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Legal Update

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International: OECD MAP statistics continue to demonstrate the effectiveness of the dispute resolution mechanism

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In brief

On 22 November 2022, the Organization for Economic Co-operation and Development (OECD) released the Mutual Agreement Procedure (MAP) statistics for 2021 ("**MAP Statistics**"). The 2021 MAP Statistics were produced pursuant to Base Erosion and Profit Shifting (BEPS) Action 14, which seeks to improve the resolution of tax-related disputes between jurisdictions.

Contents

In depth

The MAP Statistics cover 127 jurisdiction in 2021 (up from 118 jurisdictions in 2020) and nearly all MAP cases worldwide, and include information on opening and closing case inventory, evolution of case inventory, types of outcomes for cases closed, average time for cases closed, and closing case ratios. The MAP Statistics are reported in total cases and by case type – either transfer pricing cases (i.e., attribution of profits to a permanent establishment or determination of profits between associated enterprises under Articles 7 and 9 of the OECD Model Tax Convention, respectively) or "other" cases (i.e., all cases that do not involve transfer pricing).

Caseload

During 2021, 2,543 MAP cases were closed by reporting jurisdictions. This represents an increase in case closure of 13% compared to 2020, including the closure of 22% more transfer pricing cases in 2021. This significant increase is due to the more prevalent use of virtual meetings between competent authorities, prioritization of simpler cases, and enhanced collaboration to resolve issues that could be applied across a number of MAP cases. Additional staffing for competent authorities and their experience with MAP cases also contributed to greater resolution of MAP disputes. This led to an ending open inventory of 6,301 cases, including the new cases received during 2021.

In terms of new cases received during 2021, other, non-transfer pricing cases accounted for the majority (1,372 cases), with total other new cases increasing by about 4%, as compared to 2020, while the number of new transfer pricing cases received by reporting jurisdictions decreased by over 10% during the same period (with 1,051 new cases received). New MAP cases remained concentrated among jurisdictions as the top 30 jurisdictions accounted for more than 95% of all new MAP cases, while the remaining cases involved only around 40 other jurisdictions. Accordingly, close to half of the 127 reporting countries reported no new MAP cases received in 2021. The following table shows the jurisdictions with the most cases started in 2021:

Total Cases Started		Transfer Pricing Cases Started		Other Cases Started	
Jurisdiction	#	Jurisdiction	#	Jurisdiction	#
Germany	703	Germany	273	Germany	430
Belgium	407	Spain	255	Belgium	359
United Kingdom	402	Italy	207	United Kingdom	275

Spain	398	France	154	Netherlands	193
France	307	United States	130	Luxembourg	172

In North America in 2021, 254 total cases were received in the United States, including 130 transfer pricing cases and 124 other cases; 109 total cases were received in Canada, including 57 transfer pricing cases and 52 other cases; and 25 total cases were received in Mexico, including 24 transfer pricing cases and one other case. In the United States, India continues to represent the largest share of transfer pricing MAP cases, while other cases are more spread out among other jurisdictions (with Germany, the United Kingdom, India, and Canada representing the top four treaty partners for non-transfer pricing cases).

The following table shows the jurisdictions with the most cases closed in 2021:

Total Cases Closed		Transfer Pricing Cases Closed		Other Cases Closed	
Jurisdiction	**#**	**Jurisdiction**	**#**	**Jurisdiction**	**#**
Germany	690	United States	308	Germany	406
United States	490	Germany	284	Belgium	324
United Kingdom	415	Italy	258	United Kingdom	279
Belgium	366	India	167	United States	182
Italy	343	France	151	Luxembourg	168

In North America in 2021, the United States closed 490 total cases, including 308 transfer pricing cases and 182 other cases; Canada closed 81 total cases, including 54 transfer pricing cases and 27 other cases; and Mexico 16 closed total cases, including nine transfer pricing cases and seven other cases.

During 2021, Germany, Belgium, and the United Kingdom were near the top of the pack in both total cases started and total cases closed. In Germany, while the number of total cases started to decrease from 747 in 2020 to 703 in 2021, the number of total cases closed increased significantly from 569 to 690 (21% increase). This increase was more pronounced in the number of closed transfer pricing cases, which increased from 204 to 284 (39% increase). Similarly, both Belgium and the United Kingdom had a decrease in the number of total cases opened but an increase in the number of total cases closed. In particular, the United Kingdom closed a total of 415 cases in 2021, compared to 335 in 2020 (24% increase). Both the United States and Italy also showed improvement in closing cases in 2021, with total number of closed cases increasing from 357 to 490 (37% increase) for the United States and from 266 to 343 (29% increase) for Italy. While the total number of new cases received in Spain increased significantly from 273 to 398 (46% increase), the same number for France decreased from 414 to 307 (26% decrease).

