20 September 2019

Global Tax Alert

OECD holds first Tax Certainty Day and releases 2018 Mutual Agreement Procedure statistics

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Executive summary

On 16 September 2019, the Organisation for Economic Co-operation and Development (OECD) held its first OECD Tax Certainty Day (the event) at the OECD headquarters in Paris. The event was organized by the OECD Forum on Tax Administration (FTA).[1] Over 200 tax policymakers, tax administration officials, business representatives (including EY professionals) and other stakeholders from over 50 jurisdictions participated. The discussion focused on the state of the tax certainty agenda and ways to make further improvements to both dispute prevention and dispute resolution.

During the event, the OECD published a report on the 2018 Mutual Agreement Procedure (MAP) statistics.[2] For 2018, the report includes statistics from all OECD and G20 members and the members of the OECD Inclusive Framework on base erosion and profit shifting (BEPS) that joined the Inclusive Framework prior to 2019 – for a total of 89 jurisdictions, covering almost all MAP cases worldwide.[3] The report provides data separately for transfer pricing cases and for "other" (i.e., non-transfer pricing) cases for 2018 with respect to the:

- Opening inventory and ending inventory of MAP cases
- Number of new MAP cases started
- Number of MAP cases completed
- Cases closed or withdrawn
- Average cycle time for cases completed, closed or withdrawn

Building a better working world

In addition, the report provides the number of MAP cases that each jurisdiction has with each of its treaty partners. For the first time, the 2018 MAP statistics compare the reporting jurisdictions' performance with respect to key indicators for each type of case through an interactive tool.

Detailed discussion

Background

On 5 October 2015, the OECD released final reports on all 15 focus areas in its BEPS Action Plan. Among the various BEPS reports was the final report on Action 14: *Making Dispute Resolution Mechanisms More Effective* (the Action 14 Report).[4] Improving dispute resolution mechanisms is an integral part of the work on BEPS. The measures developed under BEPS Action 14 and contained in the Action 14 Report are designed to reduce the risks of uncertainty and unintended double taxation by ensuring the consistent and appropriate application of tax treaties, including the effective and timely resolution of MAP disputes.

The Action 14 Report reflects agreement by jurisdictions to a minimum standard with respect to the resolution of treaty-related disputes. One element of the minimum standard requires jurisdictions to seek to resolve MAP cases within an average timeframe of 24 months.

Since 2006, the OECD has been compiling annual statistics on the MAP caseloads of all member countries and of partner economies that agreed to provide such statistics. With effect from reporting period 2016, members of the Inclusive Framework have been reporting their MAP statistics pursuant to an agreed reporting framework.[5]

In November 2017, the OECD released the 2016 MAP statistics, following the agreed reporting framework and covering 65 jurisdictions,[6] and in October 2018 it released the 2017 MAP statistics, covering 87 jurisdictions.[7]

The BEPS Action Plan recognized that actions to counter BEPS must be complemented with actions that ensure certainty and predictability for businesses. Reflecting this recognition, the G20 Leaders at the summit in Hangzhou, China in September 2016 requested that the OECD and the International Monetary Fund (the IMF) work on issues that would support tax certainty. Following this request, the OECD launched a survey inviting businesses and other stakeholders to provide their views on tax certainty, in particular the effects of the direct and indirect tax system on business behavior.[8] The OECD and the IMF issued an initial report on tax certainty in 2017,[9] which was influenced by the survey and which included the results of the survey as an appendix. Following this initial report, the OECD and IMF released an update in 2018[10] and, more recently, the 2019 Progress Report on Tax Certainty.

The OECD Tax Certainty Day

On 16 September 2019, the first OECD Tax Certainty Day took place at the OECD headquarters in Paris, France. As set out in the agenda, the following topics were covered:

- Item 1. Opening Session: Welcome and Introduction: Why does tax certainty matter?
- Item 2. Panel: Tax certainty and the bigger picture
- Item 3. Advance Pricing Agreements
- Item 4. MAP and arbitration
- Item 5. Co-operative compliance: The view from Austria
- Item 6. Co-operative compliance: The view from France
- Item 7. Panel – Co-operative compliance and ICAP[11]
- Item 8. Joint Audits

The sessions on items 1, 2, 5 and 6 are available to watch on demand on the OECD website.

