TAX EXECUTIVES INSTITUTE, INC.

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Paris, France

Via Email: taxtreaties@oecd.org

RE: OECD Public Discussion Draft *BEPS Action 14: Make Dispute Resolution Mechanisms More Effective*

Dear Ms. de Ruiter:

On 19 July 2013, the OECD published an *Action Plan on Base Erosion and Profit Shifting* (hereinafter the Plan) setting forth 15 actions the OECD will undertake to address a series of issues that contribute to the perception that individual countries' tax bases are being eroded or profits shifted improperly. Pursuant to Action 14 of the Plan, *Make Dispute Resolution Mechanisms More Effective*, the OECD released a public discussion draft on 18 December 2014 (hereinafter the Discussion Draft or Draft). The OECD invited interested parties to comment on the Draft's recommendations no later than 16 January 2015. On behalf of Tax Executives Institute, Inc. (TEI), I am pleased to respond to the OECD's request for comments.

TEI Background

TEI was founded in 1944 to serve the needs of business tax professionals. Today, the organisation has 56 chapters in Europe, North and South America, and Asia. As the preeminent association of in-house tax professionals worldwide, TEI has a significant interest in promoting tax policy, as well as the fair and efficient administration of the tax laws,

at all levels of government. Our nearly 7,000 individual members represent over 3,000 of the largest companies in the world.[1]

TEI Comments

General Comments

The importance of adequate and effective dispute resolution mechanisms to taxpayers cannot be overstated. Along with uniformly applied, consistent, and predictable international tax rules, effective dispute resolution provides taxpayers with crucial legal certainty to remedy the international trade barriers caused by double taxation.[2] A comprehensive legal framework of dispute resolution that includes domestic remedies as well as mutual agreement procedures (MAP) and arbitration under double tax treaties would provide this needed certainty. It is imperative that these mechanisms be robust and reliable. They should work in a transparent, consistent and expeditious manner and be accessible by way of right for taxpayers, in both bilateral and multilateral settings.

The Discussion Draft acknowledges that, as the BEPS project moves from the final OECD reports to implementation by Member and other States, disputes and controversy will naturally increase, perhaps substantially, as taxpayers and tax administrators grapple with the new rules.[3] This will make bilateral and multilateral dispute resolution mechanisms even more important under a post-BEPS international tax regime. Regrettably, the current MAP process suffers from many deficiencies. These include a lack of transparency, the inordinate length of the process, and issues related to the independence of Competent Authorities, as discussed below.

Transparency of Process

The Discussion Draft acknowledges that where procedures for accessing the MAP process are not transparent or are unduly complex, taxpayers may forego the process and suffer unrelieved double taxation or be improperly denied treaty benefits.[4] Moreover, it is too often the case that once a taxpayer has successfully invoked the MAP process the settlement decided upon by the Competent Authorities does not appear to generally reflect the underlying treaty rules or the position advanced by the taxpayer. This perception will only grow with the

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1 TEI is a corporation organised in the United States under the Not-For-Profit Corporation Law of the State of New York. TEI is exempt from U.S. Federal Income Tax under section 501(c)(6) of the U.S. Internal Revenue Code of 1986 (as amended).

2 The Discussion Draft uses permissive rather than direct language. To underpin the importance of effective dispute resolution mechanisms and to ensure all parties may rely on an objective, timely, and transparent process, TEI recommends that the OECD's final report use declarative language.

3 *See* Discussion Draft, p.12.

4 *See id.*

potential addition to many double tax treaties of the principal purposes test devised under BEPS Action 6. Adding to taxpayer difficulties is that it often takes considerable time and expense, including in most cases the utilisation of an advisory firm, to prepare and submit a proper MAP request, which is then (it seems) sometimes given little credence by the Competent Authorities when deciding the case. The Discussion Draft acknowledges in paragraphs 37 and 38 that unprincipled approaches by Competent Authorities are an obstacle to the resolution of MAP cases. For these reasons, many taxpayers do not view the MAP process as a viable option to settle disputes and MNE tax personnel will generally not recommend relying on the MAP process except as a last resort and then only for a significant amount of tax. Indeed, the MAP process is often perceived as costlier, more involved, and less predictable than having tax matters adjudicated in the court system.