The following table shows the jurisdictions with the highest open inventory by the end of 2021:

Total Inventory		Transfer Pricing Inventory		Other Inventory	
Jurisdiction	**#**	**Jurisdiction**	**#**	**Jurisdiction**	**#**
Germany	1423	Italy	670	Germany	801
France	982	Germany	622	Belgium	563
Italy	926	India	603	France	416
Spain	757	France	566	Spain	316
India	754	Spain	441	United Kingdom	311

Although a significant number of cases remain open for the various jurisdictions, the total inventory generally shows a downward trend. The total end inventory for 2020 for the top five jurisdictions was 5,213 for all cases, 3,248 for transfer pricing cases, and 2,368 for other cases, whereas for 2021, the top five jurisdictions recorded 4,842 for all cases, 2,902 for transfer pricing cases, and 2,407 for other cases.

Similar to 2020, approximately 75% of all MAP cases concluded in 2021 fully resolved the issue. By comparison, only around 2% of MAP cases were closed with no mutual agreement (i.e., no relief) compared to 3% in 2020. Of the 75% of MAP cases that successfully resolved the issue under dispute, 53% of cases concluded with an agreement that fully resolved the taxation not in accordance with the tax treaty, 12% were resolved with one treaty partner granting unilateral relief, and the remaining 10% were resolved pursuant to a domestic remedy. In the United States, 85% of transfer pricing MAP cases and 80% of other cases concluded in 2021 fully resolved the issue. This evidences the general success of MAP; however, given the ultimate goal of fully relieving double taxation, there is still room for improvement among jurisdictions.

Time to close cases

Between 2020 and 2021, the average time to close transfer pricing cases decreased by 2.7 months, from 35 months to 32.3 months. Meanwhile, during the same period, the average time to close non-transfer pricing cases increased by 2.2 months, from 18.5 months to 20.7 months. In the United States, the average time (in months) to close MAP cases for 2016 through 2021 is set forth in the table below:

Case Type	2016	2017	2018	2019	2020	2021
Transfer Pricing Case	31.61	24.43	34.98	35.20	47.11	48.49
Other Case	28.65	26.02	32.78	15.36	29.52	40.09
All Cases	30.99	24.78	34.37	24.66	39.82	45.38

As shown above, the United States saw a peak in its average time to close all cases in 2021, reversing the significant decrease in 2019 where the average time to close all cases was nearly aligned with the BEPS Action 14 target of 24 months. However, the average time for the United States to close cases that were filed beginning in 2016 is significantly lower, with transfer pricing cases taking 29.36 months and other cases taking 20.22 months on average to close. This timeframe is closer to the BEPS Action 14 target than the table above suggests, with other cases being well within the target. The United States closed significantly more cases that were initiated prior to 2016 (134 in 2021 compared to 101 in 2020), which appears to have contributed to the increase in the total average time to close. In 2021, APMA's staff increased by about 21% to handle the increasing number of transfer pricing cases. In a March 2022 statement, the then acting director for the APMA Program, Nicole Welch, stated that the IRS would prioritize hiring additional employees for the transfer pricing program and ramp up face-to-face engagements with its treaty partners that were suspended as a result of the COVID-19 pandemic. These developments will likely have a positive impact on the ability of the United States to manage and progress its MAP cases.

There has been an increased engagement between competent authorities, particularly towards the end of 2021. Further, even though competent authorities have resumed in-person meetings, many have continued to use virtual meetings to facilitate the negotiation of cases. This hybrid method of communication is expected to further improve the efficiency and effectiveness of MAP as a dispute resolution mechanism.

2021 MAP Awards

The OECD gave recognition to the particular efforts of competent authorities in several different areas:

- *Category 1*: Average time to close MAP cases (eligible for the award for transfer pricing cases were jurisdictions that closed more than 50 transfer pricing cases in 2021, and for other cases, jurisdictions that closed more than 20 other cases in 2021). Spain won for the shortest time in closing transfer pricing cases (approximately 19.6 months) and Ireland won for other cases (approximately 5 months).

- *Category 2*: Age of inventory (eligible for the award were jurisdictions with more than 100 cases left in 2021 ending inventory). Canada won for the smallest proportion (2.1%) of pre-2016 cases in ending inventory.

