

Brave New World

Catching up on the tips and tools to develop issues and resolve transfer pricing and controversy matters, as well as current OECD efforts at increasing tax certainty

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Agenda


- APA/MAP Primer
- 2018 APMA Statistics
- Recent APMA Developments
- Impact of Changing International Tax Landscape

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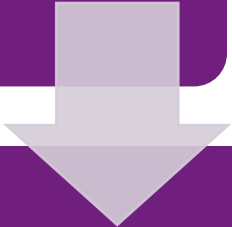
APA/MAP Primer

APA/MAP Primer

Related party transactions may give rise to the opportunity to shift income between the parties to achieve worldwide tax efficiencies



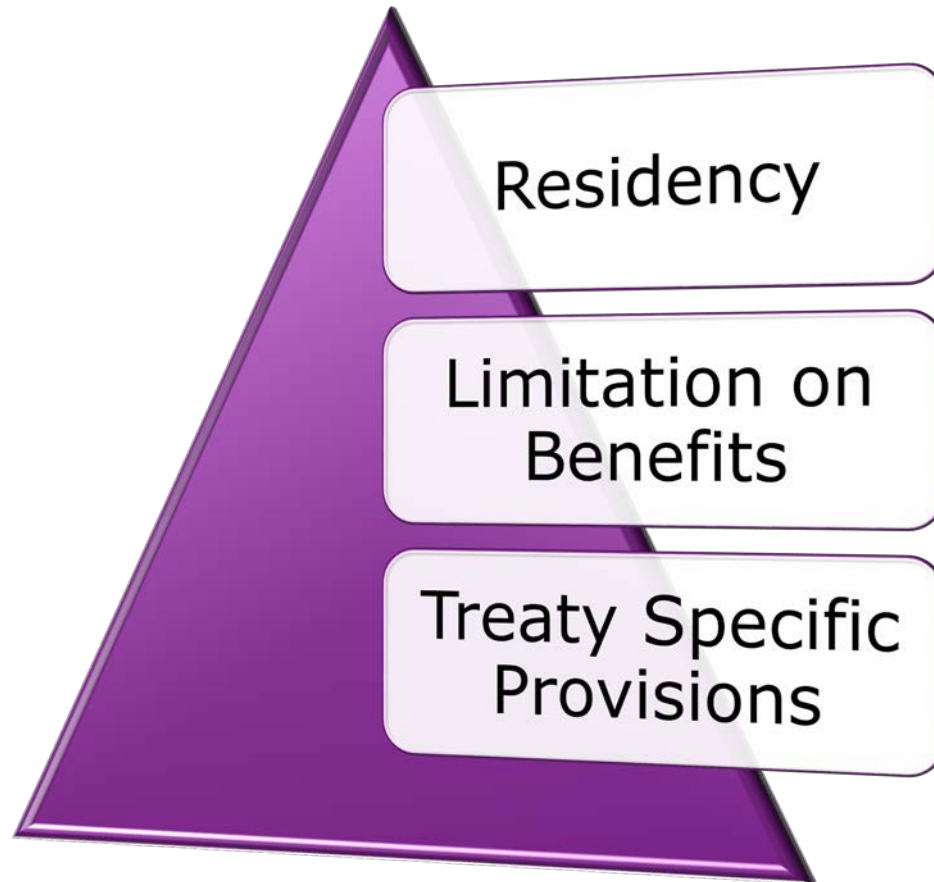
Most countries, including the United States, have arm's length transfer pricing requirements in related party transactions, and...



authority to reallocate profits or losses between related parties if prices are not viewed as arm's length

APA/MAP Primer

Treaty Eligibility – In General



APA/MAP Primer

MAP

- Retrospective
- Government-to-government process
- Generally, “endeavor to resolve” only, but some binding arbitration in newer US treaties after two years
- No IRS user fee

*Reduce or
Eliminate
Double
Tax*

APA

- Prospective, but possible rollback
- Bilateral/multilateral and unilateral
- Potential penalty protection
- Substantial IRS user fee

APA/MAP Primer

Best Practices

- Take steps necessary to preserve rights
- Selecting the transfer pricing methodology (TPM)
- Consider required disclosures

