Branch Reporters
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Summary and conclusions

Tax treaties (DTAs) provide a means of settling the most common problems that arise in the field of international double taxation. Double taxation has a detrimental effect on the movements of capital, technology and persons and on the exchange of goods and services. For a small open economy like Belgium it is particularly important to resolve all instances of taxation not in accordance with a DTA.

The aim should be to relieve any taxation that is contrary to the provisions of a DTA. Notably, however, the mutual agreement procedure (MAP) article in most DTAs does not oblige competent authorities to effectively resolve disputes. Furthermore, notwithstanding the obligation imposed by the MAP article to consider all "justified" objections that taxation is not in accordance with the DTA, some competent authorities may decide not to consider some issues in the MAP. Despite attempts to make the MAP work better, the average time for resolving cases has not diminished, few DTAs (including Belgian DTAs) contain arbitration provisions, some MAP cases remain unresolved and few countries follow all the best practices currently included in the OECD manual on effective mutual agreement procedures (MEMAP).

In Belgium, the number of pending disputes has increased tremendously. If no measures are taken, it will continue to increase following the implementation of the base erosion and profit shifting (BEPS) measures. In 2015, the Belgian tax administration (BTA) has proactively reorganised its MAP team and put in place a data bank allowing a better follow up of cases. These unilateral measures will not, however, be successful if both competent authorities do not ensure that their internal processes for resolving MAP cases are as efficient as possible. Currently, for a number of pending cases, the BTA has not received information or a position paper in a timely manner so that it is prevented from instructing the cases. The BTA is helpless in the face of such absence of reaction.

The BTA generally follows the commentary on article 25 of the OECD model and MEMAP best practice to ensure that treaty-related disputes are resolved effectively and in an efficient manner. The BTA favours close cooperation with taxpayers, especially in fact-intensive cases.

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There are, however, some aspects of the Belgian practice about which taxpayers can complain.

Belgium has not published comprehensive guidelines on the rules governing access to and use of the MAP. Clear guidelines should, however, be published in 2016 to improve the transparency of the procedure.

Although the BTA gives access to the MAP for cases of application of domestic or treaty anti-abuse rules or where violations of domestic law result in a "serious penalty", it has sometimes agreed not to resolve cases perceived as abusive through the MAP. Where the MAP article includes an arbitration provision allowing both competent authorities to agree that a case is not suitable for arbitration, one can also expect the BTA to agree not to submit to arbitration a case perceived as abusive. Moreover, Belgium proposes to its treaty partners DTA provisions that expressly exclude from the obligation to make an appropriate adjustment under article 9(2) profits relating to transactions that have resulted in administrative or judicial penalties. These practices reflect concerns that the certainty that taxation not in accordance with the DTA will be eliminated may encourage tax avoidance behaviour by taxpayers. It could, however, be fairer and more efficient to fight such behaviour by providing for and applying appropriate levels of penalties instead of retaining double taxation.

Although the BTA regularly communicates with taxpayers during the MAP and welcomes their input, especially to clarify the facts and circumstances of the case, taxpayers have no right to actively participate in the process and to have access to the MAP file.

The BTA deals simultaneously with a taxpayer's case through the MAP and in domestic proceedings. It does not require that the taxpayer chooses which of the MAP or the domestic proceedings have precedence. Belgian domestic proceedings are rather long and taxpayers may also ask for the suspension of those proceedings. A mutual resolution is therefore most often reached under the MAP first. Where a final court decision is rendered first, the BTA may be prevented from agreeing to another solution (unless the MAP highlights clear evidence that taxation was not in accordance with the DTA) and arbitration will no longer be available. Where, before a domestic court decision has been rendered, a mutual resolution is agreed or an arbitration decision is taken, the mutual agreement implementing this resolution or decision is subject to the taxpayer's acceptance and withdrawal of domestic law recourses concerning the issues settled in the mutual agreement. The taxpayer must then choose between accepting the mutual agreement and pursuing domestic remedies. He is not allowed to wait for the final court decision and to choose between that decision and the MAP resolution.

Belgium implements unilateral ruling and bilateral/multilateral advance pricing agreement (APA) programmes with a view to avoiding instances of taxation not in accordance with DTAs. Simultaneous examinations and joint audits are possible on the basis of treaties on mutual administrative assistance in tax matters or administrative arrangements. Simultaneous examinations are, however, not frequent and no joint audit has been undertaken up to now. The BTA should encourage a more regular use of those forms of cooperation to avoid disputes, especially with neighbouring countries.

Belgium considers that mandatory binding arbitration is the best way of ensuring that disputes are effectively resolved through the MAP. It will participate in the

negotiation of arbitration provisions within the multilateral instrument envisaged under BEPS action 15 with a view to including arbitration in more DTAs. For the BTA, arbitration is an important incentive for settling disputes before cases must go to arbitration. Under the EU Arbitration Convention, or where both competent authorities may agree that a case is not suitable for arbitration, the BTA should, however, not hesitate to initiate arbitration in order to maintain the incentive.

1. Avoidance of double taxation

1.1. Unilateral rulings

Since 2003, Belgium has had a broad system of advance tax rulings designed to give investors legal certainty. Businesses may submit a request to the Ruling Commission (*Service des décisions anticipées/Dienst Voorafgaande beslissingen*) on any federal tax issue (domestic law, EU law or tax treaty issues) and some regional tax issues. This may be done from the outset in a formal way. It is also possible to start discussions on an informal basis during so-called pre-filing meetings.

The average number of calendar days to issue a decision on a formal request is shown in Table 1.

Table 1

2007	2008	2009	2010	2011	2012	2013	2014
97	83	81	68	71	67	68	64

No advance ruling can be given if:

- a dispute on a similar situation involving the applicant is pending;
- the request deals with recovery and prosecution;
- the request relates to some specific issues (e.g. tax rates, procedures, prescriptions, administrative or judicial recourses, administrative penalties);
- the essential elements of the described transaction or situation involve a tax haven listed as uncooperative by the OECD (no jurisdiction is currently listed as an uncooperative tax haven by the OECD);
- there is no economic substance in Belgium.

The BTA is bound by a ruling unless the facts were incorrectly described; the taxpayer did not respect the conditions set in the ruling; the ruling is in conflict with a DTA, domestic law or EU law; the law has changed after the ruling was given. A ruling is generally issued for a period of five years but is renewable. The procedure is simple, efficient and free.

Rulings are published anonymously in French or Dutch.[1] The Ruling Commission publishes annual reports on its activities.[2]

[1] Direct taxes rulings are published on www.fisconet.be under http://ccff02.minfin.fgov.be/KMWeb/browseCategory.do?method=browse&params.selectedCategoryId=810.

[2] The reports are published on http://ruling.be/fr.

1.2. APA programmes

1.2.1. Unilateral APAs

A taxpayer may request a unilateral APA under the Belgian advance tax rulings system. APAs may cover issues of transfer pricing (TP) or attribution of profits to a permanent establishment (PE) and also interpretative issues relating, for example, to the PE definition or the definition of royalties. In 2014, 70 formal APAs were issued out of a total of 600 rulings relating to income tax.

