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Response to Public consultation document: 2020 Review of BEPS Action 14

PricewaterhouseCoopers International Limited, on behalf of the Network Member Firms of PwC (PwC), thanks the OECD for the opportunity to provide comments on the consultation document entitled *BEPS Action 14: Making Dispute Resolution Mechanisms More Effective – 2020 Review*.

We have sought to provide constructive input to enable the Inclusive Framework to make decisions as to the 2020 review, the strengthening of the Action 14 minimum standards and the statistical reporting framework.

Our response is based on our experience as an adviser to businesses, individuals and other taxpayers as well as a regular contributor to tax policy proposals and wider discussions. We have, in particular, drawn on the expertise of a number of former tax treaty competent authorities and team members, including those listed as contacts below.

As transfer pricing audits become more prevalent across the globe, some MNEs are facing multiple disputes involving countries where the level of experience of the MAP process is very limited and where there is often reluctance to engage with other competent authorities in what, from their perspective, is only likely to result in a repayment of tax revenue. As the OECD MAP statistics show, there has been a significant growth in MAP cases and we expect this trend to continue. We therefore recommend that more attention needs to be given to reducing dispute cases, both in terms of preventing disputes arising and also how MAP resolutions might be leveraged to achieve a reduction in disputes in the future. In our detailed responses we suggest how the use of agreed MAP positions might form the basis of a range of acceptable outcomes.

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In overview, there could then be considerable benefits in having a MAP that brings cases to a close more efficiently, both in terms of resolving the issues and the time taken to do so. This would need to include steps, timelines and enforcement that are more extensively included in domestic law (whether directly or by empowerment of supranational guidance) or some form of multilateral convention/ instrument. Key aspects would include:

- the use of MAP in most cases of interpretation/ application of tax treaties and instances of double taxation
- exceptions clearly identified and kept to a minimum
- identified (and enforceable in domestic law) timelines for both competent authorities and taxpayers where relevant for each phase of the process
- inclusion of milestones for interaction with the taxpayer and sharing of supporting evidence and an explanation of their technical position
- a procedure for resolving the issue whether binding mandatory arbitration or something else, even where the countries' obligations to use their endeavours to do so have failed
- the ability to pursue a case in national courts to unblock access or procedures
- publication of a summary of the decision.

One could consider an upgrade of the standards set out in Action 14, to the terms and level of agreement of the EU Dispute Resolution Directive[1] and the arbitration element of the BEPS MLI[2]. We elaborate on these points in answering the questions raised in the consultation document, as set out in the Annex below.

We would be very happy to discuss in more detail any of our experiences set out briefly in this letter. If you wish to do so please do not hesitate to get in touch with me or any of the contacts listed below, with a copy to me.

Yours faithfully,

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[1] EU Council Directive 2017/1852 of 10 October 2017 - https://eur-lex.europa.eu/eli/dir/2017/1852/oj
[2] Multilateral Instrument to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting of 24 November 2016 - http://www.oecd.org/tax/treaties/multilateral-convention-to-implement-tax-treaty-related-measures-to-prevent-beps.html

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On Introduction

Q1: 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.

Overall, our experience is that the impact of Action 14 has been patchy and the most improvement has been seen in those countries that were probably already working within the minimum standards and most of the best practices set out in the Action 14 report. This is to be welcomed of course as most MNE tax disputes are still contained within this group of countries. Pressure should not be brought to sign 'no-MAP agreements' as we still experience.

However, as transfer pricing audits become more prevalent across the globe, some MNEs are facing multiple disputes involving countries where the level of experience of the MAP process is very limited and there is often reluctance to engage with other competent authorities in what, from their perspective, is only likely to result in a repayment of tax revenue.

