

## **Dispute resolution procedures in international tax matters**

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- **Importance of avoidance of double taxation**
  - **International double taxation has harmful effects on the international exchange of goods/services and movements of capital/technology/persons.**
  - **To remove obstacles, DTAs settle the most common problems that arise in the field of international double taxation**
  - **However, Art. 25(1) encourages resolution of disputes but does not make it mandatory to resolve disputes within a limited period of time**

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- **OECD MAP Statistics**

- **Case inventories have steadily increased: 2352 at the end of 2006 - 4566 at the end of 2013**
- **Some cases are closed or withdrawn without eliminating double taxation (not all countries report these cases; around 8%)**
- **Average number of months to complete a MAP case: around 24 months in 2013**

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- **BEPS Action Plan**

- **OECD and G20 countries have committed to consistent actions: treaty shopping, country by country reporting and fighting harmful tax practices**
- **New standards will be implemented: PE definition or transfer pricing rules**
- **Countries are expected to converge through the implementation of common approaches: hybrid mismatches or limiting interest deductibility.**
- **Guidance will support countries action: mandatory disclosure initiatives or CFC legislation**
- **Action 14: Progress on dispute resolution to be able to resolve uncertainties and double taxation resulting from BEPS novel rules**

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- **Action 14**

- **Make dispute resolution mechanisms more effective**

Develop solutions to **address obstacles** that prevent countries from resolving treaty-related disputes under MAP, including the **absence of arbitration** provisions in most treaties and the fact that **access to MAP and arbitration** may be **denied** in certain cases

- **Disappointing results?**

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- **IFA Report: the means multinational enterprises and the BTA have at their disposal to solve taxation not in accordance with a DTA**

1. **Avoidance of double taxation: rulings/APAs**
2. **Domestic remedies**
3. **Bilateral/multilateral mechanisms: MAP/AC**
4. **Internal regulations regarding MAP**
5. **Alternative solutions: Mediation/Conciliation/Expertise**

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- **Avoidance of double taxation: Unilateral Rulings**
  - **Service for Advanced Decisions (Ruling Commission)**
  - **Request on tax issues including tax treaty issues**
  - **Average time to issue a decision on a formal request 64 days in 2014**
  - **The procedure is simple, efficient and free of charge**

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- **Avoidance of double taxation: Unilateral APAs**
  - **May cover TP/attribution of profits to PE + interpretative issues (e.g. PE definition, definition of royalties)**
  - **2014: 70 formal APAs**
  - **No roll-back application**
  - **Where a taxpayer is involved in a dispute with a foreign tax administration regarding a transaction covered by a unilateral APA, he may request MAP assistance: the Belgian competent authority is prepared to agree on an appropriate adjustment to relieve double taxation and not to view the unilateral APA as definitive settlement**
  - **Could parallel unilateral APA requests in concerned countries secure a bilateral solution?**

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- **Avoidance of double taxation: Bilateral/Multilateral APAs granted by the competent authorities**

- On the basis of Art. 25(3), first sentence
- 10 APA requests in 2013 and 8 in 2014
- 1 case was rejected and 1 was withdrawn by the taxpayer in 2013
- A first multilateral APA was issued in 2004; it has taken about 18 months to finalize the agreement
- 8 APAs granted in 2013 and 0 in 2014 (reorganization within the MAP team)
- 1 year for simpler cases; 2/3 years for larger cases

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- **Avoidance of double taxation: Bilateral/Multilateral APAs granted by the competent authorities**

- The BTA does not provide for the “roll-back” of APAs but, where a MAP request has been made with respect to earlier tax years, the Belgian CA may agree to take a relevant APA into consideration to resolve the dispute
- Why so few bilateral/multilateral APAS requests although they reduce the risk of double taxation? Time consuming and too long? May attract the attention of the other tax administration on the issue?
- Increase of bilateral/multilateral APAS requests as a consequence of mandatory exchange of unilateral APAs?

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- **Domestic remedies**

- **Challenge to the reported tax position**

- Difficulties?

- **Audit settlements**

- Possible audit settlements (e.g. in TP matters)
- Should not include an agreement that the taxpayer will not request MAP assistance
- Any such agreement would not prevent the taxpayer from presenting the case to MAP (a settlement has only an impact on the burden of proof)

- Difficulties?

