

PUBLIC CONSULTATION DOCUMENT

# **BEPS Action 14: Making Dispute Resolution Mechanisms More Effective – 2020 Review**

18 November 2020 – 18 December 2020



OECD/G20 Base Erosion and Profit Shifting Project

# **BEPS Action 14: Making Dispute Resolution Mechanisms More Effective – 2020 Review**

Public consultation document



## Background

In October 2015 the final report on Action 14: Making Dispute Resolution Mechanisms More Effective was published, containing a minimum standard (the “Action 14 Minimum Standard”) with a focus on improving the resolution of tax-related disputes between jurisdictions through the mutual agreement procedure (MAP) by ensuring that:

- Treaty obligations related to the MAP are fully implemented in good faith and MAP cases are resolved in a timely manner;
- Administrative processes are implemented to promote the prevention and timely resolution of treaty-related disputes; and
- Taxpayers can access the MAP process when eligible.

All 137 members of the BEPS Inclusive Framework committed themselves to have their compliance with the Action 14 Minimum Standard reviewed and monitored by their peers through a peer review process performed by the FTA MAP Forum. In addition, these members also agreed to annually report their MAP statistics on the basis of a common statistical reporting framework (“MAP Statistics Reporting Framework”).

The agreed peer review process consists of two stages. In stage 1 a jurisdiction’s legal and administrative framework in relation to its MAP programme is analysed as well as reported MAP statistics and input from peers. The outcome of this analysis comes in the form of a peer review report that includes recommendations where jurisdictions do not yet meet all elements of the Action 14 Minimum Standard. The follow-up of these recommendations is monitored in stage 2.

The review process was launched at the end of 2016 and comprises the review of 82 members of the BEPS Inclusive Framework in 10 separate batches. 48 members obtained a deferral of their peer review until 2020, with the deferral of the seven most recent members of the BEPS Inclusive Framework to be confirmed at the next FTA MAP Forum meeting. Currently, stage 1 of the process has been completed for nine batches with batch 10 well underway, whereas stage 2 has been completed for the first three batches (comprising 21 jurisdictions) and is underway for batches 4-6 (comprising 24 jurisdictions). The finalisation of the stage 2 process for all 10 batches is foreseen for 2021. The outcomes of the peer reviews are made available on the [website of the OECD](#). They show that while significant progress is being made, more needs to be done to improve the effectiveness of the MAP.

## Public consultation document

The assessment methodology for the peer review process of the Action 14 Minimum Standard foresees an evaluation of this process in 2020, including a decision on the continuation of the deferrals for the 55 jurisdictions that have been or will be deferred. Based on the experience gained with the peer reviews thus far, the 2020 review also presents an opportunity to re-examine what is working well in the MAP process and what could be further improved. It is noted that dispute prevention and dispute resolution also feature prominently in other work of the Inclusive Framework and the OECD including the work on the tax challenges arising from the digitalisation of the economy and the work of the Forum on Tax Administration (FTA). However, this consultation focuses on the MAP process that will continue to be an important part of the wider tax certainty agenda.

This consultation document therefore seeks stakeholder input on proposals for the 2020 review of the Action 14 Minimum Standard regarding the following items:

- a) Experiences with, and views on, the status of dispute resolution and suggestions for improvements, including experiences with mutual agreement procedures in those jurisdictions that obtained a deferral;
- b) Additional elements to strengthen the Action 14 Minimum Standard; and

c) Additional elements to strengthen the MAP Statistics Reporting Framework.

**The proposals included in this consultation document have been prepared by the Secretariat. While many jurisdictions expressed support for most of the proposals, several jurisdictions also raised strong concerns with some of them. They do not represent the consensus views of the Inclusive Framework, the Committee on Fiscal Affairs (CFA) or their subsidiary bodies, but are intended to provide stakeholders with substantive proposals for analysis and comment.**

Interested parties are invited to send their comments no later than **Friday 18 December 2020, 18:00 (CET)**, by e-mail to [taxpublicconsultation@oecd.org](mailto:taxpublicconsultation@oecd.org) in Word format (in order to facilitate their distribution to government officials). All comments should be addressed to the International Co-operation and Tax Administration Division, Centre for Tax Policy and Administration.

Please also note that all comments on this public consultation document will be made publicly available. Comments submitted in the name of a collective "grouping" or "coalition", or by any person submitting comments on behalf of another person or group of persons, should identify all enterprises or individuals who are members of that collective group, or the person(s) on whose behalf the commentator(s) are acting. Speakers at the upcoming public consultation meeting will be selected from among those providing timely written comments on this consultation document.

## Public consultation meeting

The public consultation meeting on the 2020 Review of BEPS Action 14 will be held virtually in early 2021. The objective is to provide external stakeholders an opportunity to provide input on the ongoing work. Registration details for the [public consultation meeting](#) will be published on the OECD website in due course.