The peer review process is a worthy endeavour, but we have seen very limited direct evidence that the peer reviews themselves have improved the MAP environment to any significant extent in relation to those jurisdictions that have been through a peer review. More publicity could be given to the main conclusions and suggestions to encourage change in addition to the peer report. It is possibly debatable whether the efforts required to undertake peer review in the deferred countries is going to be a worthwhile use of time for those countries whose experience of MAP is, or is likely to be, assessed as limited (or the OECD and reviewers).

Perhaps the clearest evidence of the impact of Action 14 has been the emphasis put on the MAP statistics and, in particular, the publication of individual country results and the league tables and OECD awards for various aspects of MAP. This has concentrated attention in many tax authorities to improve their numbers, resulting sometimes in a welcome increase of resources for MAP work. The OECD may in future consider recognising competent authorities that have been nominated by taxpayers as demonstrating adherence to the minimum standards and embracing best practices.

In our view, more might have been achieved to implement the best practices of Action 14 through an increased training effort for competent authorities and by updating and re-visiting the MEMAP[3]. At present it is rather invisible and sits only as a general guide containing recommended approaches to those who know of its existence. It needs to be aligned with the Action 14 Report and its 'authority' strengthened, for example, by referring to it in the OECD Model Article 25 Commentary.

In addition, we suggest the OECD encourages tax authorities to provide for more interaction with willing taxpayers concerned in the process in the fact finding and negotiation phase of the MAP, perhaps also with a knock-on effect with those who are minded to leave the work to the competent authorities. We would also greatly welcome OECD support for greater rights for taxpayers throughout the procedural steps including, say, an additional 'stage gate' within a specified time, interactively to review the level of supporting information. We see this, for example, in the EU Dispute Resolution

[3] Manual on Effective Mutual Agreement Procedures
http://www.oecd.org/ctp/dispute/manualoneffectivemutualagreementprocedures-index.htm

Directive[4] which considerably strengthens taxpayer's rights in dispute resolution, including an obligation on tax authorities enforceable in domestic law to remove double taxation within a reasonable time frame[5]. It ought to be good practice for competent authorities to share with taxpayers the positions they intend to take in negotiations and their reasons for this and to seek to reflect their views as far as possible. This is done by some competent authorities already and in our view leads to better outcomes and much more trust overall in the MAP process.

We recommend that more thought is given by OECD and the MAP Forum as to how MAP resolutions could be used to create guidance that could be used to inform both tax authorities and taxpayers as to what would be acceptable filing positions that would reduce the number of future audits and also provide a basis for much speedier MAP resolutions. We refer below to the possibility of publishing actual MAP outcomes on an anonymous basis. An alternative to this would be an analysis of actual settled cases where the competent authorities have agreed that the facts support a characterisation as 'routine' and can be resolved using an agreed set of comparables. We think this could be developed into either a broad OECD approach using an agreed range of benchmarked comparables for cases with similar fact patterns, or could be used by individual competent authorities to develop Memoranda of Understanding with each other, or perhaps within regional groupings. We have seen this approach work successfully between the US and Canada and we would suggest considering this and adopting it more widely. In our view, this would support the thinking behind 'Amount B' in the Pillar 1 discussions, but avoid the difficulties associated with using 'safe harbours'.

Proposals to strengthen the Minimum Standard

Proposal 1: Increase use of bilateral APAs

Q2: Introduce the obligation to establish a bilateral APA programme except for jurisdictions with a low volume of transfer pricing MAP cases.

While supportive of all initiatives that add to the number of territories offering APAs, any drive to make this compulsory should be carefully considered. APAs are very valuable additions to any jurisdiction's tax programmes and an environment of providing tax certainty can be critical in encouraging cross-border trade and investment. But they are by their nature very resource intensive exercises. Some jurisdictions will be concerned that unless the extra resources needed for training and staffing an APA programme can be funded, it would require a transfer of resources from audit or MAP work to APAs, but this focus on producing certainty and preventing conflicts is to be encouraged. Some practical solutions to the resourcing problem will be needed to make an expansion of APA programmes a success.