Common Mistakes

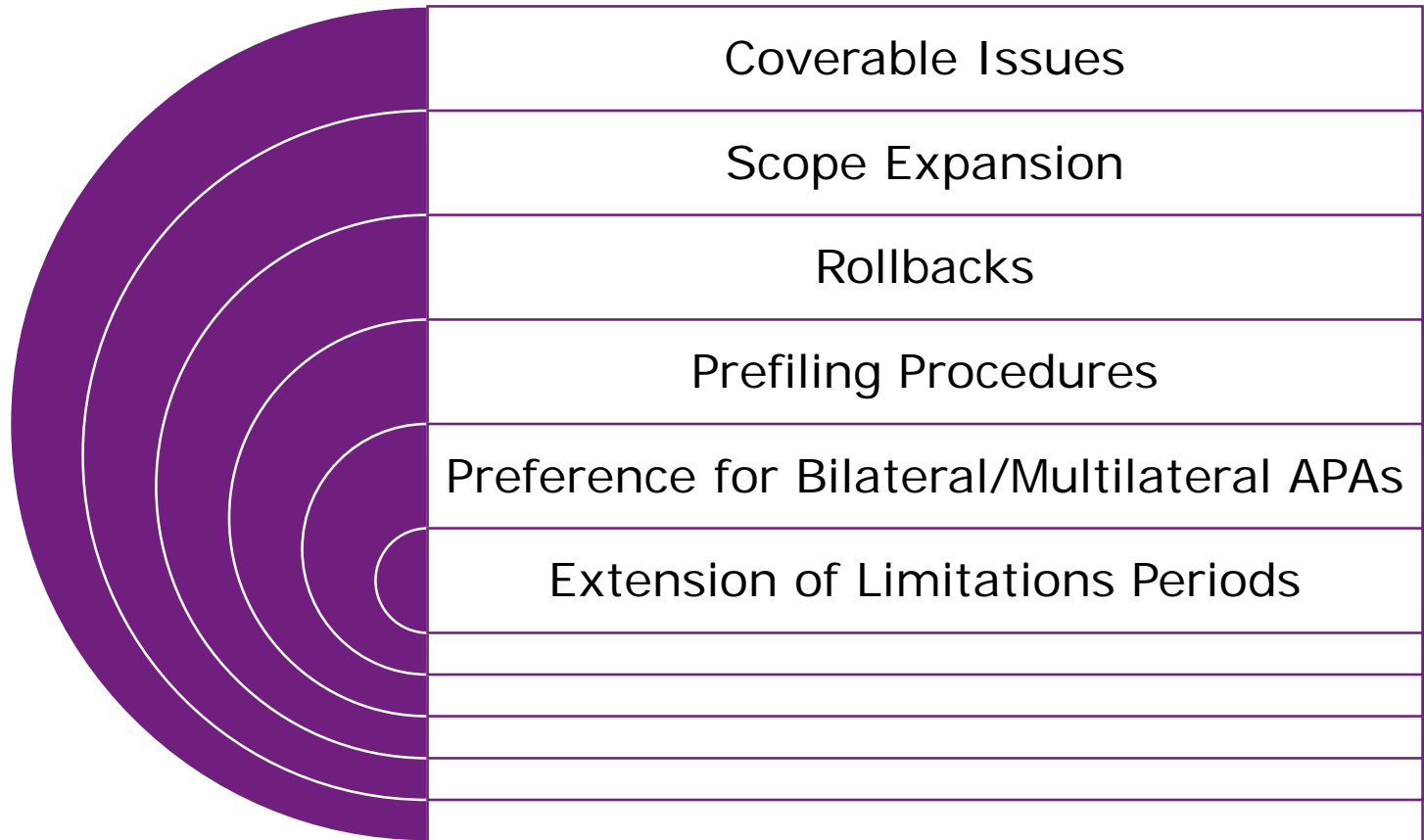
- Providing late or inconsistent financial data
- Not considering pending litigation or examinations

Working Together

- Different tenor than litigation
- Leveraging Benchmark APAs
- Securing bilateral/multilateral APAs

APA/MAP Primer

Rev. Proc. 2015-41- IRS APA