Unilateral APAs have no roll-back application. The transactions which are the subject of an advance tax ruling decision need not yet have produced any tax effects. An advance decision may be given as long as no tax return has been filed with respect to income relating to the transactions. TP issues can thus be decided with respect to a specific year until the tax return for that year is filed. The BTA is considering the possibility of introducing a limited "roll-back".[3]

Where a taxpayer is involved in a dispute with a foreign tax administration regarding a transaction covered by a unilateral APA, he may request the MAP assistance provided for by a DTA. The Belgian competent authority is prepared to agree on an appropriate adjustment of the taxpayer's profits so as to relieve double taxation and to depart from the unilateral APA.

Submitting parallel unilateral APA requests in the countries concerned could be a way to secure a bilateral solution through dialogues undertaken separately with the respective tax administrations on the basis of similar documentation. The risk exists, however, that they may reach different conclusions.

1.2.2. Bilateral/multilateral APAs

The Belgian competent authority may conclude bilateral and multilateral APAs based on article 25(3) (especially in cases where no action of the contracting states is likely to result in taxation not in accordance with the DTA). It may take about a year to get an APA in simpler cases. More complex cases can take two to three years. A first multilateral APA was issued in 2004, involving Belgium, the Netherlands and France (the United Kingdom was involved when the ruling was renewed for a supplementary period). The case related to the application of the profit-split method within a multinational group active in financial services. It took about 18 months, as of the date on which the Belgian competent authority had obtained all the necessary information, to finalise the APA.[4]

The Belgian competent authority received only ten APA requests in 2013 and eight in 2014. Two APAs were granted in 2012, eight in 2013 and none in 2014.[5] In 2013, one request for an APA was rejected because the BTA disagreed with the

[3] Written question no. 5-7719 of 15 January 2013 van Yoeri Vastersavendts (Belgian Senate Session 2012–2013).

[4] Dirk Van Stappen, Leslie Van den Branden and Andres Delanoy, "Recently published rulings and future development of ruling practice", ITPJ 2005, Vol. 12, No. 1, p. 23, s. 4.

[5] In 2014, two people joined the MAP team to handle TP cases; the TP unit, which is involved in audits, was no longer involved in APAs/MAPs. Several months were needed for these two people to gain expertise.

taxpayer's position and one request was withdrawn because the taxpayer considered the information required by the other state too burdensome and costly.

The BTA does not provide for the "roll-back" of APAs where the issues resolved are relevant with respect to previous tax years. However, where an MAP request has been presented with respect to earlier tax years, the Belgian competent authority may agree to take a relevant APA into consideration to resolve the dispute relating to those earlier years.[6]

The number of bilateral/multilateral APAs is small compared to the number of unilateral APAs, although bilateral/multilateral APAs reduce the risks of double taxation and double non-taxation. They proactively prevent disputes and can provide for equitable solutions for both taxpayers and tax administrations. Normally, the BTA and taxpayers should therefore favour bilateral/multilateral APAs whenever possible.[7] However, experience has shown that these APAs are burdensome for all interested parties. Businesses generally consider they are too time consuming (given the high level of documentation and analysis they require) and too long (the competent authorities generally have to discuss all aspects of the transactions in depth before being able to reach an agreement).[8]

Following the OECD/G20 and EU initiatives on mandatory exchange of unilateral rulings, unilateral APAs should be largely exchanged with treaty partners as of 2016. This may increase the number of requests for bilateral/multilateral APAs as these exchanges will avoid instances of double non-taxation without avoiding the possible double taxation inherent in unilateral APAs. An increase in bilateral/multilateral APA requests would require the provision of more staff for the MAP function.

2. Domestic remedies[9]

2.1. Challenge to the reported tax position (article 346 of the Income Tax Code (ITC))

Where a tax auditor intends to adjust the taxable basis reported by the taxpayer in its tax return, a written notice of the intended adjustment, including the reasons for the changes and a revised determination of the taxable income, must be sent to the taxpayer. The taxpayer may put forward objections and supporting evidence. He must do so within one month as of the third business day after the notice was sent, although additional time is often granted. By the day of the assessment, the BTA must inform the taxpayer of the objections it has not taken into consideration and the reasons for the rejection.

6 Report on action 14, element 2.7 of the minimum standard: countries with APA programmes should provide for their roll-back in appropriate cases.

7 Van Stappen *et al*., *op. cit*., s. 5.

8 Andreas Bernath, "The implications of the Arbitration Convention – a step back for the European Community or a step forward for elimination of transfer pricing related double taxation?" (Master's Thesis in International Tax Law – 22 May 2006), pp. 62–66 and 101–103.

9 Ch. Chéruy, *Tax Procedure in Belgium: Audit to Litigation: A first insight*, série Loyens & Loeff, 2014, http://loyensloeffnews.be/wp-content/uploads/2014/04/Tax-procedure-in-Belgium.pdf.

2.2. Audit settlements

It is possible to conclude an agreement with the tax authorities on certain tax issues (e.g. TP matters) within the framework of a tax audit. Audit settlements should not provide that the taxpayer will not pursue domestic law recourses or an MAP in relation to the issues agreed upon. In any case such an agreement would not prevent the taxpayer from pursuing such recourses. The agreement concluded by the taxpayer on the determination of its taxable base only has an impact on the burden of proof (during subsequent recourses the taxpayer will have to establish that this determination was incorrect).

2.3. Internal review of the audit

In some states the application by tax auditors of a domestic law general anti-abuse rule is subject to some form of approval process. Such internal reviews promote overall consistency in the application of a rule that is open to divergent interpretations. The commentary on the new treaty anti-abuse provision aimed at arrangements one of the principal purposes of which is to obtain treaty benefits suggests that states may wish to establish a similar form of administrative process that would ensure that the provision is only applied after approval at a senior level within the administration.[10]

No such process exists in Belgium.

2.4. Administrative and judicial processes

2.4.1. Administrative appeals

Judicial recourse is only available after the administrative appeal has been exhausted. This is intended to alleviate the courts' workload.

The taxpayer may file a written tax claim with the director of the regional division in which the tax was assessed (article 366 ITC). The tax claim must be filed within six months of the third business day following the sending of the notice of assessment (article 371 ITC). The tax complaint must contain specific reasons and grounds justifying it and the information necessary to enable the regional director to handle the case. During the review, the regional director may request any information he considers useful, including information from third parties. He may also conduct further investigations to decide on the taxpayer's objections.

The regional director must reconsider the position taken by the tax auditor. He must be impartial and justify his decision. There is no fixed deadline for the regional director to issue a decision. However, the taxpayer may challenge the assessment before the court of first instance if the regional director fails to take a decision within six months of receiving the claim (nine months in the absence of a tax return). If the regional director takes a decision within this six- or nine-month period (or after this time period if the taxpayer has not made recourse after

[10] Report on BEPS action 6 (Preventing the granting of treaty benefits in inappropriate circumstances), para. 26 (para. 15 of the commentary on the provision).

its expiry), the taxpayer may challenge that decision before the court within three months following notice of the decision.