Making an APA programme compulsory also risks attracting large companies that put considerable resources into their global compliance (and who would perhaps be better served by ICAP-type programmes or other cooperative compliance initiatives) rather than encouraging APAs to be available

[4] EU Council Directive 2017/1852 of 10 October 2017 - https://eur-lex.europa.eu/eli/dir/2017/1852/oj

[5] The EU Dispute Resolution Directive also includes a requirement to publish the final decision and we would like to see OECD encourage the publication of a summary suitably anonymised of each MAP case (similar to what is now a requirement for concluding an APA/ATR in The Netherlands), setting out the position of either tax authority at the outset and the outcome that was reached during the negotiations.

equally for all taxpayers above a certain size and whose transfer pricing issues may be as complex as those of a larger MNE.

We think therefore that encouragement and support for APAs from the OECD is a better route than obligation. Stressing the clear trade and investment benefits of providing tax certainty to business will in itself be important. Moreover, even countries with a low volume of transfer pricing MAP cases should be open to APAs and APA programmes to give a strong signal that countries are aligned with international best practice of cooperative compliance.

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

Q3: 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?

Q4: Do you have suggestions on how tax administrations can increase awareness on international taxation in the relevant audit and examination staff?

We advise many clients across the world on transfer pricing and in our experience not only are we seeing tax authorities refusing to accept the comparability or market conformity of transactions, resulting in an inappropriate reversal of the burden of proof, but also an increase in transfer pricing adjustments leading to MAP claims and an increasing number of inappropriate adjustments entering MAP. These can be adjustments that seek to completely recharacterise a transaction to adjustments that seek to tax all of an MNE's profits. Taking an extreme case into MAP which does not recognise agreed international principles creates extra work for the competent authorities, may well increase the time taken to resolve the claim as there is such a large gap between the two sides, and is ultimately a waste of government resources as significant time is spent to reach an acceptable conclusion that usually results in a repayment of tax to the MNE.

One solution that we have seen tax administrations adopt with some success is to require any local auditor with a case that is likely to end up in a MAP claim to contact their competent authority while the audit is in progress. This not only gives the competent authority early warning of potentially difficult cases but enables the competent authority to provide advice on the proposed adjustment, indicate what they are likely to propose to the other competent authority in the MAP proceedings and even filter out inappropriate adjustments. A good example is the guidance given to the Large Business and International division of the IRS that requires the local audit team to consult with the APMA office[6]. Similar approaches also happen in other countries, such as Denmark.

Such interventions are undoubtedly easier if the competent authority and local audit team are part of the same government department (although perhaps independent of the audit function) which has responsibility over tax collection and the functioning of international tax treaties. Often this is not the case and the authority of the competent authority may be limited to handling cases once they become MAP claims and any attempt at earlier intervention would be seen as an unwelcome encroachment or abuse of authority. But even when this would be a possibility, some competent authorities have a policy of not getting involved while the audit is still in progress, such as the UK. In our view this is an out-dated view of dispute resolution and it needs a change in mindset to one that is focussed more on problem solving and cooperative interaction, both internally and with other competent authorities. We would not see greater cooperation between the audit team and the competent authority as undermining their independence from the audit team.

[6] https://www.irs.gov/pub/foia/ig/spder/lbi-04-0219-001.pdf

If the Competent Authority cannot or feels unable to deviate from the position taken by the auditor, extreme positions end up being taken into MAP claims that tend to create difficult MAP cases which are time consuming to resolve. To prevent this happening there is also a need for training at the auditor level to create awareness of the MAP process and the likely impact of the adjustments they might be seeking to impose.

The OECD MAP Forum could play a valuable role here in devising material that could be used for local audit teams, explaining not only the role of MAP and the way it works, but also through the use of case studies that could demonstrate the importance of intervention at the appropriate time, and encouraging the group to role play and find counter-arguments to their position. Core material could be prepared by OECD and then tailored for and presented to local audit teams. This could be supported by representatives from Tax Inspectors without Borders with experience of working MAP cases and by representatives from business groups.

