



To Tax Treaties, Transfer Pricing and Financial Transactions Division, OECD/CTPA Date June 20, 2018

From KPMG International Ref KPMG Comments on Administrative Approaches (Chapter IV)

cc Matthew Frank, KPMG LLP, United States

Comments on the scoping of the future revision of Chapter IV (administrative approaches) of the Transfer Pricing Guidelines

The Global Transfer Pricing and Controversy Professionals of KPMG's Member Firms ("KPMG") welcome the opportunity to respond to the OECD's invitation for public comments on the scoping of the future revision of Chapter IV (administrative approaches) of the Transfer Pricing Guidelines. We endorse the OECD project and its aim to develop guidance to minimize transfer pricing disputes and speed their resolution.

The challenge of minimizing and speeding the resolution of transfer pricing disputes has been the subject of prior public comments and deliberation. We submitted a 26-page letter in January 2015 with suggestions to make dispute resolution mechanisms more effective. [Click here](#) for a copy of that letter. We urge consideration of all the points made therein.

The suggestions in our January 2015 comment letter remain vital. For the sake of emphasis, we will highlight a few of those suggestions as well as a few new ones that strike us as particularly important to the integrity or efficient functioning of the tax system and as readily achievable, and thus as appropriate to include in the Chapter IV scoping exercise.

Safeguarding access to MAP

[1] Access to MAP is essential to minimizing transfer pricing disputes and to the proper resolution of those disputes. There are several administrative obstacles to MAP at present, however. One is the practice in some tax administrations to seek audit settlements that require a taxpayer to waive its right to MAP. Such a practice represents an improper use of influence over taxpayers that harms taxpayer-to-government and government-to-government relationships. Moreover, the practice increases the number of tax disputes by encouraging field examiners to propose adjustments that are not properly supported, knowing that the adjustments will not be subject to scrutiny or accountability through the MAP process. The OECD should strongly discourage this practice and participating governments should implement policies to prevent the practice and to discipline field auditors that violate those policies. Guidance along these lines should be included in the scope of revisions to Chapter IV.

[2] A second impediment to the proper functioning of MAP is the requirement in some countries that taxpayers pay some or all of the disputed amount before the case can be considered at MAP. Allowing countries to treat MAP as a post-payment forum imposes a hardship on taxpayers, changes the negotiation dynamic between the involved countries, and reduces the incentive for the competent authority of the country initiating the adjustment to compromise and resolve cases quickly and fairly. Accordingly, the OECD should encourage tax authorities to permit MAP access without requiring the taxpayer to pay the disputed amount in advance.

[3] A third administrative obstacle to MAP is the ability of a competent authority to deny or delay access to MAP unilaterally, without bilateral consultation. Both competent authorities should have the opportunity to engage on the issue of whether and when a case is appropriate for MAP, with a presumption in favor of MAP access where at least one competent authority supports it.

[4] A final administrative obstacle to MAP is the denial of access to MAP for transfer pricing adjustments made under the authority of a domestic GAAR or similar provision rather than under a transfer pricing statute. Access to MAP should be guided by the substance of the tax authority action and the imperative to relieve double taxation; access should not depend on the particular form of the adjustment chosen by the initiating tax authority.

Strengthening MAP to address multijurisdictional cases

[5] We encourage consideration of guidance that would address MAP processes involving three or more competent authorities. In recent years, it has become increasingly common for MAP cases to implicate operations and entities in three or more jurisdictions, for example, where there is a transaction from A to B to C where B has only a limited role in the transaction, meaning that the real issue, economically, is between A and C. The incidence of multijurisdictional MAP cases is bound to increase further to the extent taxpayers or tax authorities rely on profit split methods to allocate profits among affiliates. With the greater incidence of multilateral treaty-related issues, guidance should be developed to make clear that MAP applies beyond bilateral cases and to develop procedures to address multijurisdictional situations. In the example above, guidance might provide that the two countries with the largest economic interest in the disputed transaction (A and C) would interact directly, copying the third country on correspondence and involving it only if the proposed resolution would impact it. Other mechanisms may be devised for profit split situations. This is a matter requiring attention.

