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# EU Commission Consultation on Improving Double Taxation Dispute Resolution Mechanisms

# Supplemental Response by the Chartered Institute of Taxation

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|  | Introduction |
|  | This response should be read in conjunction with our response to the online questionnaire published by the Commission as part of its Consultation on Improving Double Taxation Dispute Resolution Mechanisms. |
|  | ***General observations*** |
|  | As part of the OECD BEPS initiative, it was disappointing that in respect of Action 14 (Dispute Resolution Mechanisms) the recommendations stopped short of endorsing a universal mandatory arbitration provision for all bilateral double tax treaties. However, it should be welcomed that twenty of the G20/OECD countries did agree to adopt and implement a mandatory binding arbitration and since those countries are involved in at least 90% of outstanding mutual agreement procedure (MAP) cases not only should this go some way to meeting resolution in those cases but also encourage other countries not involved in the commitment to reconsider their approach. |
|  | We welcome this EU initiative and the prospect of improvements in this area even if they might only be limited to the EU. However, in the context of the OECD initiative (mentioned above), which not only covers but goes beyond all EU Member States, we would encourage the EU to channel its resources in supplementing and encouraging the development of the OECD recommendations so that a global approach is taken by all countries, not limited just to the OECD and EU Member States, but including those in the G20 and other countries. This would be our preferred outcome. We would be concerned to avoid any EU action that is not consistent and compatible with any OECD developments in this area. |
|  | Any actions in this area should extend beyond a bilateral solution to cover multilateral dispute resolution since in practice more disputes, in particular those involving transfer pricing cases, will involve more than one jurisdiction. |
|  | We support the idea of setting up a permanent arbitration court/tribunal specialising in international tax disputes which would offer a range of services to include mediation and facilitation techniques applying Supplemental Dispute Resolution (SDR) mechanisms identified by the OECD in its earlier MEMAP Report. In this respect the CIOT made a presentation to the OECD in January 2015 at its Open Day to discuss its Action 14 recommendations. We have also included below the Appendix from our Written Submission in which we set out a proposal for establishing a Collaborative Dispute Resolution (CDR) programme. |
|  | We also recommend that the whole dispute resolution process allows for more taxpayer engagement and participation in order to improve the efficiency of the process and reduce misunderstandings caused by an incomplete or insufficient understanding of the facts relevant to the issues in dispute. |
|  | Often the failings in the current system arise as a result of the tax authorities being able to deny access to dispute resolution procedures in the first place. In addition some Member States have legislation which is unfavourable to dispute resolution mechanisms: for example, France does not apply interest to repayments arising as a result of Arbitration Convention decisions. Such legislation signals a desire by tax authorities to put up hurdles to the proper application of dispute resolution mechanisms that are supposed to be available. Thus any action taken should ensure that access to dispute resolution procedures is available and that such availability can be enforced. |
|  | Another problem is that Member States refuse MAP where penalty proceedings are involved in one of the states. The EU Arbitration Convention (EUAC) allows this and, in our experience, Member States use this provision to refuse MAP quite aggressively. The OECD model does not have this provision, although some states still refuse MAP for this reason. It should be made clear that the question of penalties is and should be entirely separate from the resolution of the dispute and states should not be permitted to refuse MAP for this reason. |
|  | ***Questions asked by the consultation document*** |
|  | The paragraph numbering in the remainder of this document corresponds with the question numbers in the questionnaire. |