As noted above, the OECD MAP statistics have already led to a change in behaviour by competent authorities and an improvement in their performance. Data that would show the extent to which audit adjustments are defended would give confidence in the audit process; conversely where a high proportion of adjustments cannot be defended it would demonstrate that further auditor training may be needed. We would be cautious about such data being shared publicly as this risks harming the principled solution of MAP cases, since the other competent authority would know that the first competent authority usually gives up, say, 50% of the adjustments. But each tax authority should know what % of its audit adjustments that go to MAP are settled unilaterally in MAP, and what % of audit adjustments are sustained in MAP and should have targets for improving their performance.

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

Q5: 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.

Q6: Please share your views on whether there should be additions to the list of situations/circumstances in which access to MAP should be granted.

Q7: 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.*

Q8: Do you have any other comments on this proposal?

We have seen many instances where MAP has been, in our view, inappropriately denied to a taxpayer. The denial of a right under a treaty is a very serious step and should be challenged if done to preserve an incorrect tax adjustment or position. The instances where this has happened include:

- Loss situations - as no double taxation has yet occurred, a competent authority may not put a case into MAP until the loss situation has been cleared – this also creates a timing issue
- Timing issues – with differences of view on the 'date of first notification' and connected here to arguments that the year is statute barred under domestic rules
- Incomplete documentation at the time of the claim (even in the case of BEPS Action 13 compliant documentation)
- Tax authorities taking the view that the adjustment is not a transfer pricing issue, but the denial of a deduction under domestic law and therefore not subject to the provisions of the treaty
- Imposition of a penalty, even where the penalty is small or routine
- Characterisation of a case as abusive under domestic law and therefore not subject to the provisions of the treaty
- Cases that are agreed by the taxpayer and the tax authority under domestic law.
- A taxing authority starting an audit after the conclusion of the treaty notification period
- Pressure to agree to a more favourable reassessment if the taxpayer commits to forego MAP.

As can be seen from the above list, some competent authorities do still not apply the first Minimum Standard in providing access to MAP under the equivalent of Article 25(1) particularly in cases in which there is a disagreement between the taxpayer and the tax authorities making the adjustment as to whether the adjustment is one to which the treaty applies or as to whether the application of a domestic law anti-abuse provision is in conflict with the provisions of a treaty. The correct procedure put forward by OECD is for the Competent Authority to accept the case into MAP and then decide under the equivalent of Article 25(2) whether the taxpayer's objection appears to be justified.

We would also like to see more guidance on self-initiated adjustments, particularly following the insertion of paragraph 14 in the OECD Commentary on Article 25. This makes it very clear that a taxpayer can file for MAP where the risk of taxation not in accordance with the provisions of the treaty is probable and this can mean, for example, when an adjustment for a prior year is to be rolled forward to years not yet in audit. Getting tax authorities to state a position on these adjustments should hopefully encourage greater acceptance by competent authorities of the process and the take-up of this opportunity by taxpayers.

A common list of agreed information would be useful and a universal list drawn from the lists already used by various tax authorities or based on the EU standard on minimum information[7] or the similar requirements for the MLI would be a good starting point. This could include BEPS Action 13 compliant documentation or equivalent for those companies below the EUR750m revenue threshold

[7] See for example

- the EU JTPF's recommendations on information for claims under the EU Arbitration Convention ec.europa.eu/taxation_customs/sites/taxation/files/resources/documents/taxation/company_tax/transfer_pricing/forum/final_report_ac_jtpf_002_2015_en_final_clean.pdf ;
- the EU Council Directive on tax dispute resolution mechanisms in the EU (Article 3.3) provides details on the required minimum information for claims eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:32017L1852#d1e246-1-1; and
- Annex A of the consultation document for the OECD.