In his opening remarks, the Austrian Minister of Finance, Eduard Müller, described the spectrum of businesses that a tax administration works with. At one end of the spectrum, he identified the taxpayer that has adopted corporate responsibility principles, is fully transparent and is interested in cooperative compliance processes. At the other end of the spectrum, he identified the taxpayer that is involved in aggressive tax planning and possibly fraud. He indicated that the Austrian aim would be to distinguish between these two groups in the future, ensuring that compliance efforts are focused on aggressive businesses, while fully compliant and transparent businesses would be given certainty and predictability.

During the rest of the event, the importance of tax certainty for both businesses and governments was stressed, as it leads to minimalization of tax risks, predictable after-tax profits for business, and predictable tax revenues for governments. Moreover, a common theme discussed in all sessions was that cooperation and coordination between governments is steadily growing, which leads to a growing multilateralism. Participants noted that this multilateralism creates many advantages, such as efficiency advantages through common fact finding and tax certainty advantages given that the governments with an interest in a transaction or structure agree on the tax treatment. As a consequence of these efficiencies, the German Government representative indicated that their experience on the approximately 100 joint audit procedures they have conducted to date was that these cases were on average concluded in one year. Such a turnaround is much quicker than regular audits as well as the average turnaround for MAP cases.

During the event, the OECD released the 2018 MAP statistics. In addition, France announced its participation in the second ICAP Pilot,[12] bringing the total number of participating tax administrations to 18.

The 2018 MAP statistics

The 2018 MAP statistics include 11 additional jurisdictions that were not included in 2017: Bahrain, Botswana, Colombia, Dominican Republic, Jersey, Kazakhstan, Macau, Papua New Guinea, Saudi Arabia, Serbia and Trinidad and Tobago. Three of these jurisdictions (Jersey, Macau and Papua New Guinea) were included in the 2016 MAP statistics but were not included in the 2017 data. Additionally, nine jurisdictions were omitted from the 2018 MAP statistics that were included in 2017 MAP statistics: Angola, Bermuda, Burkina Faso, Democratic Republic of the Congo, Djibouti, Egypt, Haiti, Ukraine and Vietnam.

The agreed reporting framework makes a distinction between transfer pricing and "other" cases. A transfer pricing MAP case relates to either the attribution of profits to a permanent establishment or the determination of profits between associated enterprises. Any MAP case that is not a "transfer pricing" MAP case is considered an "other" MAP case. In the MAP statistics reporting framework, a further distinction is made between cases received before 1 January 2016 and cases received on or after 1 January 2016. For the jurisdictions that joined the Inclusive Framework after 31 December 2016, the distinction is made between the cases received before 1 January of the year of joining and cases received on or after 1 January of such year.

For the first time, the OECD launched an interactive tool that allows users to make a comparison of the reporting jurisdictions' performance in 2018 for each type of case (i.e., transfer pricing or other cases). The comparison is based on six key indicators: starting inventory, cases started, cases closed, ending inventory, time (in months) and closing ratio.[13] Users may personalize their search by filtering among the indicators and selecting groups of jurisdictions.

MAP inventories and cases closed

Looking at the statistics for all MAP cases (both transfer pricing and "other" cases, as well as both cases received prior to 1 January 2016 or 1 January of the year of joining the Inclusive Framework and cases received on or after 1 January 2016 or 1 January of the year of joining the Inclusive Framework), there has been an overall decrease in the starting inventory, ending inventory and cases closed:

- The starting inventory of all MAP cases fell by nearly 8% between 2017 and 2018, from 7,500 to 6,924 cases.
- The ending inventory of all cases also fell 3.3% during this period, from 6,831 to 6,605.
- The number of all cases closed fell slightly between 2017 and 2018, from 2,745 to 2,704.

Looking just at pre-2016 (or the period prior to 1 January of the year of joining the Inclusive Framework) cases, there has been a reduction in both the starting inventory and cases closed:

- The starting inventory of both transfer pricing and other MAP cases fell by around 27% between 2017 and 2018.
- The number of cases closed fell by more than 30% between 2017 and 2018, from 1764 to 1231.

Looking just at new post-2016 (or the period on or after 1 January of the year of joining the Inclusive Framework) cases, there was an increase in both the starting inventory and cases closed:

- The starting inventory nearly doubled between 2017 and 2018, from 1187 to 2338 cases.
- The cases closed has also increased, by around 50% between 2017 and 2018 (although the increase between 2016 and 2017 was far higher at almost 178% from 353 to 981).

The attached annex includes summary tables with an overview of the 2016, 2017 and 2018 MAP statistics.

MAP cases started during 2018

The report shows that 2,385 MAP cases were started on or after 1 January 2018. This number increased by almost 15% in comparison to 2017, from 2,076 to 2385. In comparison, there was a 39% increase in all cases started between 2016 and 2017.

