

Marlies de Ruiter
Head Tax Treaties Transfer Pricing and
Financial Transactions Division
OECD Centre on Tax
Policy and Administration
2, rue André Pascal
75775 Paris
France

Submitted by email: taxtreaties@oecd.org

The Confederation of Swedish Enterprise: Comments on the OECD Public Discussion Draft entitled: "BEPS Action 14: Make Dispute Resolution Mechanisms More Effective" 18 December 2014 - 16 January 2015

The Confederation of Swedish Enterprise is Sweden's largest business federation representing 49 member organizations and 60 000 member companies in Sweden, equivalent to more than 90 per cent of the private sector.

The Confederation of Swedish Enterprise is pleased to provide comments on the OECD Discussion Draft entitled " BEPS Action 14: Make Dispute Resolution Mechanisms More Effective " 18 December 2014 - 16 January 2015 (hereinafter referred to as the Draft).

General Comments

The Confederation of Swedish Enterprise appreciates the efforts by the OECD to enhance the dispute resolution mechanisms by addressing certain obstacles that prevent countries from solving treaty-related disputes under the Mutual Agreement Procedure (MAP).

The linkage between well-functioning dispute resolution mechanisms and cross border trade and investments should not be underestimated. Predictability and legal certainty are crucial for any business investment and effective dispute resolution mechanisms can facilitate that, thus enhancing cross border trade and the global economy.

Although we acknowledge the lack of consensus regarding mandatory binding arbitration, it still is, or at least should be treated as, a crucial part of the BEPS project.

Several of the BEPS Action Points are expected to increase disputes and the risk of double taxation for cross border business. Consequently, it is of utmost importance

that Action Point 14 presents effective dispute resolution mechanisms to mitigate those risks. If an effective dispute resolution mechanism cannot be reached, the proposals under the other Action Points may have to be reconsidered.

Bearing this in mind, we are disappointed that the OECD seems to have dropped the ambition to create mandatory binding arbitration and instead has settled for a list of non-binding measures that will constitute a minimum standard to which participating countries may commit.

We believe that a far more effective solution concerning the dispute resolution mechanism can be reached and encourage OECD to raise their ambitions regarding action 14. For example, as will be obvious in the specific comments, the language needs to be much more direct in order to be sufficient. In its current form many of the proposed revisions are too non-committal.

Specific Comments

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

Option 1 seeks to resolve the problem that arises from the absence of an obligation to resolve Article 25 MAP cases by adding to the Commentary that Contracting States are “obliged to seek to resolve the case in a principle, fair and objective manner”. Confederation of Swedish Enterprise questions the effectiveness of such a revision of the Commentary. Instead we suggest an explicit obligation to resolve MAP arbitration cases, by using the words “shall resolve”. Preferably this change would be added directly in to the Model Treaty itself, and not the commentary.

OPTION 2 – Ensure that paragraph 2 of Article 9 is included in tax treaties

The Confederation of Swedish Enterprise supports this option.

OPTION 3 – Ensure the independence of a competent authority

We believe that adoption among countries of the best practices included in the OECD Manual on Effective Mutual Agreement Procedures (MEMAP) would contribute to the independence of a competent authority. However, in order to ensure a uniform adoption, the words “could commit” should be replaced by the words “shall commit”.

OPTION 4 – Provide sufficient resources to a competent authority

The same reasoning as regarding option 3., i.e. that the adoption of the best practices included in the MEMAP would contribute to elimination of the obstacle that

the competent authority lacks sufficient resources, but the words “could commit” needs to be replaced by “shall commit” to ensure a uniform adoption.

OPTION 5 – Use of appropriate performance indicators

Same as our comments to options 3 and 4 above.

OPTION 6 – Better use of paragraph 3 of Article 25

The Confederation of Swedish Enterprise welcomes the suggestion to make article 25 (3) agreements publicly available.

Regarding the suggestion on adopting the best practices included in MEMAP, we have the same comment as in relation to option 3-5.

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

The intention of the suggestion is positive. However, yet again the wording should be more direct. We suggest that “could commit to take appropriate steps” be replaced by “shall take appropriate steps”.

OPTION 8 – Implement bilateral APA programmes

The Confederation of Swedish Enterprise share the belief that the increased use of Advanced Pricing Agreements (APAs) would lead to enhanced levels of tax certainty and lower the risk of double taxation. Consequently, we fully support measures intended to commit countries to implement bilateral APA programmes. For countries that already have APA programmes in place, the OECD should develop best practices to help improve these programmes.

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

The Confederation of Swedish Enterprise fully supports the implementation of a procedure to request for MAP assistance with respect to recurring issues. The procedure needs to be quick and simple in order to be effective. We also support the suggestion that countries commit to provide for roll-back of APAs.

OPTION 10 – Improve the transparency and simplicity of the procedures to access and use the MAP

We support this option to improve transparency and simplicity of procedures to access and use the MAP. However, as indicated in our other comments regarding

the adoption of the best practices in the MEMAP, the wording should be changed from “could commit” to “shall commit”.

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

We welcome additional guidance on the minimum contents of a request for MAP assistance and support the adoption of best practices included in the MEMAP. As previously indicated we suggest changing the wording from “could commit” to “shall commit”.