Particularly in cases between the U.S. and Canada, accelerated competent authority procedures (ACAP) can resolve filed years after the MAP years. This is a very effective use of government resources, as the auditing jurisdiction often audits the same issue year after year. However, since there is still so much discretion regarding when governments will accept ACAP, taxpayers cannot rely on it. Providing clear rules on this would help.

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

Q9: 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?

Q10: 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?

Q11: Do you have any other comments on this proposal?

We are of the firm view that this proposal should be elevated to a minimum standard not only because of the impact a substantial adjustment can have on an MNE's liquidity and on its financial reporting, but also because the lack of suspension of tax collection is not an incentive for timely resolution. If there is a risk that the taxpayer will not pay the outstanding tax after the MAP has been agreed, there is the option of requesting a bank or parent company guarantee. We have seen several examples of where this has been applied.

This would be greatly appreciated by business as some countries will find it difficult (or be unwilling) to pay back the tax they have charged when a MAP case is resolved with the result that businesses *can* find it takes a long time to get their repayment. More worryingly, we see instances of competent authorities taking non-principled positions to keep hold of the revenue they have collected by offering to reduce the tax bill for later years or seeking to find 'new' adjustments that cannot go into MAP.

Any postponement of tax should also be applied to interest and penalty charges.

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

Q12: 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?

Q13: Do you have any other comments on this proposal?

We have experienced many cases where there is a misalignment between the final adjustment agreed in MAP and the amounts charged on the two parties in terms of penalties and interest. This can result in real and effective "double taxation" that can often be sizable and sometimes larger than the tax on the income adjustment itself. Many tax authorities are required by procedure or view the question of interest and penalties as a purely domestic matter and not one to be negotiated in MAP. But this can lead to unreasonable and unfair positions and where these are directly connected to the issue that is subject to the MAP claim, their imposition should be discussed and agreed as part of the resolution of the MAP. This is covered in the OECD Commentary on Article 25 (paras 49 to 49.4) and there is

specific mention in the US/UK tax treaty in Article 26 (3) on penalties and interest, but the use of this guidance is rare in our experience.

Aligning interest and penalties in MAP cases would also be a good way to balance MAP with litigation where typically interest and penalties are refunded in proportion to the outcome. We believe that it is important to keep the MAP route neutral compared to litigation track, so that the right track is chosen by the taxpayer and the taxpayer secures tax certainty.

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

Q14: 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?

Q15: 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.

Q16: Do you have any other comments on this proposal?

We have seen examples where it was not possible to implement a MAP adjustment because the year concerned was considered to be outside statutory time limits for further adjustment. We would therefore support any moves to establish a legal right for the taxpayer to be able to enforce a MAP adjustment regardless of the time taken to resolve the MAP case. This should apply to both adjusting tax authorities, i.e. those reducing an original adjustment, and the other authority that may be making a downwards adjustment as a result of the MAP resolution.

This should follow the approach taken already by some countries, for example, the UK which has enacted domestic legislation that gives full effect to MAP adjustments regardless of any time limits in the UK domestic law and which can stretch to revising claims etc made by entities associated to the MAP company.

If a tax authority was unwilling to make this legislative change, an alternative approach would be to allow the whole MAP outcome to be implemented in a specific taxable year, but care would be needed to avoid the issue of 'rolling forward' implementation purely in order to prevent the repayment of tax due now.

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

Q17: 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.

Q18: 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)?

Q19: Do you have any other comments on this proposal?

We have observed frequent instances of multi-year resolution, in particular in MAP cases based on tax (re)assessments covering several financial years, relating to the same or similar topic (for example, disputes arising in respect of the amount of an annually recurring interest or a royalty fee).

