



**Irish Tax  
Institute**

*Leaders in Tax*

## **Irish Tax Institute**

# **Response to OECD Discussion Draft: Make Dispute Resolution Mechanisms More Effective**

**January 2015**

## **About the Irish Tax Institute**

The Irish Tax Institute is the leading representative and educational body for Ireland's AITI Chartered Tax Advisers (CTA) and is the only professional body exclusively dedicated to tax. Our members provide tax expertise to thousands of businesses and individuals in Ireland and internationally. In addition many hold senior roles within professional service firms, global companies, Government, Revenue and state bodies.

The Institute is the leading provider of tax qualifications in Ireland, educating the finest minds in tax and business for over thirty years. Our AITI Chartered Tax Adviser (CTA) qualification is the gold standard in tax and the international mark of excellence in tax advice.

A respected body on tax policy and administration, the Institute engages at the most senior levels across Government, business and state organisations. Representing the views and expertise of its members, it plays an important role in the fiscal and tax administrative discussions and decisions in Ireland and in the EU.

## **Introduction**

The Irish Tax Institute welcomes the recognition in the Discussion Draft on BEPS Action 14 that work is required to make international tax dispute resolution mechanisms more effective. This is especially important as the number of international tax disputes worldwide has increased as is evidenced from recently published OECD statistics on the number of outstanding MAP cases<sup>1</sup>.

The eventual implementation of the various BEPS recommendations will put significantly greater pressure on dispute resolution systems worldwide for a number of reasons including:

- Significantly greater uncertainty due to the introduction of a wide range of new clauses into tax treaties which, in many cases, are relatively complex and require a relatively high level of subjective judgement.
- Significant changes to transfer pricing guidelines which may be interpreted differently by tax authorities.

In particular, the OECD's current proposals on BEPS Action 6 have the potential to create huge uncertainty as to whether tax treaty access is available in many cases. This is of particular concern for businesses operating in smaller economies due to the nature of changes currently proposed.

Similarly, there are concerns that unilateral measures by countries to introduce new tax measures which fall outside of the treaty dispute resolution process exacerbate concerns and the risk of double taxation arising. Therefore, dispute resolution mechanisms will need to be extended to recognise the existence of new taxes such as the UK's Diverted Profits Tax.

## **Making dispute resolution mechanisms more effective**

The Irish Tax Institute fully supports the four key principles identified by the Discussion Draft as guiding attempts to improve dispute resolution mechanisms:

- Ensure treaty obligations related to MAP are fully implemented in good faith.
- Ensure administrative processes promote prevention and resolution of treaty-related disputes.
- Ensure taxpayers can access MAP when eligible.
- Ensure cases are resolved once they are in MAP.

However, the Institute believes that the options outlined in the Discussion Draft do not go far enough to ensure that dispute resolution mechanisms will adequately deal with the increasing number of tax disputes. This submission focuses on the key recommendations which the Institute believes would improve the dispute resolution process and best protect taxpayers.

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<sup>1</sup> OECD MAP Statistics 2006-2013: <http://www.oecd.org/ctp/dispute/map-statistics-2006-2013.htm>

*1. All BEPS recommendations across the 15 Actions should seek to minimise tax disputes*

As outlined above, there is substantial risk that an unintended outcome of the BEPS process will be to increase significantly the number of tax disputes arising worldwide. It is therefore vital that each of the 15 BEPS Actions should contain (as a key consideration), the potential impact on the volume of tax disputes that arise from the OECD's recommendations under that Action.

All of the OECD's work on BEPS should adopt a preventive approach and seek to reduce the likelihood of disputes arising where possible. Ensuring that sufficient commentary and guidance is provided on the various changes being proposed to tax treaties would help to reduce some of the inevitable uncertainty. Additionally, this could be supported by the adoption of safe harbours to avoid less material amounts being subject to double tax and excluding these from the dispute resolution processes.

*2. Taxpayer involvement in the MAP process should be facilitated*

Once the MAP process is undertaken, the role of the taxpayer concerned is effectively limited to providing information upon request. The Institute believes that consideration should be given to reforming the MAP process to enable meaningful taxpayer participation in the process. At a minimum, regular updates to taxpayers in connection with MAP cases should be provided.

