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Comments on the OECD Public Discussion Draft entitled "Make Dispute Resolution Mechanisms More Effective" 18 December 2014 – 16 January 2015

Through its members, BUSINESSEUROPE represents 20 million European small, medium and large companies. BUSINESSEUROPE's members are 41 leading industrial and employers' federations from 35 European countries, working together since 1958 to achieve growth and competitiveness in Europe.

BUSINESSEUROPE is pleased to provide comments prepared by the members of its Tax Policy Group, chaired by Krister Andersson, on the OECD Discussion Draft entitled "Make Dispute Resolution Mechanisms More Effective" 18 December 2014 - 16 January 2015 (hereinafter referred to as the Draft).

General Comments

BUSINESSEUROPE appreciates the OECD's work to improve dispute resolution mechanisms by encouraging the inclusion of such provisions in tax treaties, developing solutions to address obstacles that prevent countries from resolving treaty-related disputes or that deny access to MAP and arbitration in certain cases.

The importance of adequate dispute resolution mechanisms cannot be overstated. In combination with uniform application and implementation of consistent and predictable international tax rules, effective dispute resolution provides MNE's with crucial legal certainty to foster cross border trade and investments and enhance a well-functioning and flourishing global economy.

The occurrence of double taxation in cross border situations today is still prolific. In December 2013 BUSINESSEUROPE published a brief study at the behest of the EU Platform for Tax Good Governance regarding the occurrence of double taxation outside the transfer pricing area. This study confirms that double taxation outside the transfer

pricing area remains a problem and an obstacle for cross border trade and investments. In addition to the actual cases where double taxation have occurred, MNE's express concern that double taxation is likely to increase due to expected new, complex tax proposals following the BEPS-project.

Furthermore, the application of MAP has steadily increased over the years. The recently published Mutual Agreement Procedure Statistics 2013 by the OECD show that between 2006 and 2013 the number of new MAP cases almost doubled from 1.036 to 1.935 and that the total MAP cases in the same period also doubled from 2.352 to 4.618. The statistics only provide information about the number of MAP cases; we propose to also publish statistics about arbitration cases. Moreover, new statistics about the lead time of MAP and arbitration cases would be insightful underpinning the importance of resolving disputes timely. The OECD in paragraph 3 proposes that solutions have a measurable impact. Limiting the period of time for completion of MAP and arbitration cases will improve the effectiveness of these remedies to resolve treaty-related disputes, improving the transparency and legal predictability of the mechanism also vis-à-vis the position in the domestic legal framework.

It is therefore crucial that work is undertaken regarding Dispute Resolution Mechanism and Arbitration. Not in the least, because a number of countries is still very reluctant to include dispute resolution provisions in their tax treaties, so that - apart from domestic legal remedies - in these cases there is no recourse at all for MNE's. Too often it proves difficult to come in a timely manner to a satisfactory outcome for all parties involved.

BUSINESSEUROPE feels that the Discussion Draft could be more ambitious in its objective in making dispute resolution mechanisms more effective. Although the intentions behind the 34 proposed revisions to the Model Treaty are to be commended, the actual proposed revisions are too non-committal to truly address the obstacles preventing dispute resolution through MAP We are concerned that due to the absence of more direct language the dispute resolution process going forward will not ensure reducing double taxation. Suggestions for more direct language for the proposed revisions are included in the specific comments.

BUSINESSEUROPE is of the opinion that the OECD should be at least as resolute in resolving issues regarding double taxation as it has in previous Discussion Drafts shown to be in issues regarding double non-taxation. Its recommendations to deal with the former can therefore not be watered down on the argument of possible loss of sovereignty to the country in question, if these same considerations do not play a significant role in the recommendations regarding the latter. BUSINESSEUROPE would therefore suggest that as a prelude to the three pronged approach suggested in paragraph 3, the OECD achieves political commitments of its members to adopt Article 25 of the Model Treaty in all newly concluded tax treaties and include this provision in all existing treaties through the multilateral instrument envisaged by Action 15 where appropriate. This general improvement through the multilateral instrument is increasingly important as MNE's expand into new markets globally.

BUSINESSEUROPE appreciates that there is no international consensus yet on mandatory binding arbitration. However, we would plead that OECD describe best practices regarding binding arbitration and encourages states that would consider binding arbitration to include these. This would improve the effectiveness of the proposals in the Discussion Draft and creates a standard on which to further build future international consensus.

In addition to the suggested measures regarding improved expertise and clear documentation requirements, binding arbitration could be helpful in speeding up MAP timelines.

Specific comments

Below BUSINESSEUROPE provides comments to the specific options presented in the Discussion Draft. Options that are not explicitly discussed can be supported by BUSINESSEUROPE.

OPTION 1 – Clarify in the Commentary the importance of resolving cases presented under Article 25(1)

Paragraph 10 appears to suggest that a major obstacle to resolving disputes under MAP is that there is no obligation to actual resolve an MAP case and therefore there should be an obligation to do so in the Model Treaty text. However, the revision is to the Commentary rather than the Treaty itself. BUSINESSEUROPE therefore suggests amending the text of the Model Treaty itself or at the very least change the revision to the Commentary so it reads "shall resolve" instead of "are obliged to seek to resolve".

OPTION 3 – Ensure the independence of a competent authority

It appears to BUSINESSEUROPE that participating countries should be mandated to commit to adopt the best practices currently included in the OECD Manual on Effective Mutual Agreement Procedures (MEMAP) concerning the independence of a competent authority. Therefore, in the wording of the revision "could" should be replaced by "shall".