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|  | **Your opinion** |
|  | The OECD Commentary to Article 25 (Mutual Agreement Procedure) of the Model Tax Convention refers in paragraphs 86 and 87 to the use of Supplementary Dispute Resolution (SDR) Mechanisms, including mediation. These mechanisms were further identified in the 2007 OECD MEMAP Report but the recommendation of the Working Party to consider these mechanisms further has not been taken forward.  We recommend that the European Commission establishes a Working Party to consider the use of these mechanisms to complement the EU Multilateral Arbitration Convention with a view to facilitating a more constructive dialogue between Member States in any bi or multilateral tax dispute. |
|  | Hidden text |
|  | Although the EUAC does provide for an arbitration mechanism, we are not aware how effective that arbitration mechanism has been in practice, other than as a deterrent/encouragement to the Member States in dispute to reach agreement prior to arbitration proceedings commencing.  The length of time which disputes are taking points to an inefficiency in the current dispute resolution mechanisms which the use of SDR techniques could improve. |
|  | The statements made in this are too simplistic to be answered sensibly in the manner required by the questionnaire.  In particular, with regard to the point ‘*Double taxation has a negative effect on the diversity and quality of goods and services available in my country*’ we have indicated that we ‘somewhat agree’. We do not believe that this is true to any great extent in the UK, but given the UK has an effective tax system which counters double taxation it would be surprising if double taxation had a major impact on the UK market. However, it is quite conceivable that double taxation may have this effect to some degree in other Member States; although it might be that the effect of double taxation is more likely to be an increase in the price of goods and services, rather than impacting negatively on the diversity and quality of goods and services available.  We suggest that the penultimate point made in this question ‘*Double taxation will protect the economy in my country from competition with foreign enterprises*’ a surprising question for the EU to be raising. Firstly, there should not be protection from foreign enterprises in a single market and secondly, while it may be possible to say that double taxation could ‘protect’ wholly domestic businesses, that would not be the same thing as ‘protecting’ or benefitting the economy. Thus, we have indicated that we completely disagree with this statement on the basis that we question whether it should have been asked in the first place. |

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|  | With regard to the objective ‘*Ensuring transparency by publishing main parts of the double taxation disputes cases/decisions*’, we have indicated that we somewhat agree with this. The reason for this is that while we support building up a body of publically available jurisprudence around double taxation disputes, this must be done on the basis of taxpayer confidentiality. Thus we would only support this objective if it ensured that taxpayer anonymity was protected.  Further, we also question whether producing anonymised cases for publication is a sensible use of resources. Resources would be better employed ensuring a more speedy resolution of disputes.  Double taxation disputes, particularly those relating to transfer pricing, are so fact specific that once all the information and facts that could identify the taxpayer have been removed to protect confidentiality, the redacted report may not be particularly helpful.  Consideration could instead be given to the tribunal/court producing an annual statement of principles which have emerged from the cases before it. We would suggest that a pilot study of cases is carried out for a year or so to be able analyse the usefulness of what can be produced against the time and cost resource of producing it.  To encourage transparency it would, however, be useful to publish statistics as to how many cases are brought and how quickly they are dealt with.  We also indicated that we somewhat agree with the objective ‘*Safeguarding the financial interest of the Member States by improving collection of the tax deemed due*’. This is because we wish to draw to your attention the fact that a dispute will not always be around a cash tax liability. Thus resolving the dispute may not result in any tax being paid or collected. |

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|  | **EU Action** |
|  | With regard to the possible EU action ‘*A new comprehensive legal tool should be developed by the EU to ensure that double taxation disputes are resolved*’, we have some reservations regarding this, as indicated by our ‘somewhat agree’ response.  Firstly, it is not clear what is intended here and whether this is intended to be a reference to the possibility of the CJEU being given the power to ultimately determine double taxation disputes. While the determination of a dispute by the CJEU would be appropriate as one of a number of solutions available to Member States, we would not support proposals where such a determination is compulsory.  That said, some form of mandatory referral to a court/tribunal is helpful. In our experience the EUAC works well when both sides believe there will be a referral to the Tribunal. Where this is so the parties will find a way to reach an agreement as, generally, neither party wishes to become involved with a review by a third party.    As noted above, we would prefer to see a permanent arbitration court/tribunal set up which can determine disputes between parties inside and outside of the EU. We also suggest that this action should go further such that its aim is not simply that double taxation disputes are resolved, but that they are resolved within a reasonable timescale.  In taking this work forward, the EU Commission should be mindful of the multilateral treaty being developed by the OECD in response to BEPS Action 15, which may also have legal implications in this area. Consistency between international obligations of Member States will be crucial. |
|  | **Option A ii):**  Further to the comment made above in response to question 4.1, having the CJEU as the final arbiter would also present difficulties in relation to disputes between parties where one (or more of them) is outside of the EU.  This is a particular area of difficulty which highlights our preference for the EU to focus its efforts on in supplementing and encouraging the development of the OECD recommendations so that there is ultimately a global approach and not one limited to EU Member States.  **Option B:**  It is not clear whether this option is intended to make the taxpayer in some way responsible for resolving the dispute in a timely manner. We would not be supportive of any measures which moved in this direction. Responsibility for resolving the dispute must remain with the Member States.  **Option C:**  As described, Option C would meet the general objectives of scope, enforceability and efficiency, however, we do not under estimate the challenges of achieving this. |