- **Internal review of the audit**

- Difficulties?

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- **Domestic remedies**

- **Administrative appeals**

- Tax claim (Art. 366 ITC)
- Request for automatic relief in cases of juridical double taxation (Art. 376 ITC)

- Difficulties?

- **Judicial recourses**

- Court of First Instances: cases handled by judges specialized in tax matters
- Court of Appeal: cases handled by a fiscal chamber
- Fiscal judges give generally their decision as a single judge and often, without the assistance of a law clerk
- Supreme Court: no specialized judges in tax matters
- Belgian judicial procedures are generally rather long
- Execution suspended during the judicial recourses

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- **Double Tax Treaties (with 93 jurisdictions)**
- **Art. 24(1) of the Belgian Model**
  - Option of presenting a case to the competent authority of either Contracting State
- **Art. 24(3) of the Belgian Model**
  - No second sentence (consultation for the elimination of double taxation not provided for in the DTA)
  - Parliament approval required for agreements that departs from domestic law to an extent not provided for in the treaty and does not constitute a normal implementation or interpretation of the treaty
  - Revision foreseen: Second sentence but additional provision (it does not allow eliminating double taxation in contradiction with domestic law or other applicable DTAs)
    - ➔ agreement on facts/circumstances or triangular cases

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- **Double Tax Treaties**
- **Art. 24(4) and 24(5) of the Belgian Model**
  - Agreement on administrative measures to carry out the provisions of the DTA (not only the provisions of Art. 10 and 11)
  - Competent authorities “shall” communicate directly with each other
- **Art. 24(6) of the Belgian Model**
  - The Belgian Model provides for mandatory binding arbitration as of 2007
  - Few tax treaties do, however, have such a clause

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- **Double Tax Treaties**

- **Art. 9(2) of the OECD Model**

- No Art. 9 with 5 states (Bulgaria but AC; treaty with ex-USSR)
- No 9(2) with 46 states
- Many 9(2) have specific wording: a CS “shall make **such an adjustment as it considers appropriate** to the amount of the tax charged therein on those profits” instead of “shall make **an appropriate adjustment** to ... ” ; it incorporates the interpretation of par. 6 of the OECD Commentary clarifying that 9(2) does not provide for an automatic adjustment
- Reflects the evolution of the Belgian policy and reservations/observations on the OECD Model
- Consequences of the absence of 9(2)?
- Consequence of specific 9(2) wording?

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- **Double Tax Treaties**

- **Art. 9(3) and 9(4) of the Belgian Model**

- 9(2): open ended commitment to make an appropriate adjustment and applicable to transactions regarded as fraudulent
- Problem with late adjustments  
Par. 10 of the OECD Commentary: alternative provision limiting the time period during which CS are obliged to make an appropriate adjustment under 9(2)  
BE 9(3): No adjustment under 9(1) after 7 years as from January 1 of the year next following the year in which the profits would have accrued to the enterprise
- BE 9(4): No obligation to make an appropriate adjustment under 9(2) where transactions leading to an adjustment under 9(1) are regarded as fraudulent according to an administrative or judicial decision **Quid?**

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- **MAP experience**

- **Rather common for taxpayers to request MAP assistance**

- TP cases: MAP but generally no concomitant judicial recourses
- Other cases: MAP but judicial recourse in less than 1/3 of the cases
- Limited amounts of tax involved: often no MAP and no judicial recourses
- **Does this seems correct?**

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- **MAP experience**

- **Number of cases initiated per year:**

- 2010 120
- 2011 120
- 2012 146
- 2013 124
- 2014 205

- Numbers do not encompass cases solved unilaterally by the BTA in the first stage of the MAP
- Huge increase in 2014: specific audits in relation to foreign income; improvement of the data base to monitor MAP cases
- Next years: increase as a consequence of the implementation of the results of BEPS actions?

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- **MAP experience**

- **Aspects mainly discussed**

- Interpretation of DTAs (royalties, interest, services, remunerations, pensions, dividends, ...) 82%
- Transfer pricing cases 10%
- Conflicts of residence 7%
- Anti-abuse rules, beneficial owner, ... 1%

- **Many cross-border workers commuting out or in → 85% are individual tax cases**

- **Few cases of TP adjustments by the BTA pursuant to 9(1)**

- Few adjustments?
- Acceptable audit settlements?
- Correlative adjustment in the other state based on domestic recourses?
- Account adjustments not checked in the other state?

