What The New OECD Double-Tax Procedure Statistics Tell Us

By **Monique van Herksen and Clive Jie-A-Joen** (November 30, 2021)

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On Nov. 22, the Organization for Economic Cooperation and Development disclosed 2020 mutual agreement procedure, or MAP, statistics, five years after the 2015 implementation of the Action 14 MAP procedure that served to make dispute resolution mechanisms more effective. This then is a good time to assess if OECD's Action 14 has been successful.

As a rough and dirty recap, the action plan served to curb base erosion and profit shifting, or BEPS, and consisted of 15 actions, 12 of which essentially served to prevent identified forms of tax abuse.

Of the remaining three, one served as a concession to taxpayers to improve dispute resolution mechanisms likely to be necessary to address an expected avalanche of tax disputes triggered by the previous BEPS action items.

Another served to address datasets and analytical tools that can assist in measuring the fiscal and economic impacts of tax avoidance and the effects of the implementation of BEPS measures, and another to implement the new action items in the existing treaty mechanism.

BEPS Action 14 introduced minimum standards and complementary best practices for MAP-based dispute resolution and required countries to prevent disputes, make MAP available and accessible, resolve MAP cases and implement MAP agreements. It also led to a peer review process and MAP statistics-reporting framework to measure if the minimum standards set to resolve mutual agreement procedure cases would be followed.

To properly understand the released statistics it is relevant to have an understanding of the MAP statistics reporting framework, which will be discussed below. Beyond that, it is safe to say that MAP inventories are continuing to grow, which can be seen as a good thing. It means that taxpayers are filing requests for avoidance of double taxation under the available tax treaties, where previously it was often not considered as a useful effort and therefore neglected.

Furthermore, tax authorities appear to be improving their case load management. While there is a decrease in the total number of MAP cases closed in 2020, for both transfer pricing cases and other cases, that is mostly likely due to the COVID-19 pandemic. Competent authorities adjusted to the pandemic through having online meetings and prioritizing simpler cases.

The MAP Statistics Framework

In order to be able to track the processing of MAP requests, the framework established a start date, milestone date and an end date. The start date is generally one week from the date that one competent authority informs the other competent authority a MAP request was filed or five weeks after receipt of the MAP request, whichever is earlier.

If the MAP request is considered incomplete, the start date commences when such

information is received or two months after the request for further information, whichever is the later date.

The end date is the date the taxpayer gets notified by the competent authority of the outcome of the matter, or in certain cases, if the taxpayer formally withdraws the MAP request.

An outcome notification can range from notification that the taxpayer objection on which the filed MAP request is based is not justified and a denial of the MAP request, to notification that there will be full elimination of double taxation, or competent authority agreement that will fully eliminate double taxation or fully resolve taxation not in accordance with the tax treaty.

The milestone date regards the date that a first position paper is presented by one competent authority to the other competent authority.

The countries that joined the OECD BEPS Action Plan and inclusive framework agreed to adhere to this framework and commenced its application for the reporting period that regarded calendar year 2016.

The OECD commenced collecting MAP statistics in 2006. While for the years prior to 2016, MAP statistics were also maintained, usually those were based on the respective countries' own methods, and did not follow the same principles as other countries or those reflected in the reporting framework agreed under BEPS Action 14.

In 2007 the OECD introduced collective focus on definitions of terms used in the reporting through its 2007 report, Improving the Resolution of Tax Treaty Disputes. As a result, OECD MAP statistics reporting is formally divided in pre- and post-2016 reporting periods.

As some countries may have joined the inclusive framework later than 2016, MAP cases not following the new reporting framework are included in the category of the pre-2016 reporting period. The OECD statistics make a distinction between transfer pricing cases, which also include the attribution of profits to a permanent establishment, and other cases.

High-Level Findings

Collective end inventories of the jurisdictions that submitted statistics went up in 2020 as compared to 2019. Remarkably, the majority of the cases — over 50% — in inventory now are transfer pricing cases. This was also the case for 2019 and continues in 2020.

A couple of countries notably lead in this area as well. The 2020 end-of-the-year inventory for transfer pricing MAP requests list is topped by the following 10 countries. Italy is in first place, followed by India, Germany, the U.S., France, the United Kingdom, Spain, Switzerland, Sweden and Denmark, underscoring that getting your transfer pricing right is painfully important.

The MAP statistics do not disclose what amount of adjustments are involved, but it is safe to say that that number will be significant. In our experience, many taxpayers are still hesitant to file MAP requests and unlikely to do so for smaller adjustments, so the reported cases probably do not reflect anywhere near the real magnitude of transfer pricing adjustments.

While the time to close cases that are not transfer pricing-related went down from an average of 22 months in 2019 to an average of 18.5 months in 2020, for transfer pricing

cases, the closing time trend is the reverse, and went up from a 30.5-month average for 2019 to a 35-month average in 2020. This figure presents a rough average, and in real time is probably longer considering the counting system agreed in the framework.

