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SUBJECT: Atlas Tax Lawyers comments on the Public Consultation Document - *BEPS Action 14: Making Dispute Resolution Mechanisms More Effective - 2020 Review.*

Dear Sir or Madam,

Atlas Tax Lawyers appreciates the opportunity to submit its comments on the Public Consultation Document "*BEPS Action 14: Making Dispute Resolution Mechanisms More Effective – 2020 Review"*, published on 18 November 2020 (the "**Consultation Document**"). We acknowledge and strongly support the efforts made by the Organisation for Economic Co-operation and Development ("**OECD**") to improve and warrant effective dispute resolution. As such, we are determined to assist the OECD in improving the effectiveness of the existing Mutual Agreement Procedures ("**MAP**") and the MAP Statistics Reporting Framework in order to improve tax certainty for taxpayers during these unprecedented times.

While we strongly endorse the proposed amendments included in the Consultation Document to strengthen the resolution of tax-related disputes between jurisdictions (the "**Minimum Standard**") as included in BEPS Action 14 and acknowledge that it is a move in the right direction, we think that real effectiveness of MAPs can only be assured in combination with Mandatory and Binding Arbitration ("**MBA**").

With this letter we will provide our comments on the proposals, made by the OECD in the Consultation Document, to enhance and strengthen the effectiveness of MAP. We refer to the Appendix for our specific comments on the proposals made in the Consultation Document.[1]

Yours sincerely,
Atlas Tax Lawyers

T.A. Wiertsema

B.R. Schalker

[1] In the Appendix we provide our comments on the proposals without addressing each of the individual questions.

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APPENDIX

1. INTRODUCTION – GENERAL COMMENTS

Due to the COVID-19 pandemic (the "**Pandemic**") taxpayers face severe economic and financial difficulties. In order to overcome the comprehensive challenges presented by the Pandemic, taxpayers, now more than ever, have the need for tax certainty as uncertainty will stand in the way of recovery of cross-border trade and investments post Pandemic.

During recent years the world markets have increasingly become globally integrated. Where commercial markets for goods and services initially primarily focused on local markets, we have experienced a shift in focus to a more international scope, having far-reaching effects on the conduct of taxpayers in general. As such, we are not surprised to see that the MAP statistics of the OECD and European Union ("**EU**") Joint Transfer Pricing Forum ("**JTPF**") show an ongoing exponential growth of the amount of MAPs reported by Competent Authorities ("**CA**"). It is noted in this respect that during the period 2006 - 2019 we have seen an increase in MAP cases from 2352 to 6955. The MAP statistics furthermore show transfer pricing disputes often are the cause for double taxation and eventually lead to MAPs.

We anticipate that the exponential growth of MAPs will further increase in the foreseeable future due to: (i) an increase in taxpayer transparency (i.e. following the Country-by-Country reporting obligations, Master File and Local File documentation, the exchange of rulings, i.e. within an EU context and the EU DAC6[2]), (ii) the shift towards (more subjective) economic notions as reflected in BEPS measures (i.e. BEPS Action 7 on permanent establishments and BEPS Action 8-10 on risk-allocation and intangibles) and (iii) the increase of highly digitized businesses that are able to operate in market jurisdictions with little nexus. Furthermore, we expect that the Pandemic will put a strain on financial budgets of many jurisdictions, compelling Tax Authorities ("**TA**") to increase collection revenues with increased scrutiny on taxpayers transfer pricing positions. At last, although not covered by international tax treaties and as such MAPs, we expect that the new OECD proposals for Pillar 1, Pillar 2 and the (unilateral) digital service tax proposals will even further increase the amount of double taxation.

In practice, we observe certain obstructions that hinder taxpayers in the effective avoidance of double taxation by means of a MAP. The obstructions we observe are as follows: (i) uncertainty regarding the access to MAP, (ii) uncertainty whether MAPs will lead to an effective solution, (iii) the expenses involved in starting MAPs, (iv) denial of access to MAPs due to domestic court rulings. These obstructions are undesirable from the perspective of both the taxpayer and the CAs.

Following the above, we acknowledge that further strengthening of the Minimum Standard is of paramount importance if we want to warrant effective dispute resolution for taxpayers. As such, we come to the following general recommendations:

2 Council Directive (EU) 2018/822 of 25 May 2018 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements.

a) **Mandatory and Binding Arbitration** – We strongly believe that real effectiveness of MAPs can only be assured in combination with MBA.[3] As such, based on our experience, we recommend that MBA will be elevated to the Minimum Standard. Practice has shown that the mere existence of MBA promotes effective dispute resolution.

b) **Increased transparency** – We fully endorse further transparency of MAP-statistics as proposed in the Consultation Document. We think that further insight in MAP-statistics will assist taxpayers in making important investment decisions. In addition, recent development in international taxation and the general public have required taxpayers to comply with ever increasing transparency measures (we refer to our earlier remarks on taxpayer transparency). We think that this represents a general trend and that, consequently, TAs as well as CAs will need to be on par with these developments (i.e. one will need to practice what they preach).