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- **MAP experience**

- **Unresolved cases**

- 2009 2
- 2010 2
- 2011 0
- 2012 2
- 2013 3
- 2014 1

- **1 case: CAs disagreed on the interpretation of treaty provisions and were unable to depart from a principled approach of the case**

- **Other cases: access to the MAP was provided although the cases were regarded as abusive; after discussion, both CAs agreed that it was not appropriate to relieve their taxation; double taxation was added to anti-avoidance penalties provided by the domestic law of one state; this was in accordance with Art. 25 (1) (2) requirements**

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- **MAP experience**

- **Inventory**

- 2011 to 2014: number of cases higher at the end of the year (417 begin 2014 - 492 end 2014) **Difficulties**
- Most cases with OECD countries: 470 end 2014 (the 22 cases with non-OECD states were initiated prior to 2013)
- Average time to resolve a case: 20 months end 2014 **Not too bad but ...**
- Large number of old cases: 253 cases initiated prior to 2013 (34 prior to 2009) **Difficulties**
  - No or late reaction from the other state
  - Complex cases
  - Cases pending before foreign courses
  - Remedy: mediation by OECD tax experts?

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- **Arbitration: EU Arbitration Convention (AC)**

- Belgium never participated in an arbitration process per se
- For the BTA: the most important advantage of the AC is the incentive it constitutes for setting the dispute before a case must go to arbitration **Quid?**
- End 2014: 30 pending cases (7 were pending 2 years after initiation)
- Rejected cases during 2012 to 2014: 1 presented after the 3-years period
- Time between request and initiation: less than 6 months

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- **Arbitration: EU Arbitration Convention (AC)**
- **End 2014: 7 cases pending 2 years after initiation**
  - 1 case initiated in 2009: the taxpayer has not provided all relevant facts/circumstances (Coc requirements) **Level of documentation remains a difficulty**
  - 2 cases (initiated in 2010 and 2012): the time limit was extended with the taxpayer's agreement
  - 1 case: a settlement was agreed in principle but the exchange of closing letters for MAP was awaited (time needed to obtain the agreement of the taxpayers)

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- **Arbitration: EU Arbitration Convention (AC)**
- **End 2014: 7 cases pending 2 years after initiation**
  - 1 case initiated in 2007: pending before a foreign court

Art. 7(1) of the AC → Combination of the AC and domestic recourses lead to a very long delay in obtaining a solution under the AC: the 2-years period after which an advisory commission must be set up is computed from the date of the final court decision; this delay may incite taxpayers to choose the AC and give up domestic remedies

Change to Art. 7 to provide for the pursuance of the AC first and the suspension of the domestic law recourses (cf. hereafter MAPs regulations)?

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When a case is pending before a Belgian court:

The BTA is legally prevented from implementing an independent opinion decision confirming taxation that a Belgian court considered partly not justified → Art. 7(3) of the AC

Art. 7(3): Where a tax administration may not derogate from a court decision, an advisory commission shall not be set up unless the enterprise has allowed the time for appeal to expire or has withdrawn appeal before a decision has been delivered

Circ. 07/07/2000: taxpayers must opt between domestic recourses and the AC when the competent authorities have reached a mutual agreement or when the 2-years period to set up the advisory commission has elapsed

Some commentators: The Belgian approach is not fully in line with Art. 7(3) **To be examined**

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- **Arbitration: EU Arbitration Convention (AC)**

- **End 2014: 7 cases pending 2 years after initiation**

- 1 case initiated in 2005: referred under other reasons

The request was presented in the other state. The notification of the case to the Belgian competent authority was followed by no other information from the other competent authority and no reaction from the taxpayer. A judicial recourse might be pending in the other state.