In some specific cases (e.g. issues of juridical double taxation), an "automatic" relief procedure (*dégrèvement d'office/ambtshalve onthaffing*) is also available (article 376 ITC). This procedure can be initiated after the deadline for tax complaints has expired. The request must be filed within a period of five years as from 1 January of the year in which the tax was assessed.

2.4.2. Judicial recourses

The taxpayer may litigate the contested issues before the court of first instance, which is a civil court, the Court of Appeal and the Supreme Court. There are no specific tax courts in Belgium.

The execution of the regional director's decision is suspended during the judicial recourses, except for the uncontested part of the assessment. The execution of court decisions is suspended until the decision becomes final (article 377 ITC).

Before the court of first instance, tax cases are handled by judges specialising in tax matters. The court decides on the merits of the case. As tax law is a matter of public policy, the court must take into consideration not only the grounds put forward by the parties but also any other ground it may deem relevant. The decision is, however, restricted to the actual requests of the parties.

Appeals against court of first instance judgments are heard by the fiscal chamber of the Court of Appeal.

In practice, decisions are generally given by a single judge in first instance or in appeal, often without the assistance of a law clerk although tax matters are generally complex.[11] Due to shortage of staff, poor facilities and limited administrative support, Belgian judicial procedures are generally rather lengthy.[12]

Appeals against judgments of the Courts of Appeal are brought before the Supreme Court. The Supreme Court does not decide on the substance of cases. It reviews decisions on grounds such as error of law or failure to comply with procedural requirements. It ensures a uniform application of the law. The Supreme Court does not have a specialist tax chamber.

When the Supreme Court rejects an application, the judgment under review becomes final. When the decision under review is reversed, the case is sent to another Court of Appeal than the one that has rendered the decision. That second court is not bound by the decision of the Supreme Court. If this court's decision is repealed by the Supreme Court on the same grounds as the first appeal, the court to which the case is subsequently sent will be bound by the Supreme Court's decision on the issue.

Courts are not legally bound by the decisions of the Supreme Court and nothing prevents a court from rendering a decision that is contrary to a principle developed by the Supreme Court. In practice, this is, however, rather uncommon.

[11] François Stevenart Meeûs, Conseiller à la Cour d'appel de Mons, Plaidoyer pour une magistrature fiscale plus efficiente, www.ifa-belgium.eu/, conference of 12 June 2012.

[12] Although Belgium participated in the collection of data for the preparation of the 2015 EU Justice Scoreboard, it failed to provide much data relating to efficiency (http://ec.europa.eu/justice/effective-justice/files/justice_scoreboard_2015_en.pdf).

3. Bilateral/multilateral mechanisms

3.1. DTAs

Belgium has DTAs in force with 93 jurisdictions. All of them have an MAP article.[13]

3.1.1. Article 24(1) of the Belgian model (2010)

As of 2006, Belgium has been proposing to its treaty partners to give taxpayers the option of presenting their cases to the competent authority of either contracting state and to modify article 25(1) of the OECD model accordingly.[14] This option makes the MAP more widely available and more flexible. It permits a taxpayer to present his case to his state of residence, the state of source or to both states to avoid the decision as to whether the taxpayer's objection appears justified being left entirely to the unilateral decision of the state of residence. This ensures that taxpayers that meet the requirements of paragraph 1 can access the MAP.[15]

3.1.2. Article 24(3) of the Belgian model (2010)

The Belgian MAP article does not include the second sentence of article 25(3) of the OECD model, which enables the competent authorities to deal with cases of double taxation that do not come within the scope of the provisions of the convention. Article 172 of the Belgian Constitution prevents the Belgian competent authority from supplementing a DTA and resolving cases of double taxation which are not explicitly (or at least implicitly) dealt with in the treaty.[16] The Belgian Council of State gave the opinion that parliamentary approval is required for any agreement that departs from domestic law to an extent not provided for in the treaty itself and that does not constitute a normal implementation or interpretation of the treaty.[17]

Recently, however, Belgium has proposed to some treaty partners to include this second sentence together with additional language indicating that it does not allow the contracting states to eliminate double taxation in contradiction of their domestic law or with the provisions of other applicable DTAs. This will in particular allow the competent authorities to consult with each other to agree on the facts and circumstances of a case in order to apply their respective domestic laws to identical facts and circumstances. This may also enable the competent authorities to deal with triangular cases, in particular where an enterprise of a third state, with which one or both of the contracting states do not have a DTA, has a PE in each of the contracting states. The competent authorities may thus determine by mutual agreement the price of the dealings between the PEs in accordance with their respective laws and, as the case may be, with the DTA that one of the contracting states has concluded with the third state.

13 Belgian tax treaties and the Belgian model are published at www.fisconet.be.
14 Alternative provision found in para. 19 of the commentary on art. 25 of the OECD model (2014).
15 Report on action 14, element 3.1 of the minimum standard.
16 Pursuant to art. 172, any exemption or diminution of taxes may only be granted by law.
17 Opinion of the Council of State, Parl. St. 970 (1964–1965), No. 1, 22 (in relation to the draft law of approval of the DTA between Belgium and France signed on 10 March 1964).

3.1.3. Articles 24(4) and 24(5) of the Belgian model (2010)

Article 24(4) provides that the competent authorities shall agree on administrative measures necessary to carry out the provisions of the convention and particularly on the proof to be furnished by residents of either contracting state in order to enjoy in the other state the benefits of the convention.

Article 24(5) provides that the competent authorities "shall" communicate directly with each other for the application of the convention. This wording prevents the competent authorities from communicating through diplomatic channels, which Belgium considers inappropriate in relation to matters submitted to the confidentiality rules of the exchange of information article which covers the competent authority letters. The OECD model allows the competent authorities to communicate directly or through diplomatic channels. The Belgian model also allows the competent authorities to communicate through a joint commission, although this is not expressly mentioned.

3.1.4. Article 24(6) of the Belgian model (2010)

The Belgian model has provided for mandatory binding arbitration as of 2007. Few tax treaties, however, contain such a clause (see section 3.3.2).

3.1.5. Article 9(2) of the OECD model

Treaties with five jurisdictions[18] do not have article 9 and treaties with 46 jurisdictions do not have article 9(2). Most treaties that have article 9(2) do not follow exactly the OECD wording but specify that a contracting state should make a corresponding adjustment if it considers the primary adjustment justified. This reflects the interpretation held in paragraph 6 of the commentary on article 9 of the OECD model.[19] As indicated in paragraph 70 of the report *Transfer pricing, corresponding adjustments and the mutual agreement procedure*, it would be unacceptable to commit a state to provide an automatic corresponding adjustment, whether or not it considered that the adjustment made in the other state was justified in principle and amount, since this would be tantamount to requiring the first state to give the other state a blank cheque.[20]

These different wordings reflect the evolution of the Belgian policy. Belgium reserved the right not to insert article 9(2) in its DTAs when that provision was introduced in the OECD model (1977). In the 1997 version of the OECD model, Belgium replaced that reservation by another one in order to expressly provide that a contracting state had to make a corresponding adjustment only if it considered the primary adjustment justified. Belgium dropped that reservation in 2005.