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# 1 Introduction

1. Tax treaties contain a mechanism to resolve treaty-related disputes: the mutual agreement procedure. Under this procedure, the competent authorities of the contracting states endeavour to resolve in an amicable manner disputes on the proper application or interpretation of treaty provisions. This procedure is of fundamental importance to the proper application and interpretation of tax treaties, notably to ensure that taxpayers entitled to the benefits of the treaty are not subject to taxation by either of the contracting states which is not in accordance with the terms of the treaty.

2. The [final report](#) on BEPS Action 14 contains a Minimum Standard to ensure that jurisdictions resolve their treaty-related disputes through the mutual agreement procedure in a timely, effective and efficient manner. All 137 members of the BEPS Inclusive Framework committed themselves to implement the Action 14 Minimum Standard and to have their implementation evaluated through a peer review process. For this purpose, [terms of reference](#) were developed that translate the Action 14 Minimum Standard into 21 elements that relate to the four key areas of an effective dispute resolution mechanism: (i) prevention of disputes, (ii) availability and access to MAP, (iii) resolution of MAP cases and (iv) implementation of MAP agreements. Additionally, an [assessment methodology](#) was adopted that describes the procedures and guidelines for the peer review process, which comprises a two-stage approach. Under stage 1, jurisdictions' implementation of the Action 14 Minimum Standard is reviewed on the basis of the legal and administrative framework of their MAP programmes and the application of this framework in practice, as well input from peers and taxpayers and reported MAP statistics. Where jurisdictions do not meet all 21 elements, recommendations are made on the actions jurisdictions should take to meet the requirements under the specific element(s). Follow-up on the stage 1 recommendations is reviewed in stage 2 of the process, which is initiated within one year after the approval of a jurisdiction's stage 1 peer review report by the BEPS Inclusive Framework. The final report on BEPS Action 14 also lists 20 countries that, in addition to the commitment to implement the minimum standard by all countries adhering to the outcomes of the BEPS Project, have declared their commitment to provide for MAP arbitration in their bilateral tax treaties as a mechanism to guarantee that treaty-related disputes will be resolved within a specified timeframe.

3. The BEPS Action 14 Minimum Standard further requires members of the BEPS Inclusive Framework to annually report their MAP statistics in a collaborative manner pursuant to a specifically developed reporting framework, the [MAP Statistics Reporting Framework](#). The annual reporting of MAP statistics includes jurisdictions' MAP caseload, outcomes for closed cases and the average time taken to close such cases based on a common start and end date. Jurisdictions need to ensure that their statistics match to avoid double counting of cases or a different reporting of the number of cases. The reported MAP statistics are published on the OECD [website](#).

4. The assessment methodology stipulates that, based on its outcomes, the Action 14 peer review process should be evaluated in 2020, including a decision on whether the deferrals of certain jurisdictions' peer reviews should be continued. In this context, building on the experiences of nearly 5 years of peer reviews and mindful of the wider advances on the tax certainty agenda, this consultation document seeks stakeholder input on key aspects of the dispute prevention and resolution agenda. It takes a wide view in order to solicit broad and diverse input which in turn will enable the Inclusive Framework to make the best informed decisions. This document therefore contains items for consideration that could potentially be

included as part of this 2020 review, next to the proposal for a review of the assessment methodology and the continuation of deferrals. Section 2 includes proposals to strengthen the Action 14 Minimum Standard, focusing on what could be improved with respect to the MAP process based on the experiences with the peer review process so far. Section 3 of this document presents proposals to collect additional data under the MAP Statistics Reporting Framework in relation to the MAP process and practices that affect this process. Each section contains questions to stakeholders. Although this document does not contain a section on the assessment methodology, suggestions are being discussed to make it more risk focused. Should stakeholders have any comments on the assessment methodology, input would be welcome.

#### Question for public consultation

- 1) Please share any general comments on your experiences with, and views on, the status of dispute resolution and suggestions for improvement, including experiences with jurisdictions that obtained a deferral of their peer review.

## 2 Proposals to strengthen the Minimum Standard

5. The final report on Action 14 listed 17 elements of the Minimum Standard and 11 Best Practices. The first peer reviews on the implementation of this Minimum Standard were launched in December 2016. Currently almost all stage 1 peer reviews are finalised with nine out of ten batches already published and the stage 2 peer monitoring well underway. The Action 14 Minimum Standard is already having a broader impact on MAP and good progress has been made as evidenced by the MAP Statistics and peer input but there is still room for improvement.