# OECD BEPS Action 14 – Make Dispute Resolution Mechanisms More Effective

# Response by the Chartered Institute of Taxation to OECD Public Discussion Draft (‘Action 14 Paper’)

Appendix

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| 1. **Collaborative Dispute Resolution (CDR) Programme** |
| We believe the largest single obstacle to the effective resolution of disputes is the absence of a holistic approach to dispute resolution management, starting from risk assessment and on through tax audits and on again into MAP. |
| * 1. We recommend the development of a suitable programme to focus on establishing a collaborative working environment not only between Competent Authorities but also taxpayers and their advisers. This would include a voluntary best practice protocol covering the ‘whole journey’ from the time the dispute arises to its resolution building on the MEMAP recommendations (in particular paragraph 3.5.2 of the 2007 Report). The programme would incorporate the full range of SDR techniques including: facilitated structured negotiations involving mediation techniques, facilitative (and evaluative) mediation, non-binding expert determination and similar techniques. |
| * 1. The programme would be non-binding but all Member States would be encouraged to adopt its principles, all designed to enhance not replace MAP practices (including arbitration, where agreed) and be seen as part of MAP (potentially enlarging its ambit as a result) to reduce the delays in resolving disputes which are currently experienced. |
| * 1. The CDR Programme would establish a range of best practices taking into account also the work of the FTA Forum and its recently published ‘*Multilateral Strategic Plan on Mutual Agreement Procedures: A Vision for Continuous MAP Improvement*’ and its adoption, operation, application and output would be monitored by an appropriate Forum (see para. 2.7 above) as the Action 14 Paper suggests *(at paragraph 8; pages 5 and 6)*. |
| * 1. The application of the CDR Programme could start no later than the point at which any party feels the ‘dispute’ has reached, or is likely to reach, a point when the introduction of the formality of MAP needs to be considered. It should not be a process left, say, for the two year period of a MAP case being accepted. It should be seen as part of the MAP process, or the MAP process being part of it (*see Action 14 Paper para 40; page 20*). |
| * 1. By way of example, in the UK such a programme has been successfully developed for managing certain domestic tax disputes (between Tax Authority and taxpayer), and we see no reason why such principles and procedures could not be used in cross-border Tax Treaty disputes (between Tax Authorities where the taxpayer is also involved) with similar results including significant savings in time, cost, efficiency and enhancement of relationships. |
| * 1. We believe that one of the principal benefits would be to enable countries to make better and more efficient use of their existing Competent Authority resources. |
| * 1. The techniques rely on mediation principles and often use a third party mediation-trained facilitator being either one person appointed by both parties or two individuals acting one for each party. |
| * 1. We note the OECD has already identified the potential of some of these techniques in its 2007 MEMAP Report (at paragraph 3.5.2). |
| * 1. There are a number of detailed considerations that would need input to develop a CDR programme. The CIOT would be very pleased to make available to the OECD those of its members who have experience in this area for that purpose. |

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| **The Chartered Institute of Taxation** |
| The Chartered Institute of Taxation (CIOT) is the leading professional body in the United Kingdom concerned solely with taxation. The CIOT is an educational charity, promoting education and study of the administration and practice of taxation. One of our key aims is to work for a better, more efficient, tax system for all affected by it – taxpayers, their advisers and the authorities. The CIOT’s work covers all aspects of taxation, including direct and indirect taxes and duties. Through our Low Incomes Tax Reform Group (LITRG), the CIOT has a particular focus on improving the tax system, including tax credits and benefits, for the unrepresented taxpayer.  The CIOT draws on our members’ experience in private practice, commerce and industry, government and academia to improve tax administration and propose and explain how tax policy objectives can most effectively be achieved. We also link to, and draw on, similar leading professional tax bodies in other countries. The CIOT’s comments and recommendations on tax issues are made in line with our charitable objectives: we are politically neutral in our work.  The CIOT’s 17,500 members have the practising title of ‘Chartered Tax Adviser’ and the designatory letters ‘CTA’, to represent the leading tax qualification. |

The Chartered Institute of Taxation

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