18 Bulgaria, to which the EU Arbitration Convention is, however, applicable; Kyrghyzstan, Moldova, Tajikistan and Turkmenistan pursuant to the treaty concluded with ex-USSR states.

19 "State B is therefore committed to make an adjustment of the profits of the affiliated company only if it considers that the adjustment made in State A is justified both in principle and as regards the amount."

20 Report adopted by the OECD Council on 24 November 1982, R(1)-1 of the full version of the OECD model.

Previously, Belgium also had an observation on the commentary on article 25(1) of the OECD model,[21] expressing the view that a taxpayer has no right to request a corresponding adjustment under the MAP where a convention does not include article 9(2). This observation was dropped in 2003. Belgium now shares the view of most countries that, even in the absence of article 9(2), economic double taxation resulting from TP adjustments falls within the scope of the MAP.

What are the consequences of not including article 9(2)?

Article 9(2) is directly applicable. It allows a Belgian enterprise to introduce a claim before Belgian courts to obtain a downward adjustment where the same profits are included in the profits of an associated enterprise. In the absence of article 9(2), judicial recourses are only possible if domestic law authorises a correlative adjustment. Such a correlative adjustment is provided by article 185(2) of the ITC, which is applied by means of advance rulings. This provision does not allow a taxpayer to introduce administrative or judicial recourses. The difference is, however, rather theoretical. In practice, an upward revision of the profits in another state generally occurs after the Belgian time limits to introduce a tax claim have elapsed and, therefore, when judicial recourses are no longer available.

What are the consequences for taxpayers' recourses to the specific wording included in article 9(2) where the BTA considers that all or part of the primary adjustment is not justified?

Considering paragraph 6 of the OECD commentary, this specific wording should have no consequence. Under an MAP, where the DTA does not provide for mandatory binding arbitration, the competent authorities endeavour to resolve the case and the Belgian competent authority has no obligation to agree on an adjustment it does not consider appropriate.

What if the DTA provides for mandatory binding arbitration? Based on the specific wording included in article 9(2), one might argue that the state that must make the corresponding adjustment is not bound by an arbitration decision which results in a higher adjustment than its tax administration considers appropriate. Based on paragraph 6 of the OECD commentary, one might take the same view in relation to the OECD provision. This view would not, however, be in accordance with article 25(5) of the OECD model. The arbitration process is not an alternative or additional recourse but an extension of the MAP and the resolution of the case is still reached by mutual agreement.[22] Where an arbitration decision considers that a primary adjustment is justified, this decision is binding on both contracting states and must be implemented in a mutual agreement, even if it is in contradiction to the position of the competent authority of the state that must make the correlative adjustment. The mutual agreement will confirm that both states consider the primary adjustment justified, both in principle and as regards its amount, to the extent decided by the arbitration board.

[21] Para. 49 of the commentary on art. 25 relating to paras. 9 and 10 of the commentary of the OECD model (2000) (i.e. current paragraphs 11 and 12). This new position was made public in circular AAF 6/2003 of 25 March 2003 (www.fisconet.be).

[22] Para. 64 of the commentary on art. 25 of the OECD model.

3.1.6. Articles 9(3) and 9(4) of the Belgian model (2010)

Under article 9(2) of the OECD model, an appropriate adjustment must be made even if the upward adjustment occurred very recently. The commitment is not time limited. The competent authorities may face a number of difficulties in connection with late adjustments, particularly where relevant records and information are no longer available. This problem is discussed in paragraph 10 of the commentary on article 9 of the OECD model. States are free to include in their DTAs provisions restricting the period during which they must make an appropriate adjustment. Belgium has chosen a different approach to address the problem. It proposes a provision preventing contracting states from making an adjustment under article 9(1) after a certain period of time (seven years as from 1 January of the year next following the year in which the profits would have accrued to the enterprise). This solution avoids the economic double taxation that may otherwise result from the absence of a corresponding adjustment. This provision also applies in cases of fraud, gross negligence or wilful default which do not seem appropriate and should be changed.

Cases involving "serious penalties" are explicitly addressed in the EU Arbitration Convention, under which there is no obligation to initiate an MAP or arbitration where legal or administrative proceedings have resulted in a final decision that an enterprise concerned is liable to a serious penalty in relation to transfers of profits. Following a similar approach, Belgium proposes that article 9(2) should not apply in cases where transactions leading to an adjustment under article 9(1) are regarded as fraudulent according to an administrative or judicial decision.

Denying an appropriate adjustment in cases involving "serious penalties" would have additional punitive effects in combination with anti-avoidance penalties. From a policy perspective, one may consider that taxation contrary to a DTA, in particular double taxation, should always be avoided. Relieving double taxation in cases involving "serious penalties" could, however, encourage abusive taxpayer behaviour by reducing the risk that such behaviour may result in double taxation. While revising its model, Belgium should consider whether it is appropriate to keep that provision.

3.2. MAP experience

The BTA contributes to the OECD MAP statistics and to the EU Joint Transfer Pricing Forum (JTPF) statistics. No additional statistics are provided.

It is quite common for taxpayers to bring issues to an MAP after a tax assessment. TP cases are generally complicated and time consuming, while courts are not experienced with these issues and do not have the necessary resources and time to investigate cases in depth. Where the BTA has adjusted the profits of an associated company pursuant to article 9(1), companies bring TP issues to an MAP and generally do not seek concomitant judicial recourses. For other issues, taxpayers introduce a judicial recourse together with an MAP in less than half of the cases. Where only limited amounts of tax are involved, some taxpayers consider that it is not worth seeking an MAP or judicial recourse and that accepting double taxation is less costly and time-consuming. According to the BTA's experience, taxpayers

try to resolve disputed issues through audit settlements during the auditing process but, in the case of persistent disputes, they generally request MAP assistance.

3.2.1. Number of MAP cases initiated per year

Table 2. Number of MAP cases per year

2010	120
2011	120
2012	146
2013	124
2014	205

The number of initiated cases does not encompass cases solved unilaterally by the BTA in the first stage of the MAP but only cases that have reached the second stage where the MAP proper is set in motion.

A huge increase in the number of initiated MAP cases was registered in 2014. This corresponds to a real increase of cases (targeted audits in relation to foreign income have resulted in disputed assessments in 2014). Another explanation is the improvement of the database used to monitor MAP cases, which has become more reliable.

The BEPS action plan recognises that novel rules resulting from the actions taken to counter BEPS may introduce elements of uncertainty and create disputes concerning whether taxation resulting from the application of these rules is in accordance with the provisions of a DTA.[23] One may therefore expect an increase in MAP cases in the near future.