6. Stakeholder input is sought on their experience with the MAP process the last five years, on what they would add to the Minimum Standard or elevate from Best Practice to Minimum Standard and in particular on the following eight elements discussed below<sup>1</sup>:

- Increase the use of bilateral APAs
- Expand access to training on international tax issues for auditors
- Define criteria to ensure that access to MAP is granted in eligible cases and introduce standardised documentation requirements for MAP requests
- Suspend tax collection for the duration of the MAP process under the same conditions as are available to taxpayers under domestic rules
- Align interest charges / penalties in proportion to the outcome of the MAP process
- Introduce a proper legal framework to ensure the implementation of all MAP agreements
- Allow multi-year resolution through MAP of recurring issues with respect to filed tax years
- 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

### 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.*

7. Bilateral advance pricing arrangements (APAs) enable jurisdictions (and taxpayers) to prevent disputes by discussing them in a less controversial posture. Under the Action 14 Minimum Standard, however, jurisdictions are only required to allow for roll-back of bilateral APAs if an APA programme is already in place. There is no requirement to actually have or introduce such a programme, as this is only a best practice as identified in the Final Report on Action 14.<sup>2</sup> To ensure that jurisdictions work towards the prevention of disputes and provide certainty to taxpayers, it could be required that jurisdictions establish a

<sup>1</sup> These proposals are not listed in order of importance.

<sup>2</sup> Best practice #4 states that: “Countries should implement bilateral APA programmes”.



bilateral APA programme. Such programmes could also reduce the number of MAP requests submitted each year and their introduction aligns with the objectives pursued by the Forum on Tax Administration (FTA) under the wider tax certainty agenda.<sup>3</sup>

8. The peer reviews conducted so far show that the majority of the assessed jurisdictions already have a bilateral APA programme in place. While the competent authorities of some jurisdictions conclude APAs solely on the basis of the authority of tax treaty provisions based on Article 25(3) of the OECD Model Tax Convention<sup>4</sup>, other jurisdictions have established formal APA programmes and have detailed rules in place in their laws and administrative guidance.<sup>5</sup> Both types could qualify as an APA programme for the purposes of this element.

9. However, recognising that the volume of MAP inventory in jurisdictions may vary, jurisdictions that have only a minimal number of transfer pricing MAP cases would not be required to introduce an APA programme until their MAP inventories reached a relevant number of transfer pricing MAP cases.

#### Question for public consultation

2) Please share your views on this proposal.

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

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

10. BEPS Action 14 aims at making dispute resolution mechanisms more effective. While the focus to achieve this goal is on improving the mutual agreement procedure, efforts can also be made to avoid having cases enter into the MAP process. Different dispute prevention tools play an important part in this respect. Disputes can however also be avoided at the level of Tax Administrations by ensuring that no adjustments are made that would later need to be undone in MAP. In the Final Report on Action 14, training of audit/examination personnel on international tax matters is a best practice.<sup>6</sup>

11. Mandatory training for audit/examination personnel would increase auditors' efficacy and would result in: (i) better-trained auditors and examiners and (ii) fewer adjustments that lead to long discussions in MAP or situations where the case is closed by providing unilateral relief in the jurisdiction that made the adjustment at issue. This in turn could potentially exert downward pressure on the number of MAP cases initiated each year. It would also align with the tax certainty agenda of the FTA.

#### Questions for public consultation

3) 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?**

<sup>3</sup> See the 2019 FTA Santiago communiqué. Available at: <https://www.oecd.org/tax/forum-on-tax-administration/events/forum-on-tax-administration-communique-2019.pdf>.

<sup>4</sup> See the third bullet of paragraph 52 of the Commentary on Article 25 of the OECD Model Tax Convention.

<sup>5</sup> In total, 50 out of the 82 jurisdictions assessed under the Action 14 peer review so far have already established an APA programme.

<sup>6</sup> Best practice #3 states that: "Countries should develop the "global awareness" of the audit/examination functions involved in international matters through the delivery of the Forum on Tax Administration's "Global Awareness Training Module" to appropriate personnel".

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

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

*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.*

#### **Defining “access to MAP”**

12. Under Article 25(1) of the OECD Model Tax Convention, taxpayers have a right to submit a MAP request when they consider that actions of one or both Contracting States result, or will result, in taxation not in accordance with the provisions of the convention. To be admissible, a MAP request under paragraph 1 of Article 25 must be presented within the timeframe stipulated in the tax treaty, generally three years from the first notification of the action which gives rise to taxation not in accordance with the tax treaty. Once a request that meets the requirements of paragraph 1 has been accepted, the competent authority to which the case was presented must determine whether the taxpayer’s objection appears to be justified and whether it is possible to solve the case unilaterally by providing for a satisfactory solution.<sup>7</sup>