The situation should be clarified before end 2015

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- **Arbitration: EU Arbitration Convention (AC)**

- **End 2014: 7 cases pending 2 years after initiation**

- 1 multilateral case initiated in 2009: was to be sent to arbitration as of end 2012

Belgium was not the state that must establish the advisory commission following the Coc

The CA of the other state did not establish the commission within the required period

The Belgian CA was entitled to take the initiative. She has not done so: the resident of Belgium involved in the case never insisted for the establishment of the advisory commission; following an involved state, the 2-years period has not started in 2009 because the taxpayer has not provided all relevant information at that time

The case was resolved by mutual agreement in 2015

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- 1 multilateral case initiated in 2009: was to be sent to arbitration as of end 2012 (Tbc)

Following the Coc, the CA that initiated the establishment of the advisory commission must provide the facilities for the secretariat that assist the commission.

This obligation combined with the administrative burden inherent to arbitration may have contributed to the absence of initiatives. The Belgian CA believes that it would be easier to take initiative if the AC would provide for last best offer arbitration. This approach is a possible issue for future consideration by the JTPF.

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- 1 multilateral case initiated in 2009: was to be sent to arbitration (Tbc)

The Coc has set out a time limit and rules for the setting up of an advisory commission **but difficulties remain**

As long as a mechanism does not remedy the failure of CAs to establish the advisory commission, the efficiency of the AC is undermined

The sample MA to implement Art. 25(5) of the OECD Model: at the request from the person who made the request for arbitration, the Director of the OECD CTPA appoints arbitrators in case of failure of the CAs

**Could the EU member states agree on a similar process? Appropriate body or person within the EU instances that may establish an advisory commission?**

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- **Other shortcomings of the AC**

Disputes relating to AC procedure (e.g. the starting point of the 2-year period) or interpretation of AC terms (e.g. PE or double taxation) are not covered

A CA may refuse to initiate the AC until these preliminary issues are resolved

Application of the AC to establish the existence of a PE: future consideration by the JTPF

Where a DTA exists between all interested states, the BTA considers that the preliminary existence of a PE may fall within the scope of the AC: it covers attribution of profits to a PE and Art. 3(2) refers to DTAs to define terms used and not defined; it allows a preliminary resolution of the PE issue that is in accordance with DTAs

**Mutual agreement between all the parties to the AC without the need to amend the AC?**

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- **Arbitration in DTAs**

- As of 2006: Belgium proposes mandatory binding arbitration (Art. 25(5) OECD)
- Few DTAs with arbitration in force
- DTA with United-States
  - Not limited to specific articles (contrary to US/Germany or US/Canada)
  - No arbitration if both CAs agree that an issue is not suitable for arbitration despite the taxpayer's request: such an agreement could be reached in abusive cases (MOU US/Belgium)
  - Last best offer: the only approach provided for in the Protocol

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- **Arbitration in DTAs**

- **A group of countries involved in the BEPS work has committed to implement mandatory binding arbitration → Multilateral instrument (BEPS Action 15)**
- **Some countries: a limited scope only**
  - specific articles (5, 7 and 9), and/or
  - cases of actual double taxation, or
  - exclusion of cases of application of anti-abuse rules, or
  - cases that CAs agree not to submit to arbitration
- **Belgium: in principle no limitation but alternative provision with some countries**  
**Qui? limited to cases of actual double taxation?**

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- **Internal regulations regarding MAP**
- **No published guidelines but application of most MEMAP Best practices**
- **Guidelines will be published in 2016: minimum standard agreed under Action 14 and monitoring**
- **Access to MAP**
  - Not restricted in case of audit settlement or unilateral APA or for cases described as “tax avoidance”
  - Benefit of the doubt in borderline cases on the starting point of the time period to present a case
  - **Difficulties?**

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- **Internal regulations regarding MAP**
- **Additional requirements for initiation**
  - Request: in writing, motivated and succinct information
  - To determine whether the objection appears justified and to initiate the case, information mentioned under paragraph 2.2.1 of the MEMAP are considered sufficient
  - **Difficulties?**

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- **Internal regulations regarding MAP**

- **Tax collection/penalties/interest**

- At the taxpayer's request, the collection of the contested amount of tax is suspended during the MAP - Where the mutual agreement confirms taxation: late payment is due
- Where tax has been paid and taxation is relieved by mutual agreement, default interest is due
- Where taxation is relieved by mutual agreement because it is not in accordance with the DTA: Belgian tax increases are reduced accordingly

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- **Tax collection/penalties/interest (Tbc)**

