Competent Authorities of Ukraine in the Context of Mutual Agreement Procedure under Double Taxation Treaties

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Abstract

The article is dedicated to the identification of the issues related to competent authorities that might impact the efficiency and effectiveness of mutual agreement procedure (MAP) as a tax treaty-related mechanism in Ukraine. In this context, the author applies comparative method based on the provisions of the OECD Model Tax Convention on Income and on Capital (2017) as the primary method but also analyses the impact of the domestic law on the scope of powers and the functions of the competent authorities. There are three issues related to competent authorities that are considered by the author and might have negative impact on MAP as dispute resolution mechanism: (i) the uncertainty of option of delegation of powers of competent authority from the STS of Ukraine to the MoF of Ukraine; (ii) the ambiguity related to the impact of mutual agreements of competent authorities on the activity of other executive bodies of power at the domestic level; (iii) the absence of opportunity of competent authorities to initiate specific case MAP in case of the issuance by the MoF of Ukraine of the general tax consultations before their provisions are resulted in the actions of the tax authorities of Ukraine.

Keywords*: double taxation treaties, mutual agreement procedure, competent authorities, dispute resolution, administrative cooperation.*

JEL Classification*:* K34

1. Introduction

The mutual agreement procedure (MAP) under the double taxation treaties (DTTs) is of top importance for the resolution of tax treaty-related disputes that might arise in the context of interpretation and application of treaty provisions by the tax authority of either contracting state. The main idea behind the MAP is 'to provide foreign taxpayers with the assurance that a potentially incorrect application of treaty provisions by one treaty State may be brought to the attention of tax officials from the other treaty State'.[2] During its long history started at the end of XIX century,[3] the MAP has stayed the unique instrument of administrative cooperation aimed at (i) provision of not only certainty and predictability in the application of treaty provisions but also the flexibility of the latter ones in the changing circumstances of international taxation through the consultative process, and (ii) resolution of individual cases that might arise due to taxation not in accordance with the provisions of tax treaties.

Foreign investors investing in Ukraine can benefit from the protection and rights provided for in double taxation treaties signed between Ukraine and other states, including but not limited to the resolution of any disputes related to taxation. The

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[2] UN. *UN Handbook on Dispute Avoidance and Resolution* (UN, 2021), p. 111, para. 2.

[3] Zvi Daniel Altman, 'Chapter 1: Defining the Research Questions', para.1.2.1.1. In: *Dispute Resolution under Tax Treaties* (IBFD, 2005), IBFD Books, available at https://research.ibfd.org/#/doc?url=/document/drtt_s_1.

competent authorities are responsible for the administration and enforcement of double taxation treaties, here referring to the Ministry of Finance, the State Tax Service and other relevant agencies involved in the taxation process.

The link between foreign investment and the competent authorities of Ukraine in the context of the mutual agreement procedure under the double taxation treaties is that foreign investors can use this procedure to resolve possible double taxation disputes or inconsistent interpretations of taxation between Ukraine and other treaty contracting states. In this way, foreign investors benefit from the special protection of managing these procedures within a monitored administrative framework, but also through cooperation with similar authorities in other jurisdictions involved. The effectiveness and efficiency of the MAP under the DTTs depend on those authorities that are authorized to conduct MAP and each contracting state designates such authorities separately (so-called competent authorities). As it is explained, 'a "competent authority" is a term used in tax conventions to identify the position, person, or body to whom issues can be addressed within the contracting state that is one of the two parties to a tax convention'.[4] Nevertheless, the practice of application of treaty provisions demonstrates that such issues as the scope of powers of competent authorities, the optimal model of organization of competent authority function or the applicability of domestic limitations to activity of competent authorities is still open for discussion: 'The role of the Competent Authority is one of the most misunderstood in any tax administration or finance ministry (even the necessity of using two terms reveals something of the problem), partly because so little is known about how Competent Authority work is carried out'.[5]