3.2.2. Topics discussed during the MAP

Table 3. Topics frequently discussed during the MAP

Interpretation of treaty provisions (royalties, interest, services, remuneration, pensions, dividends …)	82%
TP cases	10%
Conflicts of residence	7%
Application of anti-abuse rules, beneficial owner …	1%

As Belgium has a high number of cross-border workers commuting in or out of the country, 85 per cent of the cases concern individuals.

Few cases involve TP adjustments by the BTA pursuant to article 9(1). In some cases, the BTA and taxpayers reach settlements acceptable to both parties during the audit process so that no recourse to an MAP is necessary.[24] In other cases, associated enterprises obtain a correlative adjustment in the other state based on

[23] The report on action 14 consequently reflects a commitment by countries to implement specific measures to remove obstacles to an effective and efficient MAP.

[24] Hugues Lamon, report of Belgium on *Cross-border business restructuring*, *IFA Cahiers* 2011, Vol. 96A, p. 135.

domestic recourses or adjust their accounts without both states checking whether such adjustments are appropriate.

3.2.3. Unresolved cases

Table 4. Unresolved cases

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

In one case, the competent authorities disagreed on the interpretation of treaty provisions and were unable to depart from a principled approach to the case and have regard to considerations of equity in order to give the taxpayer satisfaction.[25] In the nine other cases, access to the MAP was provided although the transactions to which the request related were regarded as abusive. After discussion, both states agreed that it was not appropriate to relieve their taxation. In these cases, double taxation was added to anti-avoidance penalties provided by domestic law. This was, however, in accordance with the requirements of article 25(1) and (2) (MAP access must be provided but the competent authorities need only endeavour to resolve the case).[26]

3.2.4. Inventory

Due to the increasing number of initiated cases over the years, the inventory at the end of the reporting period was higher than the inventory at the beginning of that period for 2011 to 2014 (417 beginning 2014 and 492 end 2014). Belgium should therefore reinforce its MAP team or take other measures to improve its efficiency. Otherwise, the caseload could continue to increase. In 2015, the competent authority has organised a more efficient catalogue of cases that allows for automatic follow up of each case at each step of the procedure. Unilateral measures will, however, not be enough without improved cooperation with the competent authorities of other states.

Most cases involve other OECD countries (470 out of 492 cases at the end of 2014). In 2014, the average time needed to resolve a case with other OECD countries was 20 months, which does not seem too bad. However, the statistics show that a large number of outstanding cases at the end of 2014 were old cases (253 cases were initiated prior to 2013, including 34 initiated prior to 2009).

The oldest cases are:

- cases where the Belgian competent authority has received no or a late reaction from the other state;
- complex cases;
- cases pending before a foreign court.

The MAP team has devoted more efforts in 2015 to closing the oldest cases. By the end of 2015, a detailed overview of the situation should be made. As of 2016, any possibilities of resolving, or at least reviving, pending old cases should be envisaged.

[25] Para. 38 of the commentary on art. 25 of the OECD model and best practice 3 of the MEMAP.
[26] Report on action 14, element 1.2 of the minimum standard.

In this respect, the monitoring of the implementation of the measures developed under BEPS action 14 could help countries concerned to settle these cases.

All 22 pending cases involving non-OECD countries were initiated prior to 2013. Cooperation with non-OECD countries is often difficult.

3.3. Arbitration

3.3.1. EU Arbitration Convention

Belgium has never participated in an arbitration process *per se*. It has no experience in this respect.

For the BTA, the most important advantage of the Arbitration Convention is that it is an incentive to settle a dispute before the case must go to arbitration. It is an incentive for competent authorities to mutually agree before having to rely on an uncertain decision of the advisory commission and facing the administrative burdens, lengthiness and costs inherent in the procedure. The Arbitration Convention has made the MAP more effective for cases that do not reach arbitration.

For the Belgian competent authority, the Arbitration Convention has been an incentive to develop the TP expertise of its team and to increase its autonomy from the audit functions. It is an incentive for MAP teams to interact in a fair and transparent manner in order to reach equitable solutions as quickly as possible.

At the end of 2014, Belgium had 30 pending cases under the Arbitration Convention, 7 of which were still pending two years after initiation.

3.3.1.1. Requests rejected – time between submission of request and initiation

To monitor more closely exclusions from access to the Arbitration Convention based on different arguments and lengthy time limits between request and initiation, the EU statistics have included information on these aspects as of 2012.

During the years 2012 to 2014, Belgium accepted all the cases presented except one that was rejected because it was presented after the three-year period had expired. The time between request and initiation of a case never exceeded six months.

3.3.1.2. Pending cases

One case initiated in 2009 was still pending because the two-year point had not been reached as the taxpayer had not provided all the relevant facts and circumstances of the case pursuant to the revised code of conduct for the effective implementation of the Arbitration Convention (Coc). The level of documentation needed to initiate a case remains an issue on which taxpayers and competent authorities often have disagreements.

One case initiated in 2007 was pending before a foreign court and the Arbitration Convention process was suspended.

Under article 7(1) of the Arbitration Convention, where a case has been submitted to a court, the two-year period after which an advisory commission must be set up is computed from the date on which a final court decision is given.

Table 5. Cases pending two years after initiation at the end of 2014

Two-year point not reached due to Coc[a] 5(i)(b)	Cases pending before court	Time limit waived with taxpayer's agreement	To be sent to arbitration	In arbitration	Settlement agreed in principle, awaiting exchange of closing letters for MAP	Other reasons
1	1	2	1	0	1	1

[a] Coc = code of conduct for the effective implementation of the Arbitration Convention.

The combination of the Arbitration Convention and domestic recourses may consequently lead to a very long delay in obtaining a resolution under the Arbitration Convention. This delay may lead taxpayers to choose the Arbitration Convention and give up domestic remedies.

The Belgian competent authority is legally precluded from maintaining taxation where a Belgian court has decided that the taxation is not in accordance with the provisions of a DTA (the decision is *res judicata* in the specific case and is enforceable against the Belgian treasury).[27] On the other hand, nothing precludes the competent authority from agreeing by mutual agreement that taxation is not in accordance with the provisions of a DTA and will be relieved despite a Belgian court decision confirming such taxation. The court decision cannot, however, be ignored unless the MAP has highlighted new elements justifying a different view. In such a case, the mutual agreement could allow the BTA not to apply the court decision.

Under article 7(3) of the Arbitration Convention, where a competent authority is not permitted to depart from a court decision, no advisory commission will be set up unless the enterprise has allowed the time provided for appeal to expire or has withdrawn any such appeal before a decision has been delivered. Belgium applies this restriction as the BTA is legally prevented from implementing an independent opinion decision confirming taxation that a Belgian court has considered partly not justified. Taxpayers must choose between domestic recourses and the Arbitration Convention when the competent authorities have reached a mutual agreement pursuant to article 6 of the Arbitration Convention or when the two-year period to set up the advisory commission has elapsed.[28] Some commentators have questioned that rule.[29] It is stricter than the Arbitration Convention rule which allows taxpayers to delay their choice after the two-year period as long as it is made before the court decision is given. When revising internal practices regarding MAPs and the Arbitration Convention, the BTA should examine the need to modify that rule.

