Executive summary

In October 2018, the European Union (EU)'s Joint Transfer Pricing Forum (JTPF) released a Report on a coordinated approach to transfer pricing controls as well as statistics on APAs and pending MAPs under the Arbitration Convention. Furthermore, it published Statistics on Advance Pricing Agreements (APAs) in the EU at the end of 2017 (Statistics on APAs) and Statistics on Pending Mutual Agreement Procedures (MAPs) under the Arbitration Convention at the end of 2017 (Statistics on pending MAPs).

The Report establishes best practices by issuing various recommendations for both taxpayers and tax administrations, and encourages closer cooperation in the field of transfer pricing controls. The JTPF recognizes the advantages of a coordinated transfer pricing control approach and encourages closer cooperation in the field of transfer pricing controls, for example by introducing or amending the domestic legal framework to effectively and efficiently perform joint transfer pricing controls. The Report discusses Joint Audits, Simultaneous Audits and Multilateral Controls. The Report also provides generic guidelines and a set of best practices in the context of coordinated transfer pricing controls for organizational matters, taxpayer's rights and obligations, and the various phases within a joint transfer pricing audit.
The Statistics on APAs provide an overview by Member State on the APA practice in its country. The overview shows that not all Member States have a (formal) APA practice yet (i.e., Bulgaria, Cyprus, Estonia and Malta) and more than half of the Member States apply a filing fee for APA requests. When compared to the figures from 2016, the total number of APAs in force, APA requests received and APAs granted have decreased. This reduction is largely due to a reduction in Belgium and Luxembourg, the latter being due to a reset of its domestic APA practice.

The Statistics on pending MAPs show the current state of play with respect to the cases pending under the Arbitration Convention (AC) as of the end of 2017. The total number of pending cases remained relatively similar, with an almost equal amount of cases initiated and completed during 2017. More than half of the almost 1,900 cases were pending for more than two years in 2017. In general, the average cycle times of cases remained similar to 2016.

Detailed discussion

Background

The JTPF works within the framework of the Organisation for Economic Co-operation and Development (OECD) Transfer Pricing Guidelines and operates on the basis of consensus to propose to the European Commission pragmatic, non-legislative solutions to practical problems posed by transfer pricing practices in the EU. The three documents released in October 2018, the Report, the Statistics on APAs and the Statistics on pending MAPs under the AC represent the JTPF’s latest publications.

Report on a coordinated approach to transfer pricing controls

The purpose of the Report is to establish a coordinated approach to transfer pricing controls within the EU, in order to avoid double (non-)taxation. Furthermore, it serves as a starting point for analyzing which tools can be improved based on the current EU legal framework, and how. To this aim, the JTPF has provided 10 recommendations to taxpayers and tax administrations in Member States. The JTPF builds on the recommendations with respect to the coordinated controls or joint audits it has provided in its Report on Transfer Pricing Risk Management of the Joint Transfer Pricing Forum. The Report consists of two parts: (i) the framework for a cooperative approach to transfer pricing controls in the EU, and (ii) guidelines on coordination in transfer pricing controls within the EU.

The Report starts by outlining the principles of a cooperative approach to transfer pricing controls, describing the current concepts and terms used in practice and tax literature such as Joint Audits, Simultaneous Audits and Multilateral Controls, and the legal framework for performing a coordinated transfer pricing control within the EU. The Reports states cooperation between different tax administrations and between tax administrations and taxpayers is key, given the nature of transfer pricing and the fact that tax administrations do not always share a common interest. The current EU legal framework allows Member States to agree to conduct coordinated controls, and to be actively or passively involved in the audit of another Member State. Moreover, under the legal framework, Member States could decide to exchange information in real time. This legal framework has not been universally implemented though. For example, 18 out of 27 Member States either do not allow for the active or passive presence of visiting foreign officials, or for corresponding downward adjustments as a result of coordinated controls.

The recommendations provided by the JTPF in this respect include:

1. Exchange of information and cooperation between tax administrations should be used where they are expected to assist in the identification of transfer pricing risks and to contribute to an efficient audit.

2. It is preferable to take a cooperative approach between tax administrations and taxpayers based on dialogue and trust. The taxpayer should be actively involved in the actual auditing activities and have the right to communicate and be heard in accordance with the national provisions. The taxpayer should be timely informed of the steps taken by the tax administrations during the audit. At the same time, the taxpayer should be transparent and share in a timely manner the relevant information with each of the tax administrations involved.

3. Member States are encouraged to implement legislation that permits the active presence of visiting foreign officials.

4. Member States are encouraged to swiftly lay down the legal framework which would allow them to perform corresponding downward adjustments resulting from joint audits.
5. Member States should use, in appropriate cases, on a real-time basis for the purpose of achieving a high degree of coordination, smooth communication and exchange of information during a transfer pricing control.

The second part of the Report provides a set of best practices for a coordinated approach to transfer pricing controls. These guidelines relate to specific organizational matters, the taxpayer's rights and obligations, and the various phases (i.e., initial phase, audit phase, resolution phase, and follow up phase) of a transfer pricing audit. The JTPF states that tax administrations should consider giving taxpayers the right to propose a coordinated transfer pricing control, although such rights cannot be invoked unless laid down in national law. Specific considerations are included as to the types of cases for which a coordinated approach should be considered, the process of selecting taxpayers subject to a coordinated transfer pricing control, and the initiation and preparation thereof. The JTPF recommends that if the tax authorities cannot reach a common understanding, the concluding report of the audit should include at least all relevant facts and circumstances with a clear reference to the points on which the tax administrations managed to agree. The outcome of coordinated transfer pricing controls could facilitate the MAP (and/or bilateral APAs if an agreement is reached), as the facts and circumstances that were already agreed in the concluding audit report can be taken into consideration in this procedure. However, the MAP competent authority should maintain a degree of autonomy from the audit function of the tax administration in order to ensure its independence in the case.