In this regard, TEI supports the suggestions set forth in Option 10 to help remedy the transparency problem by publishing guidelines and procedures for accessing and using the MAP process. In addition, the OECD should recommend publication of MAP settlements – properly redacted to protect confidential and sensitive taxpayer information – as a method to reveal the legal basis for the settlement outcome.[5] Shining a light on the reasoning for a MAP decision would help ensure MAP settlements are based on the facts of each case, the provisions of the treaties, and the principled arguments of the taxpayers and the respective Competent Authorities. It would also dispel the perception that too many settlements are the result of "horse-trading" based on irrelevant issues or unrelated cases. In addition, consideration should be given to treating these published MAP settlements as authority that taxpayers may rely upon and cite when developing their positions, whether on the return, on audit, or in a future MAP proceeding. Finally, performance indicators for Competent Authorities should be appropriately set, as recommended by Option 5, and should not be linked to maintaining tax revenue.

The suggested mechanism for "monitoring the overall functioning of the mutual agreement procedure, including assessment of the measures to which countries will have [politically] committed" as part of a pledge to substantially improve the MAP process, would also increase transparency.[6] TEI fully supports this proposal. In addition, TEI submits that a peer review conducted by tax authorities on the overall functioning and effectiveness of the MAP process would be a beneficial part of such a mechanism. This could be achieved through an independent committee of representatives from States other than the Contracting States that reviews a sample of settlement cases to ensure consistent application of the treaty provisions. Such a committee might be formed under the aegis of the Forum on Tax Administration MAP Forum. The FTA is a preexisting, well-functioning, and independent body that has established

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[5] If a properly redacted MAP settlement decision would not generally provide enough information to allow third parties to divine the legal basis for the settlement, then the suggestion in the text to publish such decisions may not have any utility.

[6] Discussion Draft p.5-6.

relationships with relevant, non-governmental stakeholders. A similar committee could be formed to review cases where a Competent Authority applied the principal purposes test to ensure consistent application under similar facts and circumstances.

Length of Time and Arbitration

A significant hurdle taxpayers face when deciding whether to invoke the MAP processes is the time and effort it takes to reach a resolution, if one can be reached at all. Ideally, a global consensus should be developed to implement a simple, comprehensive, standard/global dispute resolution mechanism. In TEI's view, resolving double taxation disputes through mandatory binding arbitration, after a specified time period, would be the most effective approach. The specter of a MAP case moving to arbitration should provide the States participating in the process with sufficient motivation to conclude the proceeding before reaching the arbitration stage, generally decreasing the length of time it takes to resolve a MAP case.

Adopting a binding and universal arbitration framework should be an integral part of the output of the BEPS project. Indeed, a best practice may be to grant all parties access to arbitration even before initiating a MAP case. States that have committed to arbitration already, *e.g.* EU Member States through the EU Arbitration Convention, should give priority to arbitration and not require a MAP case at first. If a two-step approach is favored, the MAP process should be a transparent, consistent and expeditious mechanism with an appropriate role for the taxpayer.

Outside of arbitration, the OECD should propose deadlines for Competent Authority responses to MAP requests, and for their ultimate resolution, to further accelerate the often slow pace of the MAP process. As to the latter, a treaty should commit Competent Authorities to settle a MAP case within a specified time period after its submission by the taxpayer, such as the three year timeframe set in the EU Arbitration Convention. For treaties with mandatory binding arbitration, the countries should be given a shorter time period to settle a case before it goes to arbitration. For example, under the Canada-U.S. treaty, the Competent Authorities generally have two years to resolve a case before it goes to arbitration.

To encourage timely responses to MAP requests before resolution, consequences could be imposed on Competent Authorities for non-responsiveness, as they generally already exist on the taxpayer side. The OECD should propose a standard set of penalties to be imposed on Competent Authorities that do not respond to a MAP request in a timely manner. Such penalties might include deferral of collection of the disputed amounts or the suspension or waiver of interest and penalties.