27 Art. 144 of the Constitution and arts. 23–28 of the Judicial Code.
28 Circular AAF/Inter ISR/98-0170 of 7 July 2000, para. A, 2(b) (www.fisconet.be).
29 Isabelle Verlinden, Patrick Boone and Kristoff de Meue, "Prior Consultation", ITPJ 2003, Vol. 10, No. 3, p. 100.

The BTA favours a change of article 7 of the Arbitration Convention to provide expressly for the application of the Arbitration Convention first and the suspension of domestic law recourses. This would ensure a swifter coexistence of the two proceedings.

In two cases initiated respectively in 2010 and 2012, the time limit was extended with the taxpayer's agreement. In these cases, elements indicated that the case should be able to be settled within a reasonable period of time. Even though the cases have taken more time than expected, the taxpayers have not requested to start arbitration.

For one case, a settlement was agreed in principle but the exchange of closing letters for the MAP was awaited. Obtaining the taxpayer's consent to the mutual agreement often takes time and delays the formal resolution of a case.

A case initiated in 2005 is mentioned under "other reasons". The request was presented in the other state. After the notification of the case to the Belgian competent authority, no other information was received from the other competent authority and no reaction from the taxpayer. A judicial appeal may be pending in the other state. The situation should be clarified before the end of 2015.

A multilateral case initiated in 2009 was to be sent to arbitration as of the end of 2011. Belgium was not the state that had to establish the advisory commission pursuant to point 7.2(a) of the revised Coc. As the competent authority of the other state did not establish the commission within six months following the expiry of the two-year period, the Belgian competent authority was entitled to take the initiative following point 7.2(b) of the revised Coc. However, it took no initiative: the resident of Belgium involved in the case never insisted on the establishment of the advisory commission and, following one of the states involved, the two-year period had not started in 2009 because the taxpayer had not provided all the relevant information at that time. The case was finally resolved by mutual agreement in 2015.

Following point 7.2(d) of the revised Coc, the competent authority that takes the initiative of establishing the advisory commission must provide the facilities for the secretariat that assists the commission. This obligation, combined with the administrative burden inherent in arbitration, may have contributed to the absence of initiatives. The Belgian competent authority believes that it would be easier to take the initiative if the Arbitration Convention provided for "last best offer" arbitration (the arbitrators choose one of the solutions submitted by the competent authorities). This approach is a possible issue for future consideration by the JTPF.[30]

The fact that the revised Coc has set out a time limit for setting up an advisory commission has not fully alleviated one of the main shortcomings of the Arbitration Convention. As long as there is no mechanism to remedy the failure by competent authorities to establish the advisory commission, there will be a loophole in the Arbitration Convention that undermines its efficiency. Point 5 of the sample mutual agreement to implement article 25(5) of the OECD model provides that, at the request of the person who made the request for arbitration, the director of the OECD CTPA appoints arbitrators in case of failure by the competent authorities. The EU Member States could agree on a similar process that would allow the

[30] Final report on improving the functioning of the Arbitration Convention (JTPF meeting of 12 March 2015), para. 47, p. 18.

enterprise that has presented its case pursuant to article 6 of the Arbitration Convention to require a person within the EU institutions to establish an advisory commission in such circumstances.

Another shortcoming of the Arbitration Convention is the fact that the disputes relating to procedural issues (e.g. the starting point of the two-year period) or to the interpretation of Arbitration Convention terms (e.g. what constitutes a PE; when does an enterprise participate directly or indirectly in the management, control or capital of an enterprise; what constitutes double taxation) are not covered by the Arbitration Convention. This allows a competent authority to refuse to initiate a procedure under the Arbitration Convention until these questions are resolved.[31] The application of the Arbitration Convention to establish the existence of a PE is a possible issue for future consideration by the JTPF.[32] This application would avoid the need to resolve the PE issue through the MAP provided by the concerned DTA before giving access to the Arbitration Convention for the attribution of profits issue.[33] It would improve the efficiency of the Arbitration Convention and would allow connected issues to be decided through arbitration where the applicable DTA does not contain an arbitration clause.

3.3.2. Arbitration in DTAs

As of 2006, Belgium has been proposing arbitration provisions in line with article 25(5) of the OECD model to its treaty partners.

Treaties in force with the United States and the United Kingdom and signed with the Isle of Man, Moldova, Switzerland and Uruguay provide for mandatory binding arbitration. Treaties with Malaysia and Tajikistan provide for voluntary binding arbitration (both competent authorities must agree that a case is submitted to arbitration). A few treaties contain a most favoured nation clause: Mexico and Russia (the clause provided for in the treaty will be applicable where Mexico or Russia agrees on mandatory binding arbitration with a third state) and Norway (if it agrees to an arbitration clause with a third state, Norway must enter into negotiations with Belgium with a view to providing for arbitration). Up to October 2015, no arbitration was requested under the treaties in force.

Arbitration with the United States largely follows the provisions included in other US treaties. A case should not be submitted to arbitration if the competent authorities agree, before the date on which arbitration proceedings would otherwise have begun, that the outstanding matter is not suitable for arbitration. The competent authority of one state alone cannot prevent a case from going to arbitration. Collusion between both competent authorities could, however, prevent some cases from being resolved through arbitration despite the taxpayer's request. This could, in particular, be true where a case involves improper use of a DTA or a violation of domestic law committed with fraudulent intent. Under the memorandum of understanding (MOU), these cases are in principle considered ineligible for arbitration by Belgium and the United States (reference to section 12.02(8)(d)

31 The JTPF has recommended that action resulting in double taxation does not require that the TP adjustment lead to an actual payment of tax. See n. 30, para. 5, p. 3.

32 See n. 30.

33 See n. 30, paras. 7 and 8, p. 4.

of Revenue Procedure 2006-54).[34] The Belgian competent authority will, however, take all the facts and circumstances of each case into consideration before agreeing to deny access to arbitration.

Unlike in other tax treaties concluded by the United States, arbitration is not limited to specific articles. Taxation resulting from the application of any article may be submitted to arbitration, except article 4(5) dealing with double residence of persons other than an individual, under which the competent authorities need only endeavour to settle the question by mutual agreement, and article 21(7) which provides for discretionary relief under the limitation on benefits article.

The arbitration board will adopt as its determination one of the proposed resolutions submitted by the contracting states ("last best offer"). This is not a default rule: the Convention does not allow the competent authorities to agree that the "independent opinion" approach will be followed in a specific case or that the determination will state a rationale.[35] These and other rules are included in the protocol to the Convention and can only be changed by treaty.