- Administrative penalties relating to domestic law compliance: not within the scope of Art. 25(1)(2) MAP
- Belgian CA is prepared to discuss, on a case by case basis, administrative penalties under Art. 25(3)
- No legal authority to discuss criminal penalties under MAP
- US/Belgium DTA provides expressly that the CAs may agree on the application of domestic law penalties but recently CAs have decided in a specific case that they won't discuss penalties

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- **Internal regulations regarding MAP**

- **New issues**

- The Belgian CA is prevented from establishing supplementary tax assessment or compensating tax reliefs with tax insufficiencies discovered when investigating the disputed case
- Tax auditors may establish a supplementary tax assessment where investigation and taxation were within the deadlines provided for under Belgian law
- **Difficulties?**

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- **Internal regulations regarding MAP**

- **Late cases**

- The taxpayer's records and documentation relating to an accounting period may be destroyed after a period of 7 years following the end of that period
- Should taxpayers follow MEMAP Best Practice 8 and notify the Belgian competent authority of a potential MAP case as soon as it appears likely that taxation not in accordance with the DTA may occur?
- Early notification might allow resolution of a case at the audit level in the other CS
- **Quid? Independence of the CA actively involved in the tax audit?**

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- **Internal regulations regarding MAP**

- **Domestic courts versus MAP**

- The MAP is an additional procedure available irrespective of the judicial recourses provided by the domestic law
- Where a DTA does not provide for mandatory binding arbitration or limits arbitration to a subset of cases, there may be tax disputes that cannot be resolved by mutual agreement
- After having been informed of the resolution reached within the MAP, there may be taxpayers that prefer pursuing domestic remedies

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- **Domestic courts versus MAP (Tbc)**

- The BTA deals at the same time with a taxpayer's case through the MAP and in the domestic proceeding:
  - the case discussed in depth under the MAP notwithstanding an on going suit on the same issues
  - the taxpayer is not requested to suspend the suit
- Where a final decision confirms, wholly or partly, Belgian taxation before a mutual agreement is reached, the Belgian CA may consider that it prevents her from agreeing on another solution and restricts her to requesting that the other CS provides relief under the MAP (unless the MAP indicates clear evidence that taxation was not in accordance the DTA)

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### ➤ Domestic courts versus MAP (Tbc)

- Pursuant to arbitration provisions in DTAs, unresolved issues are generally excluded from arbitration where a decision has been rendered by a court or administrative tribunal of either State
- Where, before a domestic court decision has been rendered, a mutual resolution is agreed or an arbitration decision is taken, the mutual agreement is subjected to the taxpayer's acceptance and withdrawal of domestic law recourses concerning the issues settled to avoid divergences between the mutual agreement and a subsequent court decision

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### ➤ Domestic courts versus MAP (Tbc)

- If the taxpayer would request to be allowed to defer acceptance of the mutual agreement until the court had delivered its decision on the issues under MAP, the Belgian CA would reject such request → the BTA does not follow the interpretation of par. 42 of the OECD Commentary on Art. 25 **Quid?**
- **Would it be preferable to request the taxpayer to suspend the domestic law proceedings and pursue the MAP first?** Under Art. 747, §2, al. 2, C. jud. the parties may agree to require during the first audience that the case be placed on the court's list and adjourned until it is reactivated by a party.

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- **Internal regulations regarding MAP**
- **Difficulties of a general nature regarding interpretation or application**
  - MAP under the first sentence of Art. 25(3)
  - May proactively resolve future disputes
  - No consensus on the binding character of such mutual agreement
  - MAP between Belgium/Germany on provisions applicable to severance payments
  - Clarifications to be made in the OECD Commentary
  - Express provisions in DTAs to give more weight to a general mutual agreement? **Quid?**

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- **Alternative solutions**
- **Pre-consultation between tax administrations before/during tax audits (exchange of information, simultaneous examinations, joint audits) → possible agreement between tax administrations on a same approach before assessments?**
- **Mediation (the mediator listens to the position of each party and communicates a view of the strengths and weaknesses of each position)?**
- **Expertise of a tax expert on a complex issue?**
- **Mandatory non-binding arbitration?**
- **What are the views regarding the value of these (or other) alternative solutions?**

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