13. There are, however, no commonly agreed criteria specifying when exactly a case would be eligible for the MAP process, as well as what information and documentation taxpayers should include in their MAP request. The current Action 14 Minimum Standard defines a number of circumstances when access to MAP should be given: (i) transfer pricing cases, (ii) cases concerning the application of treaty and domestic anti-abuse provisions, (iii) cases in which there has been an audit settlement and (iv) cases in which taxpayers have provided in the MAP request the required information and documentation as set out in a jurisdiction’s MAP guidance. Nevertheless, during the course of the peer review process a number of additional circumstances were identified in which access to MAP was inappropriately denied or where a jurisdiction’s policy is to deny access to MAP in cases where access to MAP should be granted. A few examples are: cases in which there was no double taxation, cases in which there was already a final court decision but correlative relief might be obtained, and cases where a PE no longer existed at the time the MAP request was submitted. There were also circumstances for which there is no consensus view on whether access to MAP should be granted. This is the case, for example, where a jurisdiction has entered into unilateral rulings or unilateral APAs.

14. Having the four affirmative circumstances defined when a competent authority should grant access to MAP may create ambiguity. To provide clarity and to have a consistent approach between treaty partners regarding access to MAP, and thus whether for such cases the competent authorities should endeavour to find a mutual solution, additional circumstances could be defined in the Action 14 Minimum Standard and jurisdictions could be required to provide clarity thereon in their MAP guidance.

#### **Definition of a list of minimum information taxpayers need to include in their MAP request**

15. The peer review process has shown that most jurisdictions that have introduced and published MAP guidance include in this guidance details of the information taxpayers need to include in their MAP request. Taxpayers’ access to the full MAP process is dependent on compliance with these information and documentation requirements and the competent authority’s evaluation of information submitted by

<sup>7</sup> In general, a MAP request would not be admissible if it has not been submitted within the timeframe stipulated in the applicable tax treaty, when it has not been submitted to the correct competent authority, or when the taxpayer is not a resident in one of the Contracting States.

taxpayers. Given that under the 2017 version of Article 25(1) of the OECD Model Tax Convention taxpayers are now allowed to submit a MAP request to either competent authority and in light of the requirement for competent authorities to consider whether the objection raised by the taxpayer in its MAP request is justified, a common interpretation of what constitutes such “required information” has become more important. This same consideration applies to transfer pricing cases, where both associated enterprises generally file a MAP request in their State of residence.

16. In the situation where taxpayers file a MAP request to all competent authorities concerned, both have to determine whether the objection raised in this MAP request is justified and thus whether the information contained in this request is sufficient for this purpose. Having different information requirements among jurisdictions could result in unjustified delays in the MAP process, or to a situation in which one of the competent authorities denies access to the MAP process under the argument that insufficient information was provided, whereas the other competent authority concerned accepted (or would accept) the request and, in the absence of a unilateral solution, referred the case to the bilateral phase of the MAP process.

17. To provide for more uniformity and transparency, and to avoid different positions among jurisdictions on when taxpayers have provided sufficient information in their MAP request, a standard list could be developed on what information taxpayers should (in any case) include in such requests in order to have the request accepted into the MAP process (that is not per se the information that may be required to resolve the case). An indicative list of information requirements is included in Annex A to this document. Some of these items, or items agreed on under other instruments, could serve as the standard.

***Inclusion in jurisdictions’ MAP guidance of a clarification when a request should be accepted into the MAP process and the list of minimum information to be included in a MAP request***

18. In order to ensure consistency and transparency among jurisdictions and also provide clarity to taxpayers, it could subsequently be required as part of the Action 14 Minimum Standard that jurisdictions include in their MAP guidance the (to be agreed) criteria to define when a MAP request should be accepted/can be denied as well as the (to be agreed) standard list of required information in a MAP request.

| Questions for public consultation |  |
|-----------------------------------|--|
| 5)                                | 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.   |
| 6)                                | Please share your views on whether there should be additions to the list of situations/circumstances in which access to MAP should be granted.   |
| 7)                                | 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: <ul style="list-style-type: none"> <li>a. Whether any particular items should or should not be included in such list; and</li> <li>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.</li> </ul> |
| 8)                                | Do you have any other comments on this proposal?   |

## 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.*

19. Income taxes are due and payable when a tax assessment is imposed. Generally, where an adjustment to taxable income is made in one jurisdiction, the item of income has already been taxed in another jurisdiction. Forcing a taxpayer to pay taxes on income on which tax has already been paid in another jurisdiction creates double taxation and imposes significant hardship/financial burdens on taxpayers, also since in some cases the MAP process can be quite long and taxpayers have no specific influence on its duration. To reduce the financial hardship imposed, allowing suspension of tax collection during the period that competent authorities endeavour to reach a MAP agreement would provide a respite to a taxpayer's cash position. In addition, suspending tax collection may allow a competent authority to enter MAP negotiations in good faith without bias arising from any difficulty it may face in refunding a tax already collected.