The increase in time to close transfer pricing cases likely reflects the combination of pressure on government resources to handle the usually highly specialized transfer pricing cases, the increase in number of transfer pricing cases, which usually require the digesting of substantive information to get a grip on the issue presented for analysis and resolution, and the challenges resulting from the COVID-19 pandemic.

When it comes to the disclosed MAP outcomes, as regards cases closed in 2020, 51% were closed with an agreement fully eliminating double taxation/fully resolving taxation not in accordance with the tax treaty. That outcome is the undisputed gold standard and what anyone would aim for.

Another 16% were resolved with the granting of unilateral relief, which is when only one tax authority provides relief. This can be done without subsequent MAP discussions between the relevant competent authorities, or may be granted in cases where there is no agreement between the competent authorities, and one of them decides nevertheless to provide relief to the taxpayer.

In 2019, these figures were 57% and 15% respectively and in 2018, 57% and 17%.

The other options that lead to closure of a MAP case include no agreement; denial of MAP access; conclusion that the objection by the taxpayer was not justified; withdrawal by the taxpayer; a partial agreement to resolve double taxation; resolution via a domestic remedy; or any other outcome. While there may be a good resolution in these categories, the resolutions do not get anywhere close to the gold standard of full avoidance of double taxation.

Before jumping to any conclusions, it should be noted that there are several targets that the MAP procedure and its monitoring process are aiming for. First, the process aims to make sure there is access to MAP. While MAP is still largely considered a discretionary process that allows taxpayers to submit incidents of taxation not consistent with the tax treaty to the competent authority of its state of residence, and allow the latter to try and resolve those issues in coordination with the representative of the treaty partner, the discretionary nature thereof is waning.

There is an increasing obligation for competent authorities to resolve the issues presented to them. Jurisprudence — for example in the Netherlands and Italy — underscores that submitting an issue to MAP is more and more considered a taxpayer right, although resolution of the issue is not necessarily so as that depends on all facts and circumstances.

Next, making sure that cases do not end up remaining in a MAP twilight zone is an important goal. Horror stories of MAP cases that have been outstanding for more than 10 years exist and inevitably are based on real cases. One only needs to imagine the consequence of interest running on late payment of disputed taxes in such cases to realize the potentially disastrous effect of protracted MAP cases. There have been cases where interest charges outnumbered the actual adjustments in issue.

The tracking of closing times serves to counter and possibly eradicate those occurrences. In this respect, it should be noted that countries have committed to a minimum standard of resolving MAP cases within a 24-month average time.

Furthermore, the MAP article in essence forces some self-discipline on tax authorities as regards interpreting their own taxing rights in cases where they have treaty obligations, versus treaty partners and their taxpayers.

Through the MAP article, there is a domestic review system embedded in the treaty instrument by a supposedly objective party, the competent authority. Hence, the unilateral relief option, where the competent authority may unilaterally resolve an issue presented under MAP and not involve the foreign treaty partner, even if that would lead to overriding the domestic tax inspector's findings and conclusions.

While the OECD MAP statistics do not measure this, the OECD peer-review mechanism put in place with BEPS Action 14 does consider the impartiality of the competent authority as compared to the tax administration.

Another goal of the article is that the road to access the MAP process, and throughout the process, should be clear, which is why the OECD has supported publication of countries' MAP profiles on its website, and encourages all countries to have clear MAP procedures issued in their countries and available on their government websites.

The consistent increase of MAP filings over the past years may very well be the result of clearer guidance and how-to publications in this respect as well, and not only be contributed to increased tax audit activity.

What This Means for Taxpayers

In sum, looking at the OECD MAP statistics shows there still is ample room for improvement of the MAP process. The gold-standard outcome of obtaining full avoidance of double taxation is represented by a meager 51% of cases. Taxpayer withdrawals in 2020 were reported to be up at 11%; as compared to 6% in 2019 and 2018.

Considering the several natural thresholds to filing a MAP request, such as unfamiliarity with the process, lack of trust in the process, etc., withdrawing filed requests is not an encouraging sign.

That said, the increase in new-filed MAP requests reported in 2020 is nothing short of a very good and promising sign. Yes, there may be more audits and adjustments — as expected — resulting from the implementation of the BEPS action items, but apparently many of those are moving forward for objective review by the competent authorities in MAP. This is exactly what BEPS Action 14 was meant to do.

The increase in unilateral relief — 7% in 2020, 5% in 2019 and 4% in 2018 — may be interpreted as competent authorities performing their role when the matter presented simply is not fit for MAP proceedings in one way or another.

The number of cases presented in the statistics are centralized in a very few countries, however. The nontransfer-pricing case inventory is dominated by Germany, Belgium, France, the U.S. and the U.K. Transfer pricing case inventory is dominated by Italy, India, Germany, the U.S. and France.

Anyone doing business in these jurisdictions, while having access to MAP, should also realize that the caseload is not determined by the competent authorities, but by the tax inspectors making tax assessments that subsequently lead to double taxation or are considered to be

not in accordance with the tax treaty in place. Thus, tax-risk assessment in those jurisdictions may be more than worthwhile, and risk proofing transfer pricing documentation and practices should be considered a must.

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