

## UNITED STATES

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## Tax certainty: The march goes on

Mark Martin and Thomas Bettge of KPMG in the US review recent developments in 'tax certainty'.

The OECD recently released the mutual agreement procedure (MAP) statistics for 2020 and held its latest 'Tax Certainty Day', a review of countries' work resolving MAP cases that managed to celebrate achievements while not glossing over shortcomings.

Certainly, there is much to celebrate: competent authorities around the world managed to close more transfer pricing (TP) cases in 2020 than they did in 2019, and more jurisdictions managed to adhere to BEPS Action 14's aspirational timeframe of resolving MAP cases within an average of 24 months.

Substantial as these achievements would be on their own, they are all the more impressive in the midst of the COVID-19 pandemic and the proliferation of lockdowns. While some competent authorities were hampered by operational restrictions while away from partially shuttered offices, it appears that most quickly adapted to the realities of COVID-19 and embraced a video- or teleconferencing model. Although videoconferencing cannot replicate all the benefits of meeting in person, it has the key benefit of facilitating more frequent interaction between competent authorities. No doubt this has been instrumental in achieving the processing time reduction seen in the latest statistics.

For the US, the statistics show that MAP continues to be successful. Moreover, a relatively small number of US TP cases (7%) were resolved by one competent authority providing unilateral relief. This suggests that mandatory consultations between IRS examination teams and the US competent authority – a new procedure introduced in 2019 – may have contributed to preventing a significant number of flawed IRS adjustments from being proposed and later withdrawn in MAP.

Historically, this was a significant problem for the IRS: at the high-water mark in 2017, 74% of all IRS adjustments that made it to MAP were withdrawn entirely by the US, according to a March 2019 report from the Government Accountability Office. The 7% of cases in

which unilateral relief was granted in 2020 also include cases in which the foreign competent authority granted unilateral relief, as well as cases in which the US competent authority granted correlative relief in response to a foreign adjustment. As such, it is not possible to come up with an exact figure to compare to the 2017 statistic, but the improvement appears clear.

Yet for all the achievements that the 2020 statistics show, it is clear that the progress made so far is not enough to address the rising demand for tax certainty. Processing times dropped globally, but a large number of cases begun prior to 2016 remain in global MAP inventories – the OECD figure is 1796 cases, though that includes double counting, as well as some post-2015 cases from countries that joined the Inclusive Framework at a later date. Some of those old cases may be held in abeyance (e.g. pending the resolution of litigation or other domestic procedures), but others are simply stuck in MAP. Action 14's 24-month timeframe is a laudable goal, but it can also incentivise prioritising newer cases and letting older ones linger.

More TP cases were closed in 2020 than ever before, but so too more TP cases were begun than in any prior year. Overall, inventories for both TP and other cases had reached all-time highs by the end of 2020. Simply keeping pace will be a significant undertaking. Continued investment in competent authority resources is important, but it appears that process improvements are also needed.

In that light, it is quite fitting that 2020 ended with a consultation on improving the MAP minimum standard under Action 14. As we discussed in a previous article, the OECD's proposals for improving Action 14 have great potential, particularly if additional suggestions made in response to the public consultation are incorporated.

Another ray of light on the horizon is the political agreement around tax certainty under pillar one, which we laid out in an earlier article. While the technical details remain unclear, countries' willingness to sign on to a framework that would provide mandatory and binding dispute resolution and prevention processes for both Amount A and related issues (e.g. TP and permanent establishment disputes) is highly encouraging. The successful implementation of pillar one's tax certainty framework would very likely entail significant benefits for MAP, as more developing countries become accustomed to treaty-based dispute resolution and more countries of all sizes gain comfort with mandatory binding dispute resolution.

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