20. Under the domestic law of most jurisdictions, a suspension of tax collection is available when domestic remedies are initiated to challenge the tax assessment and/or the amount of tax due. Allowing for the suspension of tax collection during the period a MAP case is pending, at least under the same circumstances as are otherwise available under domestic law, is currently a best practice as identified in the Final Report on Action 14.<sup>8</sup>

21. The current best practice element could be elevated to an element of the Action 14 Minimum Standard. Jurisdictions would then need to suspend tax collection under the same rules applicable when taxpayers pursue available domestic remedies. Under this approach jurisdictions that have no such domestic rules in force will not be required to introduce them only for the MAP process.

22. The concerns and problems that some jurisdictions have regarding suspension of tax collection during MAP due to rules governing taxes becoming statute-barred (when taxes are no longer collectable) would also be addressed and these issues would set limitations as far as the obligation to suspend tax collection during MAP is concerned. Another concern that should be addressed with regard to this proposal is to ensure that taxes due can be collected if the outcome of the MAP process confirms that such taxes should be imposed.

| Questions for public consultation |  |
|-----------------------------------|--|
| 9)                                | 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?  |
| 10)                               | 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? |
| 11)                               | Do you have any other comments on this proposal?   |

<sup>8</sup> Best practice #6 states that: "Jurisdictions should take appropriate measures to provide for a suspension of collections procedures during the period a MAP case is pending. Such a suspension of collections should be available, at a minimum, under the same conditions as apply to a person pursuing a domestic administrative or judicial remedy".

## 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.*

23. Penalties and interest charges levied as a result of tax adjustments can be substantial. In some instances, these can be significantly higher than the taxes actually under dispute. For example, if an adjustment is made five years after the ending of a fiscal year and concerns multiple years, interest is charged on all five years up to the date of the assessment. If the taxpayer files a MAP request, eventually resulting in an agreement that confirms the adjustment and that leads to the elimination of double taxation, interest accumulates until the date of the implementation of the agreement. As the period for which interest is charged can then become lengthy, the amount of interest may become substantial and leave taxpayers with additional costs, even if the original dispute was resolved. Taxpayers can therefore legitimately ask why interest and penalties are owed even where the tax adjustment that formed the basis for the interest and penalties has been (partially) reversed as part of a MAP agreement.

24. Currently, jurisdictions have no obligation to align such penalties and interest charges with the ultimate outcome of the MAP process. This can result in significant financial hardship for taxpayers that may in fact be economically equivalent to double taxation. In practice this can be an important issue for taxpayers and may even constitute an obstacle for them to resort to the MAP process. While interest charges and penalties are outside of the scope of a treaty, and thus also outside the scope of MAP, rationally linking interest and penalties to the outcome of the MAP process would provide a more holistic and fairer solution for those cases where interest or penalties are at stake. Adopting this approach would mean that interest and penalties would only stand to the extent that the taxation upon which they are based remains after a MAP agreement has been achieved.<sup>9</sup>

### Questions for public consultation

- 12) 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?
- 13) Do you have any other comments on this proposal?

## 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.*

25. The outcome of the peer review process shows that domestic time limits in approximately one-third of the reviewed jurisdictions may jeopardize the implementation of MAP agreements, in cases where the applicable tax treaty does not contain the equivalent of Article 25(2), second sentence, of the OECD Model Tax Convention (which ensures that MAP agreements can be implemented notwithstanding domestic time limits). The current Action 14 Minimum Standard does not fully address this issue because there are still instances where a MAP agreement cannot be implemented or where no agreement is reached because it could no longer be implemented. The Minimum Standard in fact allows jurisdictions that did not, or do not, wish to include this second sentence in their tax treaties to choose an alternative. This alternative is an

<sup>9</sup> For example, if the adjustment is 1 000 and the accumulated interest is 800, and the MAP agreement results in a reduced adjustment of 800, aligning interest charges in proportion to the MAP agreement could lead to a reduction of interest charges by 140 to 640. Paragraph 49 of the Commentary on Article 25 already recognises that a Contracting State that has agreed to reduce or withdraw an underlying tax liability should proportionally reduce the amount of or withdraw interest or administrative penalties that are directly connected and computed with reference to that underlying tax liability.

additional provision for Articles 7 and 9, which limits the time during which transfer pricing adjustments can be made. The aim of these provisions is to avoid late adjustments for which relief of double taxation would no longer be available via the MAP process due to domestic time limits running out. The additional provisions do not, on their own, eliminate the risk that a MAP agreement cannot be implemented because they:

- Are limited to adjustments made under Articles 7 or Article 9 (attribution/allocation MAP cases); and
- Only limit the time during which a primary adjustment can be made. Therefore, a potential MAP agreement may still not be implemented as domestic time limits are not overridden by a treaty provision under these additional provisions and such time limits may already have expired when a MAP agreement is reached, or even when a MAP request was originally submitted.