Table 1 below presents the five reporting jurisdictions with the highest number of MAP cases started in 2018 overall and for each category of cases, transfer pricing and other:

All cases		Transfer pricing cases		Other cases	
Jurisdiction	Cases	Jurisdiction	Cases	Jurisdiction	Cases
Germany	615	France	222	Belgium	546
Belgium	581	Italy	196	Germany	437
France	449	Germany	178	Netherlands	293
Netherlands	357	United States	157	France	227
Italy	256	India	133	Luxembourg	227

In contrast, the G20 jurisdiction with the lowest number of all MAP cases started in 2018 is Saudi Arabia with zero cases. Table 2 below presents the five G20 jurisdictions with the lowest number of MAP cases started in 2018, both on an overall basis and for each of the categories of cases:

All cases		Transfer pricing cases		Other cases	
Jurisdiction	Cases	Jurisdiction	Cases	Jurisdiction	Cases
Saudi Arabia	0	Saudi Arabia	0	Saudi Arabia	0
Argentina	7	South Africa	1	Japan	2
South Africa	7	Argentina	2	Turkey	2
Turkey	7	Russia	4	Brazil	3
Brazil	9	Turkey	5	Argentina	5

Compared to the 2017 statistics, there has been an increase in the number of cases started in France and Italy. In the United Kingdom, 96 fewer cases were started in 2018 compared to the cases started in 2017, and in the United States 43 cases fewer. The number of cases started in 2018 in Japan and Mexico increased slightly, but the total number of cases started in these jurisdictions remains low (33 and 19 cases respectively).

MAP cases completed in 2018

The number of cases reported as completed in 2018 is 2,704, a 1.5% decrease relative to the 2017 figures, which were reported under the same methodology.

Table 3 below presents the five reporting jurisdictions that completed the highest number of cases in 2018:

All cases		Transfer pricing cases		Other cases	
Jurisdiction	Cases	Jurisdiction	Cases	Jurisdiction	Cases
Germany	658	Germany	227	Belgium	596
Belgium	635	United States	181	Germany	431
Netherlands	373	France	136	Netherlands	314
France	362	Canada	102	Luxembourg	241
United Kingdom	274	Italy	90	France	226

According to the report, of the MAP cases closed in 2018, 80% successfully resolved the issue under dispute. Of that 80%:

- 57% of cases closed were concluded with an agreement fully resolving the taxation not in accordance with the tax treaty.
- 2% were resolved with an agreement partially resolving the taxation not in accordance with the tax treaty.
- 17% were granted unilateral relief.
- 4% were resolved via domestic remedy.

For 1% of the MAP cases closed, the parties agreed that there was no taxation not in accordance with the tax treaty. Of the 19% of cases closed that did not resolve the issue, 6% were withdrawn by taxpayers while 13% were not resolved for various reasons (including because there was no agreement by the competent authorities).

Average cycle time for cases completed, closed or withdrawn

For transfer pricing cases only, the average cycle time increased by 3 months between 2017 and 2018, from 30 months to 33 months. For other non-transfer pricing cases, the average cycle time decreased by 3 months between 2017 and 2018, from 17 months to 14 months.

Average times for resolution of MAP cases (both transfer pricing and other cases) vary significantly by jurisdiction, ranging from 2 months (Malta) to 66 months (Slovak Republic). For transfer pricing cases, the average time for resolution ranges from around 60 months (Mexico) to less than 2 months (Slovak Republic). For other cases, the average time for resolution ranges from around 98 months (Slovak Republic) to less than 2 months (Indonesia).

Implications

It is expected that the importance of MAP will increase for the foreseeable future as a result of a convergence of trends that include the introduction of BEPS-related measures by governments, the existence of Anti-Tax Avoidance Directives in the European Union, increased transparency and disclosure requirements globally, and the general increase in the focus on transfer pricing by many tax administrations.

The OECD's MAP statistics show that while starting and ending inventories of MAP cases continue to fall, the number of new cases started continues to exceed the cases closed in the majority of jurisdictions tracked. While MAP can be an effective tool to reduce double taxation, multinational businesses may want to also consider alternative controversy strategies, such as use of bilateral and multilateral Advance Pricing Agreements.

Where multinational businesses experience issues with MAP in a specific jurisdiction – including, in particular, the lack of access to MAP - they should consider making these issues known to the OECD as part of the review process. In a recent survey by EY that will be published, many companies indicated that they have experienced problems with accessing MAP. These survey results will be shared with the OECD after publication.