Another possible solution would be to have each Contracting State commit to setting a binding target to reduce their "time to settle a case." Developed countries, with more resources and processes in place, may target a greater "time to settle" reduction as compared to

developing countries. This will give each Contracting State autonomy and flexibility to implement a more tax effective MAP mechanism. In addition, an annual assessment of actual results against the target commitment made by the country should be undertaken. Empirical evidence and key lessons would be shared among the Contracting States and countries that do not meet target commitments would be required to implement some of the more effective MAP mechanisms.

Finally, we note the overriding importance of preserving confidentiality taxpayer information in both regular MAP proceedings and MAP arbitration (the latter as discussed in paragraph 49). This is especially critical in jurisdictions where the MAP process is new to taxpayers and tax authorities (*e.g.*, in many countries in Asia). Confidentiality is critical to build taxpayer confidence in the process. Confidentiality is also necessary to prevent misuse of the information disclosed to initiate audits or from being used as secret transfer pricing comparables.

Competent Authority Independence

With respect to the independence of Competent Authorities, and arbitrators where relevant, improving the transparency of the relevant procedures and rules should be instrumental in increasing taxpayer confidence in the integrity of the MAP process. This would also allay concerns or the perception that MAP outcomes are too often determined based on criteria unrelated to the merits of the issues in a particular case and the principles of the relevant treaty. Of course, it should go without saying that the Competent Authority (and arbitrators) should be actually independent to ensure the integrity of the process, in accord with Option 3 (which TEI supports). To bolster the independence of the Competent Authority, Option 3 should also limit contact between the Competent Authority and audit team to clarification of the documents received.

TEI fully supports Option 27, regarding the criteria for appointing qualified arbitrators. TEI would go further and permit the taxpayer to be involved in the arbitrator selection process to vet the qualifications of any potential candidates and have a say in their selection, along with each Competent Authority. In addition, to ensure impartiality and independence, any prospective arbitrators that have violated the standard declaration of impartiality and independence should be barred from being an arbitrator.

Comments on Specific Areas of the Draft

Option 21 would permit taxpayers to make presentations to the Competent Authorities to clarify and facilitate a shared understanding of the relevant facts and issues. The option would also encourage Competent Authorities to commit to face-to-face meetings to encourage open discussion and a collegial approach. TEI strongly supports Option 21, and in particular permitting taxpayers to participate in the MAP process by making presentations to the

Competent Authorities, including participating in face-to-face meetings. Indeed, taxpayer participation in such meetings should be a required part of the MAP process as it has the potential to expedite MAP cases considerably. Even a single presentation by a taxpayer to a joint meeting of the Competent Authorities would facilitate the process as it would allow the taxpayer an opportunity to focus the countries on what it views as the critical facts and issues. Currently, too much of the time between meetings of the Competent Authorities is spent forwarding additional questions to the taxpayer, when these questions can often be answered quickly at a Competent Authority meeting if the taxpayer attended. Indeed, the ability to engage in a back and forth discussion among the three parties may save significant time as there would be no need for taxpayers to wait for questions to be asked and tax authorities to wait for the answers. Finally, permitting taxpayers to participate in the MAP process would enhance its transparency and further encourage Competent Authorities to adopt principled positions and arguments.

Related to Option 21 is Option 11, which proposes to have specific guidelines on the minimum information that taxpayer must submit to request MAP assistance. The required information should be significantly reduced when compared to the requirements of current published guidance on MAP requests. For example, the content required for a MAP request in the United States generally necessitates hiring an outside advisor to ensure that the U.S. Competent Authority will accept the request. A simplified and expedited procedure would be for the taxpayer simply to submit the other tax authority's proposed adjustment as its documentation. If this process were adopted, permitting taxpayers to be present at meetings of the Competent Authorities, as proposed under Option 21, would allow taxpayer to supply any missing information in an efficient manner. Similarly, taxpayers should also be able to participate in any MAP arbitration proceeding. TEI recommends that such participation go further than Option 30, which would permit the Competent Authorities to allow a taxpayer to present its position orally during the arbitration procedure, and give the taxpayer a "seat at the table" during the proceeding.