Furthermore, in relation to the above, the JTPF provides the following recommendations:

6. Member States should ensure that stakeholders are aware of the possibilities and functioning of the available tools for taking a coordinated approach to transfer pricing controls. In order to facilitate the communication between stakeholders, tax administrations are encouraged to establish a contact point(s) and publish a functional e-mail box to contact in matters related to coordinated transfer pricing controls. To enable a cooperative approach, Member States are encouraged, to the extent possible, to be flexible with respect to the choice of the audit periods, the timing and the way the audit is performed.

7. Member States should participate in coordinated transfer pricing controls unless their refusal is based on a reasonable explanation.

8. Member States should agree and sign an audit plan for each coordinated transfer pricing control.

9. Member States should agree to a Memorandum of Understanding, in case they wish to establish sustained coordinated transfer pricing controls program.

10. Each coordinated transfer pricing control should finish with a concluding report.

The Report concludes that a cooperative approach to coordinated transfer pricing controls provides clear advantages. Provided the requisite legal framework is implemented by the Member States, it is feasible for Member States to already engage in procedures which present features similar to joint audits. As a next step, it would be useful to collect data on the cooperative Member States' approaches to transfer pricing controls in order to evaluate whether the current legal framework needs to be improved. The JTPF may also work in the future to develop a common methodology for transfer pricing audits.

**Statistics on APAs**

The Statistics on APAs provide details on the types of APA options that are available in a Member State, whether there is a filing fee for an APA request, and the number of (unilateral, bilateral, multilateral and total) APAs in force at the end of 2017. Also, the number of APA requests received, APAs granted, APA applications rejected and APA applications where the taxpayer withdrew its request in 2017 were disclosed. Lastly, Member States have provided input on the average time in months to negotiate bi- or multilateral APAs.

From the figures, it can be derived that not all Member States within the EU have a (formal) APA practice yet (i.e., Bulgaria, Cyprus, Estonia and Malta), although bilateral APAs might be possible under the competent authority procedure. More than half of the Member States apply a filing fee for APA requests, though the fees differ between Member States and between requests for unilateral and bi- or multilateral APAs. Compared to the statistics published for the end of 2016, the number of APAs in force and APA requests received has decreased from 2,262 to 1,421 and from 1,384 to 1,096 respectively. This reduction is largely due to a reduction in applicable APAs in Belgium and Luxembourg. In Luxembourg this is because the implementation of the OECD's Base Erosion and Profit Shifting Actions B-10 into domestic law has triggered a reset of the domestic APA practice, rendering existing APAs void of legal force. The number of APAs granted in 2017 also
was lower by 29% from 1,587 in 2016 to 1,133 in 2017. In general, the average time to negotiate bi- or multilateral APAs has remained similar to 2016.

Statistics on pending MAPs
The figures included in the Statistics on pending MAPs relate to the pending cases as of 1 January 2017, cases initiated and completed during 2017, and consequently the cases pending as of 31 December 2017 under the AC. According to the data, the total number of pending cases remained relatively similar, with an almost equal amount of cases initiated and completed (547 and 534 respectively) during 2017. Compared to 2016, more countries provided details regarding the average cycle times of cases, which range from 9 to 55 months. The cycle times provided are generally similar to the data provided in 2016. Furthermore, the Statistics on pending MAPs provide an overview of the number of cases that are pending two years after initiation and the reasons hereof. From this overview, it can be derived that 996 of the total 1,899 cases were pending for more than two years. Two of the primary reasons are that: (i) cases were pending before a court, and (ii) the time limited was waived with the taxpayer’s agreement. A total of nine cases were rejected from MAP application, five of which were due to the three-year period deadline not being met or the respective case was not within the scope of the AC.

Implications
According to the Report, a total number of 119 simultaneous controls, mainly related to transfer pricing, seem to have been initiated by the Member States since the introduction of the legal possibility. As a result of the Report, Member States may consider to introduce and/or amend the legal framework with respect to coordinated transfer pricing controls. Furthermore, they may initiate more coordinated transfer pricing controls such as Joint or Simultaneous audits, or involve other Member States in on-going audits. Such coordinated controls may reduce the number of double (non-)taxation cases as well as the need for MAPs under the AC.

Taxpayers should be aware that transfer pricing audits can be performed jointly or simultaneously by tax authorities. They could also consider to proactively request tax administrations to take a coordinated approach in the case of a transfer pricing audit, if possible under domestic legislation. Further work may be performed by the JTPF to evaluate whether the current legal framework in the EU needs to be improved, and to develop a common methodology for transfer pricing audits.

Due to the increased focus on transfer pricing by many tax administrations, the importance of APAs and MAPs is expected to increase in the foreseeable future. Taxpayers may (re)consider their transfer pricing controversy strategy as a result hereof, and analyze the opportunities available within the EU and by each Member State.

Endnotes
1. Statistics on APAs in the EU at the end of 2016.
2. Statistics on Pending MAPs under the Arbitration Convention at the end of 2016.
3. The legal framework on administrative cooperation in the field of taxation is laid down in Directive 2011/16/EU, dated 15 February 2011.
4. Hungary did not reply to the JTPF’s questionnaire.
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