26. Furthermore, under the Action 14 Minimum Standard there is no obligation to include these additional provisions into the tax treaty, as it is only required that jurisdictions that do not wish to include Article 25(2), second sentence in their treaties are willing to accept the additional provisions. This is not just a theoretical problem. Even after the effect of the BEPS Multilateral Instrument is taken into account, more than 20% of the treaties reviewed thus far still pose a potential problem with respect to the implementation of MAP agreements. For all of these treaties the risks described above relating to implementation could therefore materialise. This has been the case in practice, either due to jurisdictions not being able to implement MAP agreements or being prevented from negotiating a solution due to the expiration of domestic time limits.

27. There are several options to address the risk of non-implementation, amongst which the following three introducing the obligation for jurisdictions that:

- a) All of their tax treaties contain the equivalent of Article 25(2), second sentence;
- b) All of their tax treaties contain the equivalent of Article 25(2), second sentence, supplemented, if requested by one State, with a provision limiting the time during which a primary adjustment or an assessment is made; or
- c) Their domestic legislation includes a mechanism that fiscal years are kept open until the MAP proceedings have been finalised or they have administrative procedures that allow for implementation notwithstanding domestic time limits for at least as long as not all treaties contain the equivalent of Article 25(2), second sentence.

| Questions for public consultation |   |
|-----------------------------------|---|
| 14)                               | 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? |
| 15)                               | 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.   |
| 16)                               | <b>Do you have any other comments on this proposal?</b>   |



## 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.<sup>10</sup>*

28. In certain cases, a request for competent authority assistance in respect of a specific adjustment to income may concern recurring issues which are also relevant in previous or subsequent filed tax years. MAP procedures that allow a taxpayer also to request MAP assistance with respect to such recurring issues for these other filed tax years – generally subject to the requirement that the relevant facts and circumstances are the same and subject to the verification of such facts and circumstances – may help to avoid duplicative MAP requests and permit a more efficient use of competent authority resources. Jurisdictions should accordingly seek to implement appropriate procedures to permit, in certain cases and after an initial tax assessment, taxpayer requests 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. Currently, this is only a best practice. The introduction of procedures for the multi-year resolution through the MAP of recurring issues would remain subject to the requirements of paragraph 1 of Article 25. A MAP request to resolve an issue with respect to a particular taxable year would thus only be allowed where the case has been presented within three years of the first notification of the action resulting in taxation not in accordance with the convention with respect to that taxable year (i.e. such procedures would not allow MAP requests that would be time-barred under paragraph 1 of Article 25).

| Questions for public consultation |   |
|-----------------------------------|---|
| 17)                               | 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.   |
| 18)                               | 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)? |
| 19)                               | Do you have any other comments on this proposal?  |

## 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

29. While individual jurisdictions' MAP statistics vary significantly, the aggregate global MAP statistics for 2018 showed that 2% of the cases closed were closed without an agreement and another 2% of the cases closed had an outcome that only partially eliminated taxation not in accordance with the convention. In addition, where other cases were closed on average within 14 months, it took on average 33 months to close transfer pricing cases in 2018.<sup>11</sup> While these percentages only relate to cases that have been resolved, the MAP statistics also show that there are a considerable number of cases that started before 2016 that have not yet been resolved.

<sup>10</sup> Best practice #9 as identified in the Final Report on Action 14.

<sup>11</sup> The latest MAP statistics are available at: <https://www.oecd.org/ctp/dispute/mutual-agreement-procedure-statistics.htm>.

30. MAP arbitration is a mechanism adopted by a number of jurisdictions in their tax treaties to guarantee the resolution of treaty-related disputes within a specified timeframe. Although analysis of over 3000 tax treaties shows that only a limited number provide for MAP arbitration, several jurisdictions with relatively large MAP inventories have adopted MAP arbitration. In the final report on BEPS Action 14, 20 jurisdictions committed to adopt and implement MAP arbitration in their bilateral tax treaties in addition to their commitment to implement the Action 14 Minimum Standard. Apart from these jurisdictions, another 13 jurisdictions have since then opted for MAP arbitration in the BEPS multilateral instrument, thereby modifying over 200 tax treaties to include MAP arbitration. The option to choose MAP arbitration under the MLI is available for jurisdictions who want to have such procedure in their treaties.

31. Implementing MAP arbitration could be an incentive to reduce the number of MAP disputes that are closed with no or only partial resolution but may also have a positive impact on more timely resolution of all pending MAP cases.

