

**Consultation on Improving Double Taxation Dispute Resolution Mechanisms**

**Institute of Chartered Accountants in England & Wales (ICAEW) - Additional comments to the European Commission questionnaire**

**Introduction**

In their introduction to the Questionnaire the Commission has set out a very clear and concise summary of the problems in resolving international tax disputes when business may face taxation liabilities on the same profit in more than one jurisdiction.

As the Commission notes, globalisation and the digitalisation of economies is aggravating the problem and the changes which result from the OECD BEPS Action Plan and the European Union ATAP (Anti Tax Avoidance Package) are likely to further aggravate the situation and lead to more disputes. This will be because new systems are always more difficult to put in place and are more liable to dispute but also because the “rules” are going to be more subjective than in the past and more prone to interpretation and, hence, dispute.

The OECD has for the past ten years been monitoring the number of disputes and the length of time that they take to resolve. The time taken to resolve disputes has remained stubbornly around 24 months while the number of disputes has increased enormously. The [latest OECD statistics](http://www.oecd.org/ctp/dispute/oecd-releases-2014-map-statistics.htm) were published in November 2015.

Action 14 of the OECD BEPS Action Plan was concerned to “make Dispute Resolution Mechanisms More Effective” and includes a number of minimum standards whose objective are set out below.

The minimum standards were designed to ensure that:

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

There are, in addition, a number of Best Practices, eleven, which are listed in the final report of October 2015, for countries to implement.

**ICAEW comments in addition to those made in the body of the questionnaire**

**Arbitration**

The EU Arbitration Convention has been in existence for 20 years and while there have been very few cases that have proceded to Arbitration all the evidence suggests that the fact that the dispute could be transferred to an Arbitration process if the competent authorities do not reach agreement within a finite period of time ensures that differences are resolved. Arbitration is very much a threat *in terrorem* whose usefulness is not in the fact that it is used but that **it could be used.**

In the final paragraph of the BEPS Action 14 Report on Dispute Resolution 20 countries are listed which have declared their commitment to provide for mandatory binding arbitration in their bilateral tax treaties and it is stated that these countries were involved in more than 90% of outstanding MAP cases at the end of 2013, as reported by OECD.

To the extent that half of the member states of the European Union are not yet on that list of committed countries the other European member states, and the European bodies, should encourage them to commit.

**Parties to the MAP and Arbitration**

At the moment it is only the countries involved that are entitled to participate in the processes.

Tax cases often involved complicated facts and circumstances and we believe there is likely to be a better understanding of the business and commercial context in which the legal dispute has to be resolved if the business which is the subject matter of the dispute has an opportunity to explain the background to the competent authorities or the arbitrator(s).

**Resolving disputes before they enter the MAP process or are subject to arbitration**

Although this is not the subject of the current questionnaire ICAEW believes that MAP and Arbitration need to be considered in a broader context and tax systems will work more effectively and efficiently if disputes can be resolved before they reach the MAP process, if that is possible.

The OECD has been working on cooperative compliance for a number of years and published a report in 2013 [Co-operative compliance: A Framework. From Enhanced Relationship to Co-operative Compliance](http://www.oecd.org/ctp/administration/co-operative-compliance.htm).

The European Member States need to be encouraged to design their tax systems, and the working relations between taxpayers, tax advisers and the tax administration such that there are robust mechanisms in place to resolve differences of opinion before they turn into disputes.

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