With respect to Option 7, it should be clear that part of an audit settlement cannot preclude taxpayers from utilising the MAP process or an available arbitration procedure. Similarly, with respect to Option 16, taxpayers must not be required to give up rights under double tax treaties (*e.g.*, MAP and arbitration) to gain access to domestic remedies. More broadly, there is a need to reinforce the legal framework for APAs, MAPs and arbitration and ensure a clear and transparent interaction with available domestic dispute resolution mechanisms. In the post-BEPS environment where controversy and disputes will likely only increase, dispute resolution frameworks should be complementary and it should be clear how domestic mechanisms interact with dispute resolution under double tax treaties.

TEI applauds the acknowledgement in the Discussion Draft of the OECD's aspiration to support "complementary solutions that have a practical, measurable impact . . . ."[7] In this regard, the importance of relevant and aligned APA and MAP statistics should be underscored. The current statistics regarding APAs, MAPs and arbitration, which generally provide details regarding total and new cases, should be updated to include information on the time it takes to complete the various processes (*i.e.*, the time a case is in the "inventory" of the process). For this purpose, TEI encourages the OECD, other international organisations and tax authorities in general to utilise information already available to them and improve analysis rather than institutionalising additional requests for information.

Paragraphs 22 and 23 discuss the inability of taxpayers in certain jurisdictions to apply APAs to multiple years or "rollback" the APA to prior years. This discussion reflects the practical reality that APAs are similar to an advanced audit. An unfortunate difference, however, is that taxpayers have to pay a fee for tax authorities to audit them. This makes APAs more expensive than a regular audit and discourages taxpayers from utilising the APA process. Thus, the OECD should discourage the practice of charging for an APA.

The OECD correctly notes in paragraphs 28-30 that it is not uncommon for countries to unilaterally refuse access to the MAP process when the tax authorities have applied a domestic or treaty-based anti-abuse rule, or where a country decides that a taxpayer's objection is not justified even though the other country would disagree. Similar refusals occur in criminal cases. However, in certain cases countries define a "criminal" case by reference to the amount of tax at issue and then set a very low threshold for that amount. In such a case a taxpayer can be denied access to the MAP process merely because of the amount of the tax adjustment.

Refusing access to treaty-based remedies will continue to occur when treaties or multilateral instruments introduce binding arbitration provisions. TEI recommends that the OECD discourage its Member States from permitting their tax authorities to unilaterally refuse access to the MAP process for these reasons. This could be accomplished by introducing a multilateral instrument for countries that wish to implement a binding arbitration provision that would explicitly bar the Contracting States' tax authorities from using such an approach. Alternatively, the approach set forth in Option 15 should be adopted, which would permit a request for MAP assistance to be made to the Competent Authority of either contracting state. This would help ensure that Competent Authorities properly weigh the merits of an application when determining whether to accept a MAP request, which should build confidence in the process and enhance its transparency.

Finally, paragraph 60 discusses the potential suspension, negotiation, and/or waiver of interest and penalties as part of the MAP process. In TEI's view, not only should interest and

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[7] Discussion Draft, p.4.

penalties be suspended during the MAP process, but the taxes as well. As paragraph 33 states, a Competent Authority "may . . . find it more difficult to enter into good faith MAP discussion when it considers it may likely have to refund taxes already collected." TEI also recommends Competent Authorities be given the ability to suspend, negotiate or waive interest and/or penalties as part of the MAP discussions. These discussions should also directly involve the taxpayer, as the other involved tax authority may not be directly impacted by the penalties and interest that the taxpayer pays to the first tax authority.

Conclusion

TEI appreciates the opportunity to comment on the OECD public discussion draft regarding follow up work under BEPS Action 6. These comments were prepared under the aegis of TEI's European Direct Tax Committee, whose Chair is Nick Hasenoehrl. If you have any questions about the submission, please contact Mr. Hasenoehrl at +41 786 88 3772, nickhasen@sbcglobal.net, or Benjamin R. Shreck of TEI's legal staff, at +1 202 638 5601, bshreck@tei.org.

Sincerely yours,
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