

Analysis

BEPS Action 14: OECD detail on 'MAP' procedures

Speed read

On 20 October 2016, the OECD released further documents relating to the Mutual Agreement Procedure (MAP) under BEPS Action 14. There will be a short term opportunity to contribute to reviews of the MAP machinery in specific countries, commencing later this year. OECD proposals on binding arbitration will also follow later in the year, and the EU Commission has published a related proposal for all disputes in the EU.



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Article 25 of the OECD Model Tax Convention sets out a Mutual Agreement Procedure (MAP) mechanism, through which the competent authorities of contracting states may resolve treaty disputes concerning the interpretation or application of the treaty by agreement. An example is resolution of residence under the UK/US treaty. BEPS Action 14 seeks to address obstacles preventing MAP from operating in a 'timely, effective and efficient manner'. The idea is that peer reviews and continuous monitoring will deliver a more transparent and more effective resolution.

BEPS Action 14 comprises two strands. Strand one sets out minimum standards, best practice and monitoring processes to better achieve resolution of treaty disputes. In briefest summary, countries must ensure:

- that treaty obligations related to the MAP are fully implemented in good faith and that MAP cases are resolved in a timely manner;
- implementation of administrative processes that promote the prevention and timely resolution of disputes (including commitment to peer reviews and monitoring); and
- taxpayers can access the MAP when eligible.

Strand two is the introduction of mandatory binding arbitration of disputes which remain unresolved. There is still no consensus among OECD and G20 countries on this. (However, the UK and US are both among the 20 countries in favour of mandatory binding arbitration, those

20 countries together accounting for approximately 90% of outstanding MAP cases, as at the end of 2013.) An optional provision on mandatory binding arbitration is expected to be included in the Action 15 multilateral agreement to be published later this year.

The OECD publication

The 20 October publication has several parts. *Terms of Reference* translate the Action 14 minimum standards into 21 elements, which assess countries' legal and administrative MAP frameworks across four key areas:

- preventing disputes (2 elements);
- availability and access to MAP (10 elements);
- resolution of MAP cases (6 elements); and
- implementation of MAP agreements (3 elements).

Notable elements require countries to:

- include a provision in their treaties requiring competent authorities to endeavour to resolve disputes by MAP [A1];
- provide access to MAP in transfer pricing cases [B3];
- provide clear rules, guidelines and procedures on MAP regimes [B8];
- seek to resolve MAP cases within 24 months on average [C2];
- provide transparency of their position on MAP arbitration [C6]; and
- implement MAP agreements swiftly [D2].

There is an *assessment methodology* for peer review of countries' MAP frameworks. Taxpayers (both individuals and corporates) will be able to comment by completion of standard form questionnaires. The peer review process will cover existing treaties only. There is no requirement for countries to negotiate any new treaties. Developing countries may defer the peer review. This reflects their potential resource restraints and low levels of MAP requests.

Peer reviews will be conducted in two stages, commencing later this year. Stage 1 will involve the review of countries' current implementation of the minimum standard (with input as noted above). Stage 2 will review the measures taken by countries to address any shortcomings identified in stage 1. Stage 1 reports are to be published from the second half of 2017. Stage 2 is to be completed by 2020.

Guidance on specific information and documentation required to be submitted with a request for MAP assistance requires countries to publish clear rules, guidelines and procedures for accessing and using the MAP. These should specify the information and documentation that should be submitted by taxpayers in a request for MAP assistance. There is also a *Statistics reporting framework*.

Draft EU Directive

To date, the OECD has focused primarily on these 'soft law' approaches, so as to encourage governments to a more disciplined approach to treaty dispute resolution. Senior OECD officials state publicly that they consider governments just don't like the loss of control that comes with mandatory binding arbitration.

That may change with Action 15. In the meantime, though, the European Commission proposes a bolder path, building on the Arbitration Convention (90/436/EEC) and widening it to cover all double taxation disputes between EU member states. It notes that there are currently around 900 double taxation disputes in the EU, estimated to be worth €10.5bn. Under a draft Directive published on 25 October, a taxpayer can complain to the two states. They have six months to accept the complaint, and if either rejects the complaint the taxpayer can appeal that decision

(in the UK, appeal would be to the tribunal). Once the complaint is accepted, an advisory committee is then set up and must rule within six months; and unless the member states agree a different outcome within a further six months, the ruling is binding in each state and enforceable in local tribunals.

However, this is a long way from becoming law. Even if it becomes law before Brexit (so that the UK treats it as preserved under the Great Repeal Act), there is no guarantee that EU states will also honour it in disputes with the UK.

What next?

Individual and corporate taxpayers, and associations of taxpayers, will have the opportunity to provide input on MAP machinery in countries relevant to them. Time frames will be short. An OECD request for input will become available on the OECD website. Taxpayers will have four weeks to respond. In some ways, 2020 is far away. And it is not clear whether changes will cover existing disputes. With Brexit, however, the EU proposals are unlikely to help. And experience in these multilateral issues is that early input produces the greatest results. ■

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