ANNEX – MAP statistics 2016, 2017 and 2018 combined:

Pre-2016 (or pre-1 January of the year of joining the Inclusive Framework)			
	2016	2017	2018
Start inventory	8002	6313	4586
Ending inventory	6047	4549	3355
Cases closed	1955	1764	1231
New cases	0	0	0

Post-2016 (or on or after 1 January of the year of joining the Inclusive Framework)			
	2016	2017	2018
Start inventory	0	1187	2338
Ending inventory	1143	2282	3250
Cases closed	353	981	1473
Cases started	1496	2076	2385

Combined pre- and post-2016 (or the period prior to or on or after 1 January of the year of joining the Inclusive Framework)			
	2016	2017	2018
Start inventory	8002	7500	6924
Ending inventory	7190	6831	6605
Cases closed	2308	2745	2704
Cases started	1496	2076	2385

Endnotes

1. The FTA was created in July 2002 by the OECD's Committee on Fiscal Affairs, with the aim of promoting dialogue between tax administrations and identifying good tax administration practices. At the time of the OECD Tax Certainty Day, the FTA comprised 53 members. http://www.oecd.org/tax/forum-on-tax-administration/about/.
2. http://www.oecd.org/tax/dispute/mutual-agreement-procedure-statistics.htm.
3. Argentina, Australia, Austria, Bahrain, Belgium, Botswana, Brazil, Brunei Darussalam, Bulgaria, Canada, Cayman Islands, Chile, China, Colombia, Costa Rica, Cote d'Ivoire, Croatia, Curacao, Czech Republic, Denmark, Dominican Republic, Estonia, Finland, France, Georgia, Germany, Greece, Guernsey, Hong Kong (China), Hungary, Iceland, India, Indonesia, Ireland, Isle of Man, Israel, Italy, Japan, Jersey, Kazakhstan, Kenya, Korea, Latvia, Liechtenstein, Lithuania, Luxembourg, Macau (China), Malaysia, Maldives, Malta, Mauritius, Mexico, Monaco, Netherlands, New Zealand, Norway, Oman, Pakistan, Panama, Papua New Guinea, Paraguay, Peru, Poland, Portugal, Qatar, Romania, Russia, Saint Kitts and Nevis, San Marino, Saudi Arabia, Senegal, Serbia, Seychelles, Singapore, Slovak Republic, Slovenia, South Africa, Spain, Sweden, Switzerland, Thailand, Trinidad and Tobago, Tunisia, Turkey, Turks and Caicos Islands, United Kingdom, United States, Uruguay and Zambia.
4. See Global Tax Alert, *OECD releases final report on improving the effectiveness of dispute resolution mechanisms under Action 14*, dated 8 October 2015.
5. For more information on the agreed framework, see EY Global Tax Alert, *OECD releases mutual agreement procedure statistics for 2016*, dated 1 December 2017.
6. Ibid.
7. See EY Global Tax Alert, *OECD releases 2017 Mutual Agreement Procedure statistics*, dated 23 October 2018.
8. See EY Global Tax Alert, *OECD Tax certainty survey closes on 16 December 2016*, dated 13 December 2016.
9. See EY Global Tax Alert, *IMF and OECD deliver report addressing Tax Certainty, including practical recommendations for countries*, dated 27 March 2017.
10. See EY Global Tax Alert, *OECD Secretary-General sends G20 finance ministers an annual progress report of the Inclusive Framework on BEPS and update on IMF/OECD Report on Tax certainty*, dated 25 July 2018.
11. International Compliance Assurance Programme.
12. For more information on the ICAP, see EY Global Tax Alert, *OECD launches International Compliance Assurance Programme pilot*, dated 26 January 2018 and EY Global Tax Alert, *OECD's Forum on Tax Administration announces International Compliance Assurance Programme (ICAP) 2.0 and publishes new Pilot Handbook*, dated 4 April 2019.
13. The closing ratio is the ratio of MAP cases closed by the jurisdiction over its total MAP caseload, where the total MAP caseload is the sum of: (i) the number of MAP cases in inventory at the beginning of the year; and (ii) the number of MAP cases that started during the year. To take into consideration the fact that the MAP cases started during the year did not start on the exact same date and may have started during the first or the second semester, the latter number is divided by 2. This also explains that the closing ratio may be higher than 100% for some jurisdictions.

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EYG no. 001189-19Gbl

1508-1600216 NY
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