We think there are many more cases where a roll-forward MAP would be a good option. We frequently see cases where a MAP is just concluded, for example in respect of a distribution entity, and because of the time taken to resolve that MAP case, the same transaction is now in audit for later periods, likely to lead to another reassessment of profits and another claim for MAP. While there is a possibility that the answer might be different, depending on changes in facts and movements in the comparables, there seems to us to be a very good case for much greater flexibility and a lot of sense in the two competent authorities giving a shared view on what range of results they would be content to agree for the later audit period and agreeing this with the taxpayer. Most taxpayers would be very happy with a result that was in line with the MAP outcome agreed for the previous period and which resolved the double taxation. Too many times we see tax authorities stand in the way of such an approach and insist on carrying on a full audit, even though the end result will usually only differ marginally from the first MAP. This would reduce the number of unnecessary adjustments, in the same way that greater cooperation between the audit teams and the competent authority would reduce unreasonable adjustments.

This type of flexibility is very helpful to keep unnecessary cases out of MAP. It might also form the basis of a go-forward bilateral APA to cover future years not yet filed. We think that it should be a best practice to offer the possibility of a MAP resolution being rolled forward into a de facto APA for years not filed yet. While tax authorities might be concerned about rolling forward an agreement for a full five years if they thought that the MAP result was based on 'old facts', the risk would in fact fall on the taxpayer if the facts and circumstances had changed significantly and this was not notified to the tax authority.

For example, particularly in cases between the US and Canada, accelerated competent authority procedures (ACAP) can resolve filed years after the MAP years. This is a very effective use of government resources, as the auditing jurisdiction often audits the same issue year after year. However, since there is still so much discretion regarding when governments will accept ACAP, taxpayers cannot rely on it. Providing clear rules on this would help.

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

Q20: 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?

We fully support the inclusion of mandatory binding arbitration in all MAP articles, not just Article 25(2) cases but also Article 25(3) where the taxpayer has submitted an APA application and no agreement has been reached. While there is limited experience of arbitration actually being used to resolve disputes, it plays an increasingly important role in resolving disputes because it acts as a clear warning to tax authorities that they must use their best endeavours to resolve disputes within a reasonable period of time or be required to hand over the process to a third party whose decision will be binding on both tax authorities.

In our experience, when the treaty has an arbitration clause the tax authorities are more inclined to work cases efficiently and quicker than when there is no possibility of arbitration. There is a noticeable sense of urgency when the end of the two-year period is approaching, and cases seem to get prioritised. In addition, the more extreme positions that may be taken at the outset of a MAP are usually modified, especially if the taxpayer is keen to pursue the opportunity of arbitration at the earliest opportunity.

Moreover, the finality of arbitration means that taxpayers have more faith in MAP as an effective dispute resolution mechanism and are therefore more willing to make claims rather than bear the burden of double taxation or seek to resolve double taxation through other means which do not necessarily result in an allocation of profits that reflects the arm's length principle, which are unlikely to be acceptable to the tax authority concerned.

Q21: 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?

Our experience is that while mediation can be a good approach in small domestic cases, it is not used in complex transfer pricing cases. The dynamics of the competent authority relationship make the introduction of an independent third-party mediator difficult and we think that competent authorities would find this unwelcome even as an approach to try to help both sides reach agreement. Unlike normal taxpayer/ tax authority mediations where mediation is only likely to arise once and for there to be few other interactions of the same nature, the competent authorities have a very different relationship, often developed over several years and covering many cases. Mediation would imply that this relationship was damaged and could make it difficult for the same competent authorities to agree other cases.

Another possibility but only where a MAP case has reached a complete impasse and if arbitration is not available would be to provide the possibility for both competent authorities to agree to refer the claim to a panel of other competent authorities. This panel could review the arguments on both sides and give their views on the merits of the case. This would be non-binding on either competent authority concerned but we think it could be helpful to narrow the issues in dispute and provide possible resolutions for them to consider.

The anonymised publication of MAP outcomes (see earlier comments on this) would also be help tax authorities and taxpayers find a resolution to similar cases.

Q22: 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.