In Ukraine, the issue of competent authority has received additional layer of complexity due to the fact that there is more than 70 DTTs in effect at the beginning of 2023 but their provisions point out at different public authorities of Ukraine as a competent authority, i.e. the Ministry of finance (MoF) of Ukraine or the State Tax Service (STS) of Ukraine, depending on the year of conclusion of the specific DTT. Such result has been determined by the different approaches that were applied by Ukraine as a contracting state before the middle of 2000s. In the period from the end of 1990s and up to 2005, Ukraine defined the predecessor of the State Tax Service of Ukraine as a competent authority in the DTTs of Ukraine with such states as Algeria, Azerbaijan, Brazil, Greece, India, Israel, Yugoslavia, Korea, Lebanon, Mongolia, North Macedonia, Portugal, Slovenia, South Africa, Syria, Tajikistan, Turkmenistan. There is a tendency to replace the STS of Ukraine as a competent authority by the MoF of Ukraine in the DTTs of Ukraine (for example, such replacement took place in the DTT with Switzerland in 2019 or the DTT with the UAE in 2021) but it will take a lot of time to conduct such replacements in all cases. Nevertheless, the need to build effective competent authority function is already reflected in the agenda of Ukraine and determines the purpose of this research which is to identify the issues related to competent authorities that might impact the efficiency and effectiveness of MAP as a tax treaty-related mechanism for dispute resolution in Ukraine. Unfortunately, such issue has not been in the focus of research

[4] OECD. *Manual on Effective Mutual Agreement Procedures (MEMAP)* (2007), p. 10, para. 1.3, available at <https://www.oecd.org/ctp/38061910.pdf >.

[5] Edward Morris, 'International dispute resolution: the myths of Competent Authority', *Tax Planning International Transfer Pricing*, 2009, Vol. 10, no. 4, p. 4.

interests of the Ukrainian scholars.

The structure of this research is determined by its purpose and includes such sections as (i) the general description of MAP as a dispute resolution mechanism and the role of competent authorities, (ii) the competent authorities of Ukraine in the context of the network of its tax treaties, and (iii) the potential issues that should be addressed in the process of building effective competent authority function in Ukraine.

2. MAP as a dispute resolution mechanism and the role of competent authorities in ensuring its effectiveness

The most DTTs that are still in effect as of today are based on the recommendations of the OECD Model Tax Convention on Income and on Capital (OECD MTC) in the context of wording of their provisions regarding MAP which is determined by the role of the OECD as a standard-setter in international taxation.[6] Among all the provisions of the OECD MTC related to MAP, the central role belongs to Art. 25 of the OECD MTC which generally proposes three main types of MAP, i.e. specific case MAP (Art. 25(1) and (2) of the OECD MTC), interpretative MAP (the first sentence of Art. 25(3) of the OECD MTC), and legislative MAP (the second sentence of Art. 25(3) of the OECD MTC) (MAP arbitration is not covered by this analysis as such opportunity is presented only in three DTTs of Ukraine at the moment).

Each type of MAP has its own goals. If the specific case MAP requires from the competent authorities to 'endeavour by mutual agreement to resolve the situation of taxpayers subjected to taxation not in accordance with' the treaty provisions (para. 2 of the Commentary to Art. 25 of the OECD MTC), the interpretative MAP allows the competent authorities 'to resolve by mutual agreement problems relating to the interpretation or application of the Convention' (para. 3 of the Commentary to Art. 25 of the OECD MTC). In contrast to the specific case MAP and the interpretative MAP, the legislative MAP proposes only 'to consult together for the elimination of double taxation in cases not provided for in the Convention' (para. 3 of the Commentary to Art. 25 of the OECD MTC).[7] The features of the legislative MAP are considered by some researchers as so critical that it is not characterized as 'a real dispute settlement procedure' but 'as a procedure aimed at filling gaps in treaty coverage to the extent those gaps have led to double taxation'.[8]