[6] We recommend encouraging tax authorities to implement the guidance in the Commentary to Article 25, which addresses MAP processes for dealings between branches. Consider a company in A which has branches in B and C. The branches in B and C may have dealings with each other subject to adjustment by the B and C tax authorities. The OECD should clarify that taxpayers should have access to MAP and APA under an applicable treaty between B and C (at least where the treaty follows the OECD Model Tax Convention), regardless of whether A has treaties in place with both jurisdictions and whether A has a significant economic interest in the resolution.

Strengthening APA mechanisms to span numerous countries

[7] We encourage consideration of guidance that would make APA mechanisms more effective by outlining an efficient process by which a taxpayer can secure an APA among a large number of countries where common facts and principles apply. Many taxpayers may have a sound, globally consistent transfer pricing policy that is applied broadly. This global policy may involve costs charged for HQ or shared service transactions or for the global licensing of an intangible. Currently taxpayers may consider a multilateral APA or multiple bilateral APAs among four or five countries, but APAs involving a dozen or more countries are regarded as unrealistic due to the time and expense involved. Guidance should explore a mechanism by which, in an appropriate case, a large number of countries may agree that a subgroup among them will take the lead in negotiating the terms of a multilateral APA that all participating countries will then be invited and expected to join.

Strengthening APA availability and reach

[8] We encourage consideration of guidance that encourages tax authorities to eliminate APA barriers to entry for difficult or complex transfer pricing issues. Some countries discourage or reject such cases, but we submit the APA process is the best venue to address such issues, as it allows tax authorities to educate themselves about such issues in a cooperative setting (more conducive to understanding and addressing the issues than an examination setting) and it allows taxpayers to achieve certainty where it is needed most. We also encourage consideration of guidance that encourages tax authorities to extend APA resolutions to past years in appropriate cases, including years under audit. This is important to promote efficient tax administration and consistency, for the benefit of all parties.

Strengthening mandatory arbitration in MAP cases by allowing taxpayer input

[9] Lastly, we applaud the work to date to encourage the adoption of mandatory binding MAP arbitration. Experience with it in the US-Canada context confirms that mandatory binding arbitration with a last-best-offer feature ensures both that virtually all cases of double taxation will be dealt with and that they will be dealt with in a timely fashion – almost all within the time allotted to the competent authorities to resolve the issue through MAP. Anecdotal evidence also shows greater use of the unilateral relief within MAP to reverse unwarranted or unreasonable adjustments. We recognize that the capacity concerns of some countries with respect to the MAP/APA process generally may impact adoption of mandatory binding arbitration and encourage efforts by the OECD to address them. One point on which we encourage further guidance is to allow taxpayers to provide their views as to which of the last-best-offers is the most appropriate, as put forward in the US-France context. This would be a good feature to have for all arbitrations and we encourage its consideration.

About KPMG International

KPMG is a global network of professional services firms providing Audit, Tax and Advisory services. We operate in 154 countries and territories and have 200,000 people working in member firms around the world. The independent member firms of the KPMG network are affiliated with KPMG International Cooperative ("KPMG International"), a Swiss entity. Each KPMG firm is a legally distinct and separate entity and describes itself as such.

KPMG Contacts	Firm	E-mail
Steve Blough	KPMG in the US	sblough@kpmg.com
Brian Cody	KPMG in the US	bcody@kpmg.com
Manal Corwin	KPMG in the US	mcorwin@kpmg.com
Komal Dhall	KPMG in the US	kdhall@kpmg.com
Sean Foley	KPMG in the US	sffoley@kpmg.com
Matthew Frank	KPMG in the US	matthewfrank@kpmg.com
Mark Martin	KPMG in the US	mrmartin@kpmg.com
Chris Morgan	KPMG in the UK	christopher.morgan@kpmg.co.uk
Peter Steeds	KPMG in the UK	peter.steeds@kpmg.co.uk
Montserrat Trape Viladomat	KPMG in Spain	mtrape@kpmg.es
Graeme Webster	KPMG in the UK	graeme.webster@kpmg.co.uk