32. The Minimum Standard requires that jurisdictions should provide transparency with respect to their respective positions on MAP arbitration. A number of jurisdictions have expressed strong support for the adoption of MAP arbitration as a means to improve the efficiency and effectiveness of the MAP, while a number of others have clearly indicated that MAP arbitration raises several issues around constitutional and sovereignty concerns, but also practical issues including cost, capacity and resource constraints, which is why they do not support its inclusion into the Minimum Standard and consider it very difficult to move away from such position.

33. It is noted that as part of the wider tax certainty agenda, mandatory and binding forms of dispute prevention and dispute resolution also feature in the Pillar I blueprint recently released by the Inclusive Framework in connection with its work on addressing the tax challenges arising from the digitalisation of the economy. Stakeholders are encouraged to comment on the issues identified in the blueprints, in particular around the tax certainty for “Amount A” and beyond in connection with Pillar 1, and separately on the issue of MAP arbitration and other dispute resolution mechanisms more generally as part of this BEPS Action 14 consultation.

34. Recognising there are divergent views on the acceptability and on the effectiveness of MAP arbitration for achieving timely and efficient solutions in the MAP, the following questions solicit comments both on experiences with MAP arbitration as well as views and suggestions on other dispute resolution approaches that might be considered for promoting more timely and effective resolution of MAP cases.

#### Questions for public consultation

- 20) 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?
- 21) 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?

#### Question for public consultation

- 22) Do you have other suggestions to strengthen the Action 14 Minimum Standard? In your response please also mention whether there are any other best practices that you think should be elevated to elements of the Minimum Standard.



# 3

## Proposals to strengthen the MAP Statistics Reporting Framework

35. As noted in section 1, jurisdictions committed to annually report their MAP statistics in order to allow a review of their progress towards meeting the 24-month target timeframe to resolve MAP cases. MAP statistics are used for the peer reviews and are published annually on the OECD [website](#), and include the number of cases on a jurisdiction-by-jurisdiction basis. The statistics enhance the transparency of the MAP process and are an important part of the Minimum Standard and the peer review process. Further improvements could however be made.

36. Input is requested on what could be improved to obtain further transparency and in particular on the following two proposals:

- Reporting of additional data relating to pending or closed MAP cases
- Providing relevant information on other practices that impact MAP – APA statistics

37. Commentators should be aware that the Action 14 framework needs to balance the objective of achieving transparency and being able to measure progress with the need to dedicate maximum resources to resolving MAP cases rather than collecting and reconciling data points for statistical purposes. These considerations as well as considerations relating to confidentiality of taxpayer information will inform any decisions that the Inclusive Framework will take.

### 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.*

38. The agreement on a common statistical framework has undoubtedly provided more transparency, uniformity and consistency in the reporting of MAP statistics by members of the BEPS Inclusive Framework. The current MAP statistics not only provide a global picture of a jurisdiction's MAP caseload, the evolution of its inventory, the time taken to close cases and the outcomes of these cases, but also provide information on a jurisdiction-by-jurisdiction basis. The latter information also allows a better view on where jurisdictions stand [compared with their MAP partners](#). There is, however, some relevant information that is missing and that would allow a fuller assessment of how a competent authority is performing, such as the age of the cases remaining in inventory and the average resolution time per category of outcome. In order to increase transparency further and to obtain a more complete picture of a jurisdiction's MAP performance, some additional data points would be necessary.

39. A first data point would be the indication **which jurisdiction made the adjustment or took the action at issue**. This information would reveal which jurisdiction has more information on the action under

dispute. As it is generally the jurisdiction that made the adjustment at issue that writes the first position paper, it would be relevant to acknowledge that, in those circumstances, the other jurisdiction must wait for action by – and is thus dependent on – the jurisdiction that initially made the adjustment to achieve progress in the case.

40. A second additional data point would be the **time taken to close MAP cases per type of outcome**. Currently the average time for closed MAP cases is only reported per type of case (meaning attribution/allocation cases or other cases) and per treaty partner. This information does not reveal where it took a jurisdiction the most time to close a case, nor does it provide a view on how long it takes jurisdictions to resolve their cases in the bilateral phase of MAP. The reporting of a breakdown of the time taken to close MAP cases per type of outcome could provide a further insight on the cases that were actually resolved through the MAP process and the time needed for that purpose.