The structure of Art. 25 of the OECD MTC is impacted by the nature of the tax disputes related to interpretation and application of the provisions of DTTs that might be generally divided into two types depending on the role of taxpayer: (i) taxpayer-state disputes that are considered as vertical arise from conflicting positions between the taxpayer and the contracting state taxing such taxpayer, and (ii) state-state disputes as horizontal occur in case of divergent or conflicting positions of contracting states in the same situation. It should be mentioned that the latter ones might be rooted in the previous

[6] Richard Vann, 'Chapter 3: International Tax Policy and International Tax Institutions: Never the Twain?'. In: Guglielmo Maisto (ed.) *Current Tax Treaty Issues* (IBFD, 2020), p. 72.
[7] OECD. *Model Tax Convention on Income and on Capital: Condensed Version 2017* (OECD Publishing, 2017), p. 429.
[8] Gerrit Groen, 'Arbitration in Bilateral Tax Treaties', *INTERTAX*, 2002, Vol. 30, Issue 1, p. 6.

dispute of the former type.[9]

The first category of disputes covers, in particular, such common cases as (i) questions relating to the attribution of profits to a permanent establishment, (ii) the taxation in the state of source of the excess part of interest and royalties subject to special relationship between the payer and the beneficial owner, (iii) the application of legislation to deal with thin capitalisation when the state of the debtor company has treated interest as dividends, (iv) the determination of residence, (v) the existence of a permanent establishment, (vi) the temporary nature of the services performed by an employee, or (vii) the economic double taxation in the context of transfer pricing (paras. 9 and 10 of the Commentary to Art. 25 of the OECD MTC).[10]

The second category of cases might address such types of situations as (i) completion or clarification of the definition of the term that has been incompletely or ambiguously defined to obviate any difficulty, (ii) settlement of any difficulties that may emerge from the system of taxation that has been introduced by either contracting state after the conclusion of the DTT and impairs the balance or affects the substance of such treaty, (iii) determination of the opportunity and the conditions of interest to be treated as dividends under thin capitalisation rules in the country of the borrower and provision of relief for double taxation in the country of residence of the lender in the same way as for dividends, (iv) conclusion of bilateral or multilateral advance pricing arrangements (APAs), (v) determination of appropriate procedures, conditions and modalities for the application of the provisions on the specific case MAP (para. 52 of the Commentary to Art. 25 of the OECD MTC).[11]

The competent authorities play the crucial role in MAP whether it is the specific case MAP, the interpretative MAP or the legislative MAP. The determinative factor here is the government-to-government nature of MAP as tax treaty-related dispute resolution mechanism: 'The competent authority is the gatekeeper, prosecutor and judge: it decides whether (and when) to contact the other competent authority, and, together with that other competent authority, presides over the proceedings and decides on the outcome'.[12] At the same time, it does not mean that the competent authority acts at its own discretion based on the national interests of contracting state that is represented by it because the role of competent authority 'is sanctioned by the relevant tax convention between two countries; as such the person carrying out the role serves as an "officer of the treaty" and that person is not supposed to be bound by narrow national interest'.[13]

The public body of executive power designated as a competent authority should have been delegated the powers to participate in the MAP and conclude mutual agreement that underlines the need to understand the scope of competence of either competent authority at the domestic level.

On the one hand, the scope of powers of competent authorities should ensure them the opportunities to find mutual solutions for different issues related to interpretation or application of the provisions of the applicable DTT whether they have

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[9] Luciana Nobrega e Silva Loureiro, 'Mutual agreement procedure: preventing the compulsory jurisdiction of the International Court of Justice?', *INTERTAX*, 2009, Vol. 37, No. 10, p. 534.
[10] See (n 7), pp. 431-432.
[11] Ibid, pp. 450-451.
[12] Lucas de Heer, 'In for a Penny, in for a Pound: Anti-Tax Avoidance Initiatives and Dispute Resolution', *EUROPEAN TAXATION*, 2016, Vol. 56, No. 8, p. 328.
[13] See (n 5), p. 4.

individual or general nature, but it is delegated by the contracting state based on the provisions of its domestic law. Consequently, the competent authority should comply with the limitations set at the domestic level of the contracting state represented by it. In other words, 'when power is delegated, the power should carry significant limitations as to its scope and duration',[14] i.e. the powers of competent authorities depends on the features of domestic law of the contracting state that is represented by such competent authority.