*3. The right for a taxpayer to compel arbitration should be provided for*

Where a MAP dispute is not resolved within a reasonable timeframe, the right for a taxpayer to compel arbitration should be provided for. Currently arbitration is only available where specifically provided for in tax treaties or other international agreements (such as the EU Arbitration Convention). We note that there is no consensus within OECD on moving towards universal mandatory binding arbitration. Nevertheless, the Institute believes that a taxpayer should be entitled to compel the competent authorities to engage in binding arbitration, should the parties not be able to reach an agreement within a reasonable time,

The right to arbitration should also extend to cover new tax measures introduced unilaterally by countries, such as the UK's Deferred Profit Tax, to the extent that they result in double taxation.

The Institute has concerns about the proposal in Option 26 to allow competent authorities to mutually agree to defer the initiation of MAP arbitration. We do not support its adoption as it may result in the frustration of a taxpayer's right to seek arbitration.

*4. An independent arbitration tribunal should be established*

An independent, international, speedy and binding arbitration tribunal to resolve disputes over tax treaty issues should be established. This would substantially reduce the risk of unjust treatment of taxpayers generally and of those based in small countries in particular.

A right of appeal to a qualified and genuinely independent body is a basic principle of justice.

This tribunal may not only facilitate the arbitration process but may provide support to countries in the pre-arbitration phase as well. Once this arbitration tribunal is established it should seek to provide for clear rules on how arbitration fees and other costs are to be determined as well as provide for time limits for reaching a resolution.

#### *5. Obligation to resolve MAP cases*

Option 1 outlined in the Discussion Draft suggests adding to the Commentary on Article 25 of the Model Tax Convention to emphasise that the mutual agreement procedure is an integral part of the obligations that follow from concluding a tax treaty. While welcome, this is unlikely to go far enough in reaching the goals set by the Discussion Draft.

Instead, Article 25 should be amended to expressly include a **requirement** for competent authorities to actually resolve cases by mutual agreement. The words “shall endeavour” as stated in Article 25 currently, do not provide a legally binding undertaking to resolve the dispute and the implications of this are evident from the delays in cases actually being resolved.

The Institute also welcomes the suggestion in Option 2 that countries should include Article 9(2) of the Model Tax Convention in treaties. As suggested, it should also be made clear in the Commentary that the absence of Article 9(2) in a treaty should not be used as grounds for denying MAP in transfer pricing cases and that Article 25(3), which allows for discussions between the competent authorities in cases of double taxation not provided for in the tax treaty, can be applied in cases where the provision of Article 9(2) is not included.

#### *6. Adequately resourced and independent competent authorities*

As the Discussion Draft notes “*appropriate tax administration practices are important to ensure an environment in which competent authorities are able to fully and effectively carry out their mandate*”.

Option 3 and Option 4 suggest that countries should adopt best practice concerning the independence of a competent authority and concerning the provision of sufficient resources to their competent authorities. The Institute supports these options. A commitment by countries to ensure they have an adequately resourced, transparent and independent competent authority would be an important step in ensuring appropriate tax administration practices.

#### *7. Increased use of Advanced Pricing Arrangements*

Option 8 suggests that countries could commit to implement bilateral Advance Pricing Arrangement (APA) programmes. As noted by the Discussion Draft, bilateral APAs provide an increased level of tax certainty in both jurisdictions, lessen the likelihood of double taxation and may proactively prevent transfer pricing disputes.

The Institute supports this option and further suggests that a commitment should be made by countries to minimise the timeframe to agree an APA between the relevant parties.

*8. Clear guidance should be given on timelines and operation of MAP/CA processes*

It is important that taxpayers' access to the MAP is not effectively prevented through complex or unclear procedures. The Institute supports Option 10 which suggests that countries should ensure best practice is adopted concerning the transparency and simplicity of the procedures to access and use MAP. This should include a commitment to provide clear guidance to taxpayers on the operation of the process.

Similarly the Institute supports the intention of Option 18 to require countries to provide clear guidance to taxpayers on the timelines for accessing MAP.