41. A third data point would be **the year the MAP cases pending at year-end were initiated**. Apart from the distinction between pre-2016 and post-2015 cases, there is no information available on the exact age of the cases that remain in inventory. One of the elements of the Minimum Standard requires jurisdictions to seek to resolve MAP cases within an average timeframe of 24 months. Under the current MAP Statistics Reporting Framework, a jurisdiction can meet the target 24-month average by closing its most recent cases while keeping the old cases in its inventory, which would not be a desirable outcome. Providing the year the post-2015 cases that remain in inventory were initiated will give a correct view of the exact age of the cases that remain in inventory, which will allow a more accurate monitoring of the compliance with the above-mentioned element of the Minimum Standard.

| Questions for public consultation |  |
|-----------------------------------|--|
| 23)                               | 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.                             |
| 24)                               | 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? |

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

42. From the perspective of transparency (one of the pillars underlying BEPS Action 14) and the tax certainty agenda, focusing exclusively on statistical data on MAP cases may not accurately reflect a given jurisdiction's caseload and efforts on dispute prevention and resolution. Work on dispute prevention for competent authorities primarily concerns APAs. Bilateral APAs can make a significant contribution to the improvement of dispute resolution mechanisms by preventing disputes from arising. Hence, if fewer cases come into the MAP process, the more likely it is that cases that make it into the process can be resolved swiftly.

43. There is already a substantial amount of work done by members of the FTA MAP Forum on APAs, and the efficacy of that work directly impacts MAP case inventories. Some jurisdictions may even handle considerably more APA cases than MAP cases (for example, one jurisdiction's composition of such cases is 80/20 respectively). Also providing statistics on APAs would give a fuller and more accurate picture of a jurisdiction's efforts regarding dispute prevention and resolution.

44. The following non-exhaustive data categories (based upon data in existing published annual reports on APAs) could be considered:

## Inventory overview

- Inventory at the start of the year
- Filed APA requests
- Case closures (including withdrawals)
- Inventory per year-end

## Type of APA cases for newly received requests

- Unilateral or bilateral
- New APA request or a renewal of an existing APA
- Roll-back request

Average completion times for closed cases.<sup>12</sup>

## Questions for public consultation

- 25) Please share your views on the proposal to also publish statistics on APAs, including the data categories being considered for publication.
- 26) What, if any, other items should be added to the data categories for reporting of statistics on APAs to increase transparency?

## Question for public consultation

- 27) **Do you** have other suggestions on how the MAP Statistics Reporting Framework could be supplemented or modified to provide increased transparency?

<sup>12</sup> The start and end date to determine the average completion time would be based on jurisdictions' own computation rules and there would not be a requirement to match APA statistics.

## Annex A.

# Guidance on information and documentation to be submitted in a MAP request

- (i) **Identity of the taxpayer(s) covered in the MAP request** – the identity of the taxpayer(s) covered in a MAP request must be sufficiently specific to allow the competent authority to identify and contact the taxpayer(s) involved. The information provided should include the name, address, taxpayer identification number or birth date, contact details and the relationship between the taxpayers covered in the MAP request (where applicable).
- (ii) **The basis for the request** – the MAP request should state the specific tax treaty including the provision(s) of the specific article(s) which the taxpayer considers is not being correctly applied by either one or both Contracting Party (and to indicate which Party and the contact details of the relevant person(s) in that Party).
- (iii) **Facts of the case** – the MAP request should contain all the relevant facts of the case including any documentation to support these facts, the taxation years or period involved and the amounts involved (in both the local currency and foreign currency).
- (iv) **Analysis of the issue(s) requested to be resolved via MAP** – the taxpayer should provide an analysis of the issue(s) involved, including its interpretation of the application of the specific treaty provision(s), to support its basis for making a claim that the provision of the specific tax treaty is not correctly applied by either one or both Contracting Party. The taxpayer should support its analysis with relevant documentation (for example, documentation required under transfer pricing legislative or published guidance, copies of tax assessments, audits conducted by the tax authorities leading to the incorrect application of the tax treaty provision).
- (v) **Whether the MAP request was also submitted to the competent authority of the other Contracting Party** – If so, the MAP request should make this clear, together with the date of such submission, the name and the designation of the person or the office to which the MAP request was submitted. A copy of that submission (including all documentations filed with that submission) should also be provided unless the content of both MAP submissions are exactly the same.
- (vi) **Whether the MAP request was also submitted to another authority under another Instrument that provides for a mechanism to resolve treaty-related disputes** – If yes, the MAP request should clearly state so and the date of such submission, the name and the designation of the person or the office to which the MAP request was submitted, should be provided. A copy of that submission (including all documentations filed with that submission) should also be provided unless the content of both MAP submissions are exactly the same.
- (vii) **Whether the issue(s) involved were previously dealt with** – the request should state whether the issue(s) presented in the MAP request has been previously dealt with, for example, in an advance ruling, advance pricing arrangement, settlement agreement or by any tax tribunal or court. If yes, a copy of these rulings, agreements or decisions should be provided.

- (viii) ***A statement confirming that all information and documentation provided in the MAP request is accurate and that the taxpayer will assist the competent authority in its resolution of the issue(s) presented in the MAP request by furnishing any other information or documentation required by the competent authority in a timely manner –*** the request for any other information or documentation should be well-targeted and responses to the request should be complete and be submitted within the time stipulated in the request for such information or documentation.