Although Belgian treaty negotiators prefer the "independent opinion" approach, which produces an objective and reasoned opinion that both states might apply to other similar cases, Belgium should consider proposing the "last best offer" approach as the default rule to its treaty partner. This approach is simpler and quicker to apply and is favoured by the Belgian competent authority. It would consequently reduce the risk of arbitration being unduly delayed where the competent authorities were unable to resolve a case.

Belgium considers that mandatory binding arbitration is the best way to ensure that tax treaty disputes are effectively resolved through an MAP. A group of countries involved in the OECD/G20 BEPS work have committed to adopting and implementing mandatory binding arbitration. Although some countries, including Belgium, prefer to have no limitations on the cases eligible for arbitration, others consider that arbitration should be limited to a subset of cases. The following possible limitations have been suggested: only cases involving specific articles (e.g. articles 5, 7 and 9), only cases of actual double taxation, exclusion of cases involving application of treaty or domestic law anti-abuse rules, exclusion of any case that both competent authorities consider not suitable for arbitration. During the negotiation of the multilateral instrument envisaged under BEPS action 15, Belgium will defend the view that the multilateral instrument should include article 25(5) of the OECD model and, for countries that may not agree on that provision, an alternative provision with a limited scope. Among the possible limitations, Belgium could support the option limiting arbitration to cases of actual double taxation, provided the term "taxation" is defined. Specific cases of intended double non-taxation should also be expressly covered by arbitration (e.g. treaty benefits for pension funds or for dividends paid to an affiliate company). Such limited arbitration is, however, not ideal. It would allow the competent authority of one of the contracting states to refuse to resolve taxation not in accordance with a treaty provision in cases where a treaty benefit is not subject to the condition that the income be taxed in the other state.

[34] Published on http://www.irs.gov/Businesses/International-Businesses/Belgium–Tax-Treaty-Documents.
[35] Point 6(b)(h)(j) of the protocol.

Where a DTA does not provide for mandatory/voluntary binding arbitration, it is still possible for the competent authorities to agree to submit a specific unresolved issue to binding arbitration (the Belgian competent authority has recently concluded such an agreement) or to agree to submit any unresolved MAP issues to mandatory binding arbitration.[36]

4. Internal regulations regarding MAPs

Belgium has not published guidelines regarding MAP rules but follows most of the MEMAP best practice.[37] Guidelines should be published in 2016 to conform to the minimum standard agreed under BEPS action 14.[38] The following and other rules should be clarified in these guidelines.

4.1. Access to MAP

In practice, access to MAP is not restricted in any way. Belgium gives MAP access in case of audit settlement or unilateral APA (see sections 1.2 and 2.2).[39] It gives MAP access for cases described as "tax avoidance" cases to at least allow the competent authorities to endeavour to resolve these cases (see section 3.2.3).[40] The BTA gives the taxpayers the benefit of the doubt in borderline cases concerning the starting point of the deadline for presenting a case, although it is strict where the request is clearly after the deadline; the notice of assessment indicates the mail and email addresses where information on the MAP can be obtained.[41]

4.2. Additional requirements for initiation

No specific form is required but an MAP request must be filed in writing and must be justified. Succinct information is sufficient to consider that a case has been presented to the competent authority under an MAP.

To determine whether the objection appears justified and to initiate the case, the information mentioned under paragraph 2.2.1 of the MEMAP is considered sufficient. Taxpayers may communicate with the BTA electronically.

4.3. 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 that taxation was in accordance with the Convention, late payment interest is calculated as of the day the tax was due until payment. Where tax has been paid and taxation is relieved by

36 Para. 69 of the commentary on art. 25 of the OECD model.
37 Guidelines regarding the Arbitration Convention have been published (Circulars AAF/InterISR/98-0170 of 7 July 2000 and 25 March 2003).
38 Report on action 14, element 2.1 of the minimum standard.
39 Report on action 14, element 2.6 of the minimum standard.
40 Report on action 14, element 1.2 of the minimum standard.
41 MEMAP best practice 9 and Circular AAF/InterISR/98-0170 of 7 July 2000, p. 10.

mutual agreement, default interest is due. The legal interest rate is applicable for late payment interest and default interest.[42]

Where the competent authorities agree that taxation is, in whole or in part, not in accordance with the DTA, Belgian tax increases computed with reference to the amount of taxation (article 444 ITC) are reduced accordingly. Administrative penalties that relate to domestic law compliance (article 445 ITC) do not fall within the scope of article 25(1)(2). The Belgian competent authority is, however, prepared to discuss these penalties with the other competent authority pursuant to article 25(3) on a case by case basis. Where, for example, an administrative penalty for fraud has been levied and it appears during an MAP that there was no fraudulent intent, the penalty may be reduced or withdrawn by mutual agreement. The Belgian competent authority has no legal authority to reduce or withdraw criminal penalties (article 449 ITC). Article 24(3)(f) of the United States–Belgium treaty provides expressly that the competent authorities may agree to the application of the provisions of domestic law regarding penalties, fines and interest in a manner consistent with the purposes of the Convention.

4.4. Taxpayers' participation

Taxpayers are not a party to MAPs and have no right to participate in the negotiations between the competent authorities. The rights guaranteed under domestic administrative appeal are not applicable.

Under Belgian practice, taxpayers have the right to make written applications and be represented during the MAP. They have no right to be heard but the BTA accepts, most often, a request to be heard and invites taxpayers to explain the facts and their views. Upon request, the BTA informs taxpayers on the progress of their case.

Normally, the BTA gives taxpayers no access to the MAP file to ensure the confidentiality of information exchanged for the purpose of the MAP. Access can, however, be given with the express consent of the other competent authority. Although the resolution achieved by the competent authorities need not be reasoned, the reasons and principles of the outcome are generally briefly explained.

Especially in TP cases, if the BTA is to achieve an appropriate result, it must rely on the taxpayer's information and views to have a comprehensive picture of the case. Close cooperation with the taxpayer during the MAP may generally help achieve a quicker resolution of the case. As a matter of policy, the BTA therefore grants taxpayers extensive access to the MAP, including the possibility, where appropriate, of explaining the facts and their position before a joint commission composed of representatives of both competent authorities.

4.5. Domestic courts versus MAP

Under the domestic law of many countries, no one can be deprived of judicial domestic law remedies.[43] The MAP is therefore an additional procedure available

[42] Annual rate of 2.5 per cent in 2015.
[43] Arts. 144–146 of the Belgian Constitution.

to taxpayers irrespective of the judicial remedies provided by the domestic law of the contracting states.

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. Also, after being informed of the resolution reached within the MAP, taxpayers may prefer to pursue the disputed issue before domestic courts. To allow taxpayers to use both MAP and domestic law remedies, the BTA applies the following rules.