The period during which transfer pricing and other adjustments can be made varies according to the jurisdiction making the adjustment. These variations should not prevent access to MAP because the statute of limitations (or its domestic equivalent) in the jurisdiction with the shortest period of limitation has been passed.

Presenting a MAP claim should always be made possible to either jurisdiction i.e. exclude the reservation under Multilateral Instrument Article 16(5)(a)[8].

We would like to see more emphasis placed on "Best Practice 8" regarding guidance setting out an explanation of the relationship between the MAP and domestic law administrative and judicial remedies. This should be a requirement for each country's OECD MAP profile and should also be available on the tax authority website or other information source. Any barriers to the acceptance of a case into MAP should be clearly stated and explained.

We would like to see "Best Practice 11" elevated to a minimum standard requiring every country to publish guidance on how they approach requests for multilateral MAPs and APAs and on the types of cases where they would be willing to engage with other competent authorities, if only for a preliminary discussion. This would be very important in those cases where there is a need for a multilateral rather than bilateral redistribution of profits required following a transfer pricing adjustment in one country. At present, there are some countries that will not engage in any cases where they are not the direct counterparty to the transaction, although this may leave the counterparty jurisdiction in an impossible position if they are required to make a corresponding adjustment.

Proposals to strengthen the MAP Statistics Reporting Framework

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

Q23: 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.

Q24: 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?

We would support items 1 (which jurisdiction made the adjustment or took the action at issue) and 3 (e the year the MAP cases pending at year-end were initiated), but not 2 (time taken to close MAP cases per type of outcome). We think it would be overly burdensome to spend time and resources on the work required for number 2.

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

Q25: Please share your views on the proposal to also publish statistics on APAs, including the data categories being considered for publication.

We welcome the proposal to publish statistics on APAs and the data points suggested. It would be a step forward if the OECD would publish APA statistics as we see a tendency for some competent authorities to concentrate on MAPs at the detriment of APAs because the first are measured and published. APA statistics and monitoring of the conduct of APAs (possibly as part of the Action 14 peer

[8] Notification procedure to the other jurisdiction for cases in which the competent authority to which the MAP case was presented does not consider the taxpayer's objection to be justified.

review for the countries with an APA programme or similar) would be helpful to improve the performance and attitude to APAs that we find in a minority of countries.

Q26: What, if any, other items should be added to the data categories for reporting of statistics on APAs to increase transparency?

We would refer to the data points included in the former EU Joint Transfer Pricing Forum's APA reporting recommendations[9] and those that are included in annual reports made by a number of countries. There should also be rules around counting the time taken to reach agreement to reflect the time spent by the competent authority/ APA team during the pre-acceptance period. Some jurisdictions spend a considerable amount of time and effort evaluating candidacy and gathering information for APAs. This means that the true time spent is incorrectly recorded and is counterproductive from a collaboration and cooperation perspective if this leads to an asymmetry of knowledge between the two competent authorities.

Q27: Do you have other suggestions on how the MAP Statistics Reporting Framework could be supplemented or modified to provide increased transparency?

It would be interesting to track the percentage of adjustments made under Article 25(1) and under Article 25(2) i.e. adjustments made before and after the bilateral part of MAP has been engaged. A higher than average percentage would demonstrate which countries are willing to give full relief without the need for a time-consuming engagement in a bilateral process.

Finally, there is a good argument for recording as a statistic the time spent implementing and executing a MAP settlement. Competent authorities often feel that the case is closed and their job is finished once the resolution is reached but for taxpayers the case is not closed until all of the amounts are settled and finalised. We see cases where there is an immediate demand for the tax released for collection by one jurisdiction, but the taxpayer has to wait many months, even a year, for the other jurisdiction to make the refund. This can have significant cash flow problems for taxpayers as well as financial accounting issues.

[9] https://ec.europa.eu/taxation_customs/sites/taxation/files/apa-and-map-2019-4.pdf