The exact same amendment should be made to the proposed revisions regarding MEMAP best practices under OPTION 4, OPTION 5, the second bullet point of OPTION 6, OPTION 10, OPTION 11 and OPTION 21.

OPTION 7 – Ensure that audit settlements do not block access to the mutual agreement procedure

BUSINESSEUROPE would also suggest more direct wording: "could commit to take appropriate steps" should be replaced by "shall take appropriate steps" and "or to implement procedures" should be replaced by "and to implement procedures".

OPTION 8 – Implement bilateral APA programmes

BUSINESSEUROPE supports the commitment that participating countries implement bilateral Advance Pricing Agreement (APA) programmes. In addition, we feel it would be beneficial if countries that already have APA programmes in place are assisted in improving these through best practices.

OPTION 9 – Implement administrative procedures to permit taxpayer requests for MAP assistance with respect to recurring (multi-year) issues and the roll-back of APAs

We support the implementation of an appropriate procedure in these cases. It is important for the procedure to be simple and quick in order to be effective. The procedure could be based on the grouping together of disputes; for example, in cases of multi-year depreciation or amortization of an asset. It is also positive that the countries commit to provide the roll-back of APA in appropriate cases. It could be useful to have an open list of cases when the roll-back is possible or at least set of guidelines for assessing these cases.

OPTION 11 – Provide additional guidance on the minimum contents of a request for MAP assistance

We are requested to point out other obstacles related to the documentation and information requirements. An excessive amount of documentation is hard to read and taxpayer and Administration often waste time because they do not focus on the problem to be solved. In our understanding, there should be two different approaches in terms of documentation: i) "basic" information and documentation provided by the taxpayer or the Administration to assess access to MAP and ii) "comprehensive" information requested when the procedure is ongoing. In this case the information should focus on the specific problem to be resolved. Another obstacle is the language in which the information or/and documentation is provided. Therefore, there should be mechanisms to minimize the burden of translation. It is a good practice to have hearings to explain the relevant information and documentation in the language the Administration is familiar with.

OPTION 12 – Clarify the availability of MAP access where an anti-abuse provision is applied

BUSINESSEUROPE is of the opinion that the question if an anti-abuse provision is applied correctly should always allow access to MAP. Doing otherwise would effectively negate the legal certainty that the MAP seeks to provide for MNE's.

Furthermore, we strongly feel that application of an anti-abuse provision, such as the PPT or LOB rule, resulting in the denial of treaty benefits should not be possible through unilateral action by one authority. As such, there cannot only be an obligation

to notify the treaty partner, but the other contracting state should also concur with the application of the anti-abuse provision.

OPTION 13 – Ensure that whether the taxpayer's objection is justified is evaluated prima facie by both competent authorities

BUSINESSEUROPE welcomes the intention of this revision that it should be impossible to deny access to MAP unilaterally, since this would negate the purpose of the MAP. However, the proposed revision does raise some questions as to how this would be put into practice. We would read the revision in such a way that MAP access can only be denied if both contracting states agree that a prima facie evaluation shows that the taxpayer's objection is not justified. In all other instances, MAP access should be granted. We would propose to clarify the language of this revision in this manner.

Also, the wording "could commit to a bilateral consultation and/or" should be replaced by "shall commit to".

OPTION 16 – Clarify the relationship between MAP and domestic law remedies

A taxpayer's choice for either a domestic remedy or MAP should not result in the exclusion the application of the other. Paragraph 32 appears to confirm this, but this should be clarified.

There doesn't seem to be a compelling argument to make the MAP the first option, other than that domestic law recourse might not result in the subsequent adjustment in the other contracting state. Making MAP the first option would however subject the taxpayer to the risk of undue delay. To not unnecessarily limit the recourse possibilities open to the taxpayer, the better solution would be to have participating countries commit to perform the counter adjustments when the domestic law remedy applies. To achieve this, access to a MAP and arbitration should also be available after domestic remedies have been exhausted.

OPTION 17 – Clarify issues connected with the collection of taxes and the mutual agreement procedure

Pursuant domestic law remedies, the application of MAP should result in a deferral of payment of the tax assessment until a decision is reached.

OPTION 23 – Policy issues; Tailor the scope of MAP arbitration

BUSINESSEUROPE would encourage countries to adopt binding arbitration in their tax treaties, or at least to take steps to move in the direction of binding arbitration. For this purpose it could be conducive to explicitly define any limits on arbitration in the provision of the tax treaty.

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OPTION 30 – Practical issues: Evidence

BUSINESSEUROPE welcomes the comment about the role of the taxpayer in arbitration cases. Competent authorities should permit taxpayers to present its position orally. We would propose a similar opportunity for taxpayers in MAP cases.

OPTION 33 – Address issues related to multilateral MAPs and advance pricing arrangements (APAs)

BUSINESSEUROPE would support the development of a specific provision that would address MAP issues that arise in multilateral situations. This would for instance be helpful in providing guidance in triangular situations with back-to-back transactions and the relevant tax treaties offer no recourse to MAP for the second part of the transaction.

BUSINESSEUROPE would be willing to engage in a constructive dialogue with the OECD on Dispute Resolution Mechanisms.

On behalf of the BUSINESSEUROPE Tax Policy Group

Yours sincerely,

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