The BTA deals with a taxpayer's case through the MAP and in domestic proceedings at the same time; it does not require the taxpayer to choose which of the MAP or the domestic law proceedings have precedence. The Belgian competent authority is prepared to discuss a case in depth under the MAP notwithstanding an on-going suit on the same issues. The choice of remedies remains with the taxpayer.[44]

Where a final decision wholly or partly confirms Belgian taxation before a mutual agreement is reached, the Belgian competent authority may consider that this prevents it from agreeing to another solution and restricts it to requesting that the other contracting state provide relief under the MAP (unless the MAP reveals clear evidence that taxation was not in accordance with the DTA).

Pursuant to arbitration provisions in DTAs, unresolved issues are generally excluded from arbitration where a decision has already been rendered on an issue by a court or administrative tribunal of either state.

Where a mutual resolution is agreed or an arbitration decision is taken before a domestic court decision has been rendered, the mutual agreement implementing this resolution or decision is subject to the taxpayer's acceptance and withdrawal of domestic law recourses concerning the issues settled in the mutual agreement. This aims at avoiding divergences between the mutual agreement and a subsequent court decision and possible unintended double non-taxation.[45]

The Belgian competent authority would reject a request by a taxpayer to be allowed to defer acceptance of the mutual agreement until a court decision is delivered on the issues under MAP. Thus, the BTA does not follow the interpretation found under paragraph 42 of the commentary on article 25 of the OECD model, which states that there would be no grounds for rejecting such a request. Following this interpretation would, however, allow a taxpayer to choose the best possible dispute resolution and could compensate taxpayers' concerns that the MAP is not transparent enough and does not permit their active participation.

According to the BTA, it would be preferable for the taxpayer to request the suspension of the domestic law proceedings and pursue the MAP first.[46] An agreement reached through the MAP will generally provide a bilateral resolution of the case. A domestic recourse, in contrast, will only settle the issue in Belgium and may fail to relieve international double taxation. If the taxpayer was not satisfied by the agreement reached through the MAP, he would be allowed to reject it and to

44 Report on action 14, best practice 7.

45 Paras. 45 and 82 of the commentary on art. 25 of the OECD model.

46 Pursuant to 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.

resume the domestic recourse. The public discussion draft on BEPS action 14 proposed that countries commit to facilitate the MAP as a first option, for example, by providing for the suspension of domestic law proceedings as long as an MAP case is pending. This option has, however, given rise to public comments stating that MAP and domestic law remedies should not exclude each other and that the taxpayer should be free to choose either of them or proceed with both simultaneously. Belgian practices are in line with these expectations as the taxpayer is left free to suspend judicial recourses or not.

However, under the MOU relating to the arbitration procedures set forth in the United States–Belgium treaty, where a taxpayer has introduced an administrative appeal or judicial proceedings in the case for which assistance under the MAP is requested, the case will be considered not suitable for arbitration as long as the appeal or proceedings have not been suspended until a mutual agreement has been reached.[47]

4.6. Difficulties of a general nature

Issues of a general nature regarding the interpretation or application of a DTA may be resolved by mutual agreement under the first sentence of article 25(3) of the OECD model. Agreeing on and publishing mutual agreements applying to all or a category of taxpayers may proactively resolve future disputes. Belgium favours that practice.[48] For instance, the Belgian and German competent authorities have concluded a mutual agreement clarifying that severance payments made to an employee whose employment has been terminated constitutes remuneration derived from the employment and is taxable in the state where the employment was exercised.[49] The German Supreme Court has, however, decided that, pursuant to article 15 of the DTA, severance payments are exclusively taxable in the resident state.[50] That decision has resulted in double non-taxation in the case under consideration. The Court held that the wording of the DTA was sufficiently clear and that the mutually agreed interpretation went beyond the text of the DTA. As the mutual agreement supported the Belgian courts' interpretation and conformed to the subsequent interpretation held in the 2014 update of the OECD model, it seems obvious that the wording of the DTA was not clear enough and that the mutual agreement did not go beyond the text of the DTA.

No consensus on the binding character of such a mutual agreement exists in Belgium.[51] This may create instances of double non-taxation (or double taxation) and may deter the competent authorities from concluding general mutual agreements. The OECD commentary should therefore consolidate the legal status of mutual agreements relating to the meaning of incompletely or ambiguously defined terms or conflicts in meaning under the laws of the contracting states. Under article

47 See n. 34.

48 Report on action 14, best practice 2.

49 Mutual agreement of 15 December 2006 (www.fisconet.be).

50 Federal Finance Court, Judgment of 2 September 2009 I R 90/08.

51 For an overview under the Belgian legal system, see Luc De Broe and Christophe De Backere, "Over de – miskende? – doorwerking van internationaalrechtelijk verbindende onderlinge akkoorden (mutual agreements) in de Belgische rechtsorde", *Algemenen Fiscaal Tijdschrift* 2014/1.

31(3)(b) of the Vienna Convention of the Law of Treaties, "any subsequent practice in the application of a treaty which establishes the agreement of the parties regarding its interpretation" constitutes a means of interpretation to be taken into consideration together with the context of a treaty. A common understanding and common "practice" by the tax administrations consolidated in an agreement should thus be taken into consideration by courts in interpreting a DTA. The BTA is examining the possibility of giving more weight to general mutual agreements through an express provision in DTAs. Taxpayers might, however, consider that courts should be left free to decide their own interpretation of treaty provisions without being constrained in any way by the agreed interpretation reached by the competent authorities.

5. Alternative solutions

5.1. Pre-consultation

Exchange of information, simultaneous examinations and joint audits may allow tax administrations to agree on a common approach before assessments and thus avoid subsequent disputes. The BTA conducts simultaneous examinations of TP cases with the tax administrations of neighbouring countries. It has participated in no joint audit although several administrative arrangements organise the presence of foreign tax auditors in Belgium to investigate and vice versa.

Where taxpayers follow MEMAP best practice 8 and notify a competent authority of a potential MAP case as soon as it appears likely that taxation not in accordance with the DTA may occur, an early resolution of the case at the audit level and with the assistance of the MAP teams is possible. The BTA does not, however, favour such an early consideration. It is more difficult for an MAP team to preserve its independence if it is actively involved in tax audits.[52] Taking into consideration the current Belgian caseload, early resolution of cases is not a priority at the moment.

5.2. Mediation/conciliation

Absent mandatory binding arbitration, the help of a mediator could contribute to the resolution of old cases. Mediators can get a situation back on course, persuade the parties to adopt a different approach and resolve misunderstandings. They can render parties more informed as to the issues on which to concentrate and can highlight the strengths and weaknesses of their respective positions. The BTA will envisage this solution in the future.

Under Belgian law, conciliation may help in resolving tax issues under consideration by the BTA following an administrative appeal.

[52] Report on action 14, element 2.3 of the minimum standard.

5.3. Expertise of a tax expert

Such expertise could help cooperative competent authorities to work out a solution in complex cases.

5.4. Mandatory non-binding arbitration

Mandatory non-binding arbitration was envisaged as an alternative during the work on BEPS action 14. It was not retained. It would give no certainty as to the resolution of a case and would delay the closing of a case where a competent authority was determined to stick to its view without regard to the arbitral opinion.