c) **Judicial enforcement of access to MAP** – In order to warrant tax certainty and effective dispute resolution for taxpayers, we recommend that, as the Minimum Standard, jurisdictions will be required to allow for a request for a MAP to be eligible for domestic litigation.[4] We note in this respect that a Dutch Administrative Court ruled that the decision of the Dutch CA to deny a taxpayer access to a MAP will need to be considered a decision which is subject to objection and appeal at the Dutch Tax Court.[5]

3 Currently, MBA is already possible in the EU on the basis of: (i) the EU Convention (90/463/EEC) of 20 August 1990 on the elimination of double taxation in connection with the adjustment of profits of associated enterprises, (ii) the Council Directive (EU) 2017/1852 of 10 October 2017 on tax dispute resolution mechanisms in the European Union ("**EU DRD**") and in certain circumstances (iii) bilateral tax treaties.

4 EU member states may already be subject to this requirement based on their domestic implementation of the EU DRD.

5 Rb. Amsterdam 25 July 2017, AMS 16/5412, ECLI:RBAMS:2017:9099.

2. PROPOSALS TO STRENGHTHEN THE MINIMUM STANDARD

Proposal 1: Increase the use of bilateral APAs.

We acknowledge that bilateral APAs are a powerful instrument for taxpayers to avoid double taxation and obtain tax certainty during an agreed period of time. As such, we endorse the introduction of the obligation to establish a bilateral APA program. We think that the increased use of bilateral APAs could reduce the amount of tax disputes taking place between jurisdictions. Having said this, we do note that bilateral APAs can also be considered a double-edged sword, as the increased use of bilateral APAs could also lead to an oversharing of information by taxpayers and thereby potentially triggering more tax disputes. We however do not recommend to make an exception for jurisdictions with a low volume of transfer pricing MAP cases as the amount of transfer pricing MAP cases reported by a jurisdictions is not conclusive to determine whether or not access to bilateral APAs would be beneficial for taxpayers.

Proposal 2: Expand access to training on international tax issues for auditors and examination personnel.

We agree that mandatory training for audit/examination personnel would increase auditors' efficacy and would result in: (i) better-trained auditors and examiners and (ii) fewer adjustments that lead to long discussions in MAP or (iii) situations where the case is closed by providing unilateral relief in the jurisdiction that made the adjustment at issue. We therefore endorse the inclusion of mandatory training. In practice, we have experienced instances where the lack of coordination and information sharing between the CA and the TA resulted in transfer pricing corrections that eventually had to be reversed by the CA in the course of a MAP. As such, based on our practical experience, we recommend that coordination of audit policy (i.e. specifically in the field of transfer pricing) takes place within the TA and between the TA officials engaged in tax audits. In the Netherlands, coordination and information sharing takes place within the TAs centralized coordination group on transfer pricing. Additionally, we strongly recommend that information and specifically know-how and experiences on transfer pricing are shared between a jurisdiction's CA and TA. We strongly suggest to consider raising the above recommendations, related to the coordination and sharing of information, to the Minimum Standard.

Proposal 3: Define criteria to ensure that access to MAP is granted in eligible cases and introduce standardized documentation requirements for MAP requests.

We agree that it would be most beneficial for taxpayers to have (uniform) guidance on the documentation requirements for MAP requests. As such, we welcome the introduction of standardized documentation requirements for MAP requests. Having said this, it should be noted that the scope of the standardized documentation requirements should be in proportion to the MAP request (i.e. based on this "standardized" documentation CAs should merely determine whether access to MAP is justified and not resolve the dispute itself). Based on our practical experiences we further note that it is common that CAs ask taxpayers additional questions and information during the course of the MAP. As such, it is essential that taxpayers always have the

right, if needed, to provide any additional information required at a later stage of the MAP to solve the tax dispute. At last, we would like the OECD to provide clear guidance on whether or not domestic adjustments are eligible for access to MAP. Ideally, we think that domestic adjustments should be eligible for access to MAP and therefore argue that this should be raised to the Minimum Standard.

Proposal 4: Suspend tax collection for the duration of the MAP process under the same conditions as are available under domestic rules; and
Proposal 5: Align interest charges/penalties in proportion to the outcome of the MAP process.

In practice, we observe that double taxation and the collection thereof can have a substantial impact on the liquidity of taxpayers. Furthermore, we see that jurisdictions apply asymmetrical policies as regard to interest on tax.[6] The Dutch CA acknowledges this issue and publicly expressed it endeavors to align the interest calculated by both CAs. If double taxation is ultimately resolved without dealing with the "interest-asymmetry", a taxpayer will still be faced with a (potentially) substantial amount of additional (interest) costs. Given the, on average, quite lengthy discussions in MAPs (i.e. recent OECD data indicates that transfer pricing MAPs take on average thirty and a half months to resolve), the amount of double interest costs may even approximate the amount of the double taxation. Although this issue is generally acknowledged (e.g. in BEPS Action 14 which contains the "best practice" to this end), few countries actually provide solutions for interest on tax (and penalties) in their domestic tax law or MAP guidance. Certain jurisdictions have expressed their concerns that the suspension of tax collection could result in the jurisdiction not being able to effectuate the tax claim at a later stage, we argue that, this will often not be a real concern in practice as there are several means by which taxpayers can offer guarantees to the CAs in respect of the amount of tax under dispute. In MAPs, double interest charges (due to tax interest-asymmetry) could for example be avoided by suspending the calculation of interest on tax in both countries under the condition that the taxpayer contributes, into an interest-bearing blocked account, the amount of tax on the "consolidated profit" (after deduction of tax already paid). Upon reaching a resolution in the MAP, the countries involved will be entitled to their corresponding part of funds on the blocked account, including interest. Additionally, it would also be possible for the ultimate parent of the taxpayer to provide a corporate guarantee to the CAs. At last, we think that, if we want to offer absolute tax certainty to taxpayers, penalties should ultimately also form part of MAPs.