It is important that the requirements for documentation regarding a request for MAP assistance is not to excessive. Requirements for excessive documentation may in many cases mean unnecessary work for both the taxpayers and competent authorities. Therefore our recommendation is that the documentation requirement for a request for MAP assistance is limited to basic information. When the procedure is ongoing, more specific documentation can be provided by the taxpayer if necessary. The language in which the documentation shall be provided is also a complicating factor. Mechanisms to mitigate the burden of translation are needed.

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

The Confederation of Swedish Enterprise welcomes the clarification regarding access to MAP where an anti-abuse provision is applied. In our view, all cases involving the application of an anti-abuse provision, irrespective of whether it is a domestic provision or a treaty provision, should allow access to MAP.

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

We welcome the intention that one country should not be able to unilaterally deny access to MAP.

We do however have some concerns regarding the effectiveness of the proposal, as it seems to indicate that the resident country still can deny access to MAP unilaterally. For obvious reasons we would prefer a wording that clarifies that there needs to be consensus from both countries in order to deny access to MAP.

OPTION 14 – Clarify the meaning of “if the taxpayer’s objection appears to it to be justified”

Such a clarification would be welcomed, making it more predictable for taxpayers to know under what circumstances access to MAP can be denied.

OPTION 15 – Amend Article 25(1) to permit a request for MAP assistance to be made to the competent authority of either Contracting State

The Confederation of Swedish Enterprise welcomes the option to permit a request for MAP to the competent authority of either Contracting State. Such a possibility is particularly relevant if one competent authority is more experienced and has better resources than the other competent authority. However, the goal should naturally be that all competent authorities have the necessary experience and resources making it less important for companies to be able to turn to the competent authority of their choosing.

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

The Confederation of Swedish Enterprise believes that MAP and domestic law remedies should not exclude each other. A taxpayer should be free to choose either of them.

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

Deferral of the payment of tax assessed is often available in domestic law remedies. The possibility of deferral should also be available in case of a MAP until a decision has been reached.

OPTION 18 – Clarify issues connected with time limits to access the mutual agreement procedure

Clear guidance regarding time limits to access MAP is of interest to all parties. Consequently, the Confederation of Swedish Enterprise supports this option.

OPTION 19 – Clarify issues related to self-initiated foreign adjustments and the mutual agreement procedure

Self-initiated foreign adjustments are likely to give rise to disputes. The Confederation of Swedish Enterprise supports clarification of these issues.

OPTION 20 – Ensure a principled approach to the resolution of MAP cases

The Confederation of Swedish Enterprise supports this option as it would simplify the resolution of MAP cases.

OPTION 21 – Improve competent authority co-operation, transparency and working relationships

The Confederation of Swedish Enterprise supports this option but, as previously stated in relation to the adoption of best practices in the MEMAP, States “should commit” to adopt these practices.

OPTION 22 – Policy issues: Increase transparency with respect to MAP arbitration

We fully support the removal of the footnote to article 25 and the modifying of paragraph 65 of the commentary as it would increase transparency by requiring countries to enter an observation, reservation or position explaining their views.

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

The Confederation of Swedish Enterprise fully supports this option and encourages countries to include mandatory binding arbitration in their tax treaties or at least take steps in the direction of broader mandatory dispute resolution. Any limitation to the arbitration should be expressly defined in the treaty.

OPTION 24 – Policy issues: Facilitate the adoption of MAP arbitration following a change in treaty policy

A favored nation clause would make the adoption of MAP arbitration easier for countries and is therefore a welcomed suggestion.

OPTION 25 – Policy issues: Clarify the co-ordination of MAP arbitration and domestic legal remedies

The Confederation of Swedish Enterprise supports this option as clarification of the relation between MAP arbitration and domestic law remedies would mean increased certainty for taxpayers.

OPTION 26 – Practical issues: Amend Article 25(5) to permit the deferral of MAP arbitration in appropriate circumstances

We agree that there might be circumstances under which a referral to MAP arbitration may be premature. However, a decision to defer the initiation of MAP arbitration should not be possible unless approved by the taxpayer.

OPTION 27 – Practical issues: Appointment of arbitrators

We share the belief that mutually agreed criteria for determining the appointment of arbitrators is essential for a well-functioning arbitration mechanism.

OPTION 28 – Practical issues: Confidentiality and communications

We agree with the proposed amendments.

OPTION 29 – Practical issues: Default form of decision-making in MAP arbitration

We welcome the initiative to develop a default decision-making mechanism in MAP arbitration.

OPTION 30 – Practical issues: Evidence

The Confederation of Swedish Enterprise welcomes the comment that the taxpayer be permitted to orally present its position in arbitration cases. The same should also apply in MAP cases.

OPTION 31 – Practical issues: Multiple, contingent and integrated issues

We support option 31.

OPTION 32 – Practical issues: Costs and administration

We support option 32.

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

A provision addressing MAP issues in multilateral situations would be welcomed by the Confederation of Swedish Enterprise.

OPTION 34 – Provide guidance on consideration of interest and penalties in the mutual agreement procedure

We support option 34.

On behalf of the Confederation of Swedish Enterprise

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Krister Andersson
Head of the Tax Policy Department