On the other hand, the reasonable balance between the need of effective resolution of tax treaty-related disputes and the limitation of powers of competent authority determined by the provisions of the domestic law is the key that might impact on the effectiveness of MAP in both ways. For example, the issue of competence of authorities involved into interpretative MAP and their productive interaction might receive additional significance in cases that are related to difficulties 'which could impair or impede the normal operation of the clauses of the Convention as they were conceived by the negotiators, the solution of which does not depend on a prior agreement as to the interpretation of the Convention' (para. 51 of the Commentary to Art. 25 of the OECD MTC).[15] It is determined by the assumption that the potential failure of interpretative MAP in this case might lead to risk of undermining legal certainty, interfering with legitimate expectations of taxpayers and even damaging respect to rule of law. As it follows, the delicate balance should be found between, the scope of powers of competent authorities in the context of interpretative MAP in the light of rule of law and the compliance with the international commitments to perform the duty to resolve by mutual agreement in good faith at least in the cases of taxation not in accordance with the provisions of the applicable DTT (even though the reference to good faith is made in the context of the specific case MAP in accordance with para. 5.1 of the Commentary to Art. 25 of the OECD MTC, it is difficult to explain why the other types of MAP should not be covered by the scope of the same requirement).

3. The competent authorities in the context of the network of the DTTs of Ukraine

The most DTTs of Ukraine mention the MoF of Ukraine as the competent authority and only less than twenty of them provide such role to the STS of Ukraine whereas Ukraine has 72 DTTs as of January 2023. The existence of two competent authorities responsible for MAP function might lead to duplication of powers and inefficient use of scarce public resources that determines the need to avoid such possible negative consequences. As it is stated, 'most competent authorities delegate the full powers of the function (in other words, the legal authority to conclude a MAP arrangement) to the required personnel who carry out, or are involved in, the day-to-day functioning of the MAP program'.[16] Consequently, there is a need to amend the existing approach of Ukraine by introduction of, on the one hand, the consistent practice in the

[14] Craig West, 'Chapter 4: Substantive Tax Law', para. 4.2.3.2. In: Pasquale Pistone et al. (eds.) *Fundamentals of Taxation: An Introduction to Tax Policy, Tax Law and Tax Administration* (IBFD, 2019), Books IBFD, available at <https://research.ibfd.org/#/doc?url=/document/pt_c04>.
[15] See (n 7), p. 450.
[16] See (n 4), p. 39, para. 5.1.

light of designation of competent authorities under the DTTs and, on the other hand, to implement coordination mechanism of activities of both competent authorities under the DTTs of Ukraine at the domestic level where it is relevant.

First of all, there is a need to define the scope of powers of the MoF of Ukraine and the STS of Ukraine as the competent authorities in accordance with the provisions of the domestic law.