Proposal 6: Introduce a proper legal framework to ensure the implementation of all MAP agreements.

We welcome the introduction of a proper legal framework to ensure the implementation of MAP agreements. More specific, we endorse that as the Minimum Standard, domestic statutes of limitation should not pose an obstruction for the effective implementation of MAP agreements. Currently, such a safeguard mechanism already exists in an EU context for tax disputes based on

[6] This may arise where one jurisdiction calculates interest in respect of the (additional) tax liability, while the other jurisdiction does not offer interest refund on a tax refund.

the EU DRD. The EU DRD offers EU taxpayers the possibility to enforce the implementation of MAP outcome via an administrative law procedure at their domestic court.

Proposal 7: Allow multi-year resolution through MAP of recurring issues with respect to filed years.

We agree that allowing for a multi-year resolution through a MAP for recurring issues with respect to filed years will be beneficial for both the taxpayer and the CAs. When CAs are engaged in a discussion on a recurring issue, in a MAP, it would be very efficient if they are able to also address such issue with respect to filed years, that are not in scope of the initiation correction. Initiating a subsequent MAP for these years will be inefficient and time consuming for both the taxpayer and the CA. As such, we firmly endorse to raise the allowance for multi-year resolutions through MAP for recurring issues with respect to filed years to the Minimum Standard.

In addition, we would like to raise awareness that taxpayers are increasingly applying complex transfer pricing models such as global profit splits or principal models with sub-entrepreneurs. If, in respect to these complex operating models, TAs make a transfer pricing adjustment, this adjustment can have a taxation impact in more than two jurisdictions. Currently, taxpayers often have to resolve such tax disputes by engaging in multiple MAPs (i.e. we note in this respect that certain jurisdictions are not willing to actively engage in dispute resolution when the local taxpayer is not a direct party to the transaction). This process can be very time consuming as well as inefficient for both taxpayers and CAs. In practice, such complex disputes could however be resolved more effectively if taxpayers would have the ability to engage in a multilateral MAP (or even APA). As such, we would like to recommend the OECD to design, as a best practice, clear guidelines for multilateral MAPs and APAs.

Proposal 8: Implement MAP arbitration or other dispute resolution mechanisms as a way to guarantee the timely and effective resolution of cases through the mutual agreement procedure.

We refer to our position included in our general comments. We strongly endorse the implementation of MBA or other dispute resolution mechanisms as a way to guarantee the timely and effective resolution of cases through MAPs. Anecdotal evidence within the EU shows that CAs have a real incentive to reach agreement in MAPs. If a resolution of the dispute is not reached in the MAP, the dispute will be brought under MBA. Because CAs can no longer influence the process and the outcome under MBA, they in practice appear to have a real incentive to resolve disputes in the MAP. Because, in our view, MBA is the only real solution to increase effectiveness of MAPs and considering the deterrent effect in practice, we recommend the OECD to investigate a project to explain the benefits of MBA while at the same time acknowledging the current objections that many jurisdictions still have to MBA.

3. PROPOSALS TO STRENGTHEN THE MAP STATISTICS REPORTING FRAMEWORK

Proposal 1: Reporting of additional data relating to pending or closed MAP cases

We experienced that the increased transparency due to the publication of the Peer Review Report (i.e. regarding the "process" of the MAP) and the Reporting Framework (i.e. for the "output" of the MAP) have led many CAs to improve their MAP processes and effectiveness. As such, we welcome further transparency and endorse the three recommendations made by the OECD in this proposal. Most importantly, we endorse the proposal to report data on the identification of the jurisdiction(s) that made the initial correction. This information is not only of value to CAs, but it will also assist taxpayers when making cross-border investment decisions. Furthermore, we expect that the increased transparency will reduce the number of legitimate MAP requests that are denied by CAs.

Proposal 2: Providing relevant information on other practices that impact MAP-APA statistics.

We welcome further transparency by CAs on information and other practices that impact MAP-APA statistics. As mentioned above, increased transparency provides an incentive to CAs to improve their MAP processes and effectiveness. As such, we endorse the data categories currently put forward in the proposal. Having said that, we do think that there should be boundaries to the extent of which transparency is demanded from CAs. Example given, transparency should not be required to the extent that it can (potentially) negatively impact the negotiation powers of CAs during MAPs.