases.

4. The mandate of Action 14 also points to future challenges associated with the implementation of other actions of the BEPS initiative: “the interpretation and application of novel rules resulting from the work described [in the other BEPS action points] could introduce elements of uncertainty”. The draft asserts this point where it states that MAP issues “are likely to become more significant as a result of the work on BEPS, as more stringent standards are adopted and competent authorities are called upon to develop common

¹ <http://www.oecd.org/ctp/dispute/map-statistics-2006-2013.htm> & <http://www.oecd.org/ctp/dispute/mapstatistics2012.htm>

interpretations of new tax treaty and transfer pricing rules through the mutual agreement procedure” (#36).

5. Indeed, other actions contained in the BEPS initiative, once they are completed and implemented, *could* create new sources of uncertainty in relation to MAP. But knowledge about this is rather limited at this stage. Hence there is an inherent difficulty in achieving Action 14 at this stage of the BEPS process because most of the challenges that MAP is supposed to meet are not determined and are dependent on the final outcome of other parts of the BEPS initiative.

Staffing and empowerment of tax authorities

6. Option 3 (“Ensure the independence of a competent authority”) & Option 4 (“Provide sufficient resources to a competent authority”) would in effect generalise the 2007 OECD MEMAP best practice n°23 on “Independence and resource of a competent authority”.

7. Administrative staff in charge of the MAP should work with sufficient “autonomy” from field departments in charge of corporate tax audit, as suggested in the draft. The use of the term “independence” on the other hand seems excessive and could be misinterpreted. Public servants in charge of a MAP are expected to act on behalf of government and the public interest. In doing so, and like any other public servant, they are not expected to be “independent”, at least not from a government perspective. On the contrary, they are expected to be bound by, report to and be accountable to public authorities. Indeed, there is a strong need for public accountability, given the context of the overly secretive nature of MAPs.

8. The proposition that tax departments in charge of MAP be sufficiently resourced in terms of “personnel, funding, training, etc. to carry out their mandate” is naturally welcome. However this should be provided in a manner that does not produce a zero-sum game. Additional funding to MAP departments should not be provided at the cost of other tax departments with responsibilities which, from a BEPS perspective, would have higher priority. Public tax administration budgets are – unfortunately – not among the highest priorities of OECD governments. Among EU member countries, a total of 56,865 jobs have been lost within tax administrations between 2008 and 2012, which is equivalent to a cut of 9.6% in the workforce.

Domestic law remedies and collection of taxes

9. Option 16 would see MAP prioritised over domestic remedy judicial procedures, and the latter be suspended until completion of the MAP. Option 17 would force the suspension of tax collection procedures during the entire MAP. Practices differ extensively across OECD jurisdictions on these matters and it seems that the opposite conclusions could be drawn from existing practices and rules:

- Domestic remedies should allow to coexist with international mediation and arbitration procedures;
- the automatic suspension of taxes as a result of a MAP being engaged could well create the wrong incentives for MNEs to make abusive use of the MAP (to defer or delay the payments of their tax liabilities).

Transparency and access to information

10. The OECD recognises that tax is a risk that needs to be addressed at the level of the Board of Directors of the company². Tax is a risk for all corporate stakeholders and is not

² According to the OECD Guidelines for Multinational Enterprises: “Enterprises should treat tax governance and tax compliance as important elements of their oversight and broader risk management systems. In particular,

limited to the board and to executive management of the company. Other stakeholders, including workers, creditors and shareholders of the company have a legitimate right to information about the exposure of the company to tax risk – provided that confidential requirements are met.

11. Action 14 is concerned with promoting the “taxpayer’s” access to and information on MAP. By “taxpayer”, it is meant the company and, in more practical terms, the CEO and the executive management. Action 14 is not concerned with the right to information of other corporate stakeholders with regard to MAP issues, which would help them make an informed judgement about the company’s exposure to tax risk. Corporate stakeholders, including workers and their representatives, creditors, shareholders and, not least, citizens at large, have an interest in accessing information on MAP.

12. In relation to Option 10 (“Improve the transparency and simplicity of the procedures to access and use the MAP”), countries could commit to transparency rules going beyond those suggested in the 2007 MEMAP “best practices”, regarding publicity of MAP rules and guidelines. Within the limits of business confidentiality requirements, public disclosure could cover the list of companies benefiting from a MAP, together with basic elements of the arrangements contained in the agreements.