- *Category 3*: Caseload Management (eligible for the large inventory award were jurisdictions with more than 100 cases left in 2021 ending inventory, and for the medium inventory award, jurisdictions with more than 20 cases but fewer than 100 cases left in 2021 ending inventory). Ireland (approximately 73%) and New Zealand (65%) won for the most effective large and medium caseload management, respectively.

- *Category 4*: Cooperation (eligible for the award for transfer pricing cases were pairs of jurisdictions with more than 20 transfer pricing cases fully resolved in 2021, and for other cases, pairs of jurisdictions with more than 20 other MAP cases fully resolved in 2021). France and the United States won the collaborative award for the pairings of jurisdictions that dealt most effectively with their joint caseload for transfer pricing cases and Ireland and the United Kingdom for other cases. Germany and the United States came in second place for transfer pricing cases.

- *Category 5*: Most improved jurisdiction (eligible for the award was the jurisdiction with the greatest increase in cases closed with unilateral relief or full agreement between 2021 and 2020, with an increase for both transfer pricing and other cases). Germany won with an increase of 144 cases closed with unilateral relief or full agreement in 2021 compared to 2020 (increase of 90 for transfer pricing cases and increase of 54 for other cases).

It is important to recognize competent authorities that strive to meet or exceed the Action 14 minimum standard and the continued encouragement of resolution via MAP.

Implications

MAP continues to be an important avenue for resolving disputes and, as the OECD has recognized, remains a cornerstone of a well-functioning international tax system. While MAP cases generally continue to take a long time to resolve, particularly for transfer pricing issues, the outcomes of MAP cases remain generally positive. It is encouraging that the competent authorities are resolving MAP cases in most instances, especially transfer pricing cases, in a more effective and collaborative manner. The trends show that, even though they require time and resources, the MAP program generally provides an avenue for successfully navigating and resolving instances of double taxation or taxation not in accordance with the treaty. In addition, it is positive that taxing authorities are invested in the MAP process and are dedicating additional resources to resolving MAP cases, consistent with Action 14. Taxing authorities globally view the MAP program as worthwhile and see continued value in the program.

The number of transfer pricing audits across the globe is expected to rise as taxing authorities look for additional revenue after the COVID-19 pandemic. Countries like the United States have provided additional funding to taxing authorities to bolster compliance by multinational companies, targeting investments in data analysis and artificial intelligence to increase transparency. Likewise, for many multinational companies, transfer pricing will continue to be their top audit issue, which requires them to invest resources in the MAP process. While the efforts by the OECD through Pillar 1 to provide for a tax certainty framework may help to alleviate some of the burden placed on companies in certain transfer pricing disputes, it is expected that transfer pricing will continue to be a focus of tax authorities and MAP will continue to be a critical means through which to resolve these issues. Thus, because transfer pricing MAP cases also take significantly more time to resolve than other cases (although litigation may take even longer), companies engaged in business operations in jurisdictions with a high number of MAP cases in particular should proactively manage their transfer pricing exposures by carefully considering their audit planning strategies and ensuring that robust transfer pricing documentation is in place.

Mandatory arbitration is another factor to consider when evaluating the success of MAP. While not every MAP case results in relief, for certain jurisdictions, the unresolved issues can be solved through an arbitration process if the competent authorities fail to reach an agreement within two years. Thirty-three countries have adopted a mandatory arbitration provision in their applicable tax treaties through the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting ("**MLI**"). While the United States is not a signatory to the MLI, a number of tax treaties to which the United States is a party provide for mandatory binding arbitration. These include the treaties with Belgium, Canada, France, Japan, Germany, Spain, and Switzerland. Arbitration as a backstop to MAP can facilitate resolution of tax disputes not only by providing another avenue for double tax relief but also by encouraging competent authorities to negotiate and avoid triggering the two-year time limit.

While MAP remains a viable and likely successful means for resolving cross-border disputes, taxpayers may also want to consider alternatives to proactively address potential transfer pricing issues, such as advance pricing agreements (APA's) and the International Compliance Assurance Program (ICAP). APA's continue to be the leading choice for achieving tax certainty, particularly for recurring audit issues, despite a lengthy and often resource-intensive voyage to an ultimate resolution. ICAP, a more recent program designed by the OECD, is a joint risk assessment and assurance program aimed at facilitating open and cooperative multilateral engagement between multinational enterprises and tax administrations. ICAP is available in 22 jurisdictions, including the United States, to provide risk assessment for substantial international issues including transfer pricing. These alternatives could serve as an efficient means of preventing or reducing transfer pricing disputes.

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