The MoF of Ukraine is the central body in the system of executive authorities of Ukraine which is responsible, in particular, for the formation and performance of a single public tax policy, public policy with regards to combating violations of tax legislation, public policy in the area of control over transfer pricing, and public financial policy in the area of international cooperation (subclause 3 of clause 3 of the Statute of the MoF of Ukraine).[17] The functions of the MoF of Ukraine in tax matters are also mentioned in the provisions of the Tax Code of Ukraine where it is stated that the MoF of Ukraine as a competent authority is obliged 'to carry out mutual agreement procedures in accordance with the double taxation treaties of Ukraine' (Art. 19-2.1.6 of the Tax Code of Ukraine).[18] In addition, it is also mentioned that the MoF of Ukraine might issue normative acts aimed at legal regulation in the areas covered by the competence of the MoF of Ukraine including formation and implementation of tax policy (subclause 5 of clause 4 of the Statute of the MoF of Ukraine) which is complemented by the duty to apply the measures on the preparation to implementation into the domestic legislation of the recommendations of the OECD in the area of international taxation (subclause 5-1 of the clause 4 of the Statute of the MoF of Ukraine).[19] As it seems, the combination of the abovementioned powers provides the MoF of Ukraine with broad competence in the context of interpretation and application of the provisions of the DTTs of Ukraine in general and in the framework of the MAP in particular whether it is specific case MAP or interpretative MAP. In other words, the MoF of Ukraine as a competent authority is entitled to participate in the MAPs under the DTTs of Ukraine and is provided with powers to address the issues on interpretation and application of the provisions of the DTTs of Ukraine in the framework of the MAP following such general goal as the formation and implementation of a single public tax policy under the domestic law. Nevertheless, some powers of the MoF of Ukraine as a competent authority are hardly be considered as provided with the detailed mechanism of their application (for example, it is not clear what are the procedural details of requesting additional information by the MoF of Ukraine as a competent authority at the first (domestic) stage of the specific case MAP under Art. 108-1.3.2 of the Tax Code of Ukraine).

In contrast to the MoF of Ukraine, the case of the STS of Ukraine as a competent authority is more ambiguous. Taking into consideration that the STS of Ukraine is responsible only for tax policy implementation, the Tax Code of Ukraine provides less broad scope of functions to the STS of Ukraine in the area of international relations. In particular, the STS of Ukraine has to ensure the performance of the international treaties

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[17] On the approval of the Regulation on the Ministry of Finance of Ukraine: Resolution of the Cabinet of Ministers of Ukraine No. 375 of August 20, 2014, access mode: <https://zakon.rada.gov.ua/laws/show/375-2014-%D0%BF#Text>.

[18] Tax Code of Ukraine dated December 2, 2010 (with additions), access mode: <https://zakon.rada.gov.ua/laws/show/2755-17#Text>.

[19] See (n 17).

that are concluded and conduct the international cooperation in tax matters. There is no reference to such function of the STS of Ukraine as participation in the MAP on the basis of the DTTs of Ukraine but it might be assumed that the competence regarding MAP could be deduced from the combination of both functions mentioned above. In other words, the STS of Ukraine has relevant competence in the specific case MAP at the domestic level where such MAP is limited by the conflict in fact. The issue arise in case of the interpretative MAP as the application of its outcome is not typically limited by the specific case of the taxpayer and might be considered in this context as going beyond mere performance of the international treaties. Again, the MoF of Ukraine has the function of formation of tax policy of Ukraine including the tax treaty policy but not the STS of Ukraine. Therefore, the competence of the STS of Ukraine as a competent authority in case of interpretative MAP is at least disputable.

The separate issue is the scope of powers of competent authorities in the framework of the legislative MAP. In accordance with Art. 67 of the Constitution of Ukraine, 'everyone is obliged to pay taxes and levies in accordance with the procedure and in the extent established by the law'.[20] This position is complemented by para. 1 of the second part of Art. 92 of the Constitution of Ukraine where it is stated that the system of taxation, taxes and levies might be adopted only by the laws of Ukraine. Moreover, as it is clarified by the Constitutional Court of Ukraine, the power to introduce or repeal of taxes is the exceptional competence of the Verkhovna Rada of Ukraine which should be considered as 'the right of the parliament to determine all elements of legal regulation of taxes and levies (mandatory fees)' (para. 5 of the reasoning part of the Judgement of the Constitutional Court of Ukraine No. 15-rp/2009 of 23 June 2009).[21] In this context, it is worth mentioning that the Constitutional Court of Ukraine has clarified also the meaning of the term 'elements of legal regulation of taxes and levies (mandatory fees)' which covers 'taxpayer, object of taxation, source of payment of tax, tax rate, taxable period, terms and order of payment of tax, tax quota, tax reliefs' (para. 4 of the reasoning part of the Judgement of the Constitutional Court of Ukraine No. 15-rp/2009 of 23 June 2009).[22] In accordance with such explanation, the Tax Code of Ukraine includes the principle of uniform approach to establishment of taxes and levies, i.e. 'determination of all necessary elements of tax on the level of legislation' (Art. 4.1.11 of the Tax Code of Ukraine).[23]

As it seems, the position of Ukraine in relation to the second sentence of Art. 25(3) of the OECD MTC has been, in particular, determined by the limitations imposed by the constitutional law of Ukraine, i.e. the competent authorities of Ukraine have no powers under the domestic legislation to eliminate double taxation in cases not provided in the treaty provisions.[24] Due to the exceptional right of the Verkhovna Rada of Ukraine to determine all elements of legal regulation of taxes and levies (mandatory fees) that could not be transferred, the competent authorities could not eliminate double taxation not provided in the provisions of the applicable DTT because they are obliged by the

[20] Constitution of Ukraine dated June 28, 1996, access mode: <https://zakon.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80#Text>.
[21] Decision of the Constitutional Court of Ukraine dated June 23, 2009 in case No. 1-21/2009, access mode: <https://zakon.rada.gov.ua/laws/show/v015p710-09#Text>.
[22] Ibid.
[23] See (n 18).
[24] See (n 7), p. 649.

application of the provisions of domestic tax laws that are not challenged. Therefore, they could only 'agree on the facts and circumstances of a case in order to apply their respective domestic tax laws in a coherent manner, in particular with respect to any dealings between those permanent establishments' (para. 55.1 of the Commentary to Art. 25 of the OECD MTC).[25]

4. The potential challenges in building effective competent authority function in Ukraine

The existing difference in the competence of the MoF of Ukraine and the STS of Ukraine might determine the practical issues related to building effective competent authority function. On the one hand, it is obvious that the duplication of MAP function and resources involved in any MAP case in the context of each authority mentioned above is hardly could be considered as an optimal way of operation of MAP. On the other hand, it is obvious that the effectiveness and efficiency of MAP function should be based on the active cooperation of the MoF of Ukraine and the STS of Ukraine especially in the transitory period, i.e. until the STS of Ukraine will be replaced by the MoF of Ukraine as competent authority in all DTTs of Ukraine.

One of the problems related to competent authorities of Ukraine is the delegation of powers of competent authority from the STS of Ukraine to the MoF of Ukraine. In this context, the Art. 108-1.1.3 of the Tax Code of Ukraine confirms that the competent authority of Ukraine is the MoF of Ukraine or other authority authorized by the MoF of Ukraine unless the other approach is applied according to the DTTs of Ukraine. It is also clarified that the MoF of Ukraine can make a decision to delegate its powers on MAP to other authority unless the otherwise is stated in the provisions of the DTTs of Ukraine. Nevertheless, it is still unclear whether the STS of Ukraine might delegate its powers on MAP if it is the competent authority under the provisions of a DTT with Ukraine as it follows from the wording of Art. 108-1.1.3 of the Tax Code of Ukraine. On the one hand, the provisions of the Tax Code of Ukraine do not mention this right of the STS of Ukraine directly in contrast to the MoF of Ukraine. On the other hand, nothing in the DTTs of Ukraine points out at the exclusion of the right of the STS of Ukraine from the delegation of powers to other authorities in accordance with the domestic legislation of Ukraine if it is designated as the competent authority under the provisions of a DTT of Ukraine.

The other issue is the impact of mutual agreements concluded by the competent authority of Ukraine on the activity of other executive bodies at the domestic level, especially tax authorities. Due to the fact that interpretative MAP might be conducted by different competent authorities in Ukraine, depending on the provisions of the applicable DTT, it is not clear whether the interpretative mutual agreement concluded by the MoF of Ukraine is bound to the STS of Ukraine and vice versa. As the MoF of Ukraine is the central body in the system of executive authorities of Ukraine which is responsible, in particular, for the formation and performance of a single public tax policy, it has the powers to issue normative acts that are mandatory to other bodies of power as well as citizens and corporate entities (para. 8 of the Statute of the MoF of Ukraine).[26]

[25] Ibid, p. 452.
[26] See (n 17).

Consequently, if the MoF of Ukraine issues the normative act which makes public the content of interpretative mutual agreement, then its provisions are formally bound to the STS of Ukraine too but only subject to compliance of such normative acts with the procedural requirements such as the registration by the Ministry of Justice of Ukraine. The situation is different in case of the STS of Ukraine as a competent authority under the provisions of applicable tax treaty. In this case, it has to be admitted that (i) the STS of Ukraine is responsible only for tax policy implementation, and (ii) its letters that are typically used for making public the content of mutual agreements concluded by the STS of Ukraine could not be considered as binding for taxpayers as well as the MoF of Ukraine as they are not normative legal acts. Consequently, the duty of the MoF of Ukraine to follow the interpretative mutual agreement concluded by the STS of Ukraine might be disputable at the domestic level (it seems that the discussion on the duty of the MoF of Ukraine to follow the provisions of interpretative mutual agreement concluded by the STS of Ukraine becomes less relevant in the context of the principle of *pacta sunt servanda* and the rules of interpretation of treaty provisions under Art. 31 and Art. 32 of the Vienna Convention of the Law of Treaties of 23 May 1969).

There is also a potential problem related to initiation of specific case MAP in case where the general tax consultation of the MoF of Ukraine is issued under Art. 19-2.1.5 of the Tax Code of Ukraine which is defined as a public disclosure of official position on practical application of provisions of the domestic legislation based on (i) the analysis of individual tax consultations or (ii) the analysis of circumstances which confirms inconsistency of certain provisions on taxation where the compliance with such provisions is under the supervision of the controlling authorities (Art. 52.6 of the Tax Code of Ukraine). Taking into consideration Art. 108-1.1.1 of the Tax Code of Ukraine, it seems that there is no option to challenge any general tax consultation issued by the MoF of Ukraine based on MAP provisions until it is transformed into the actions or decisions of the STS of Ukraine even in case where it allows to interpret provisions of DTT or domestic legislation in a manner that will result in taxation not in accordance with the provisions of DTT. Therefore, such approach seems disputable in the light of clarification that the MAP 'can be set in motion by a taxpayer without waiting until the taxation considered by him to be "not in accordance with the Convention" has been charged against or notified to him' (para. 14 of the Commentary to Art. 25 of the OECD MTC).[27]

5. Conclusions

The competent authorities of contracting states are the key players in the context of resolution of tax treaty-related disputes in the framework of MAP but the success of their involvement into the MAP, in particular, depends on the provisions of domestic law determining their scope of competence. In this context, the divergent practice of Ukraine regarding the designation of competent authorities has become the source of potential issues related to interaction of the MoF of Ukraine and the STS of Ukraine. Therefore, there is a need not only to avoid the duplication of functions and resources related to MAP function but also to make MAP more effective and efficient in the post-BEPS era.

[27] See (n 7), p. 433.

There are at least three potential issues that might be addressed in the process of improvement of normative basis of MAP at the domestic level: (i) the uncertainty in relation to the option of delegation of powers of competent authority from the STS of Ukraine to the MoF of Ukraine; (ii) the ambiguity regarding the impact of mutual agreements concluded by the competent authority of Ukraine on the activity of other executive bodies of power at the domestic level, especially tax authorities; and (iii) the absence of opportunity of competent authorities to initiate specific case MAP in case of the issuance by the MoF of Ukraine of the general tax consultations before their provisions are resulted in the actions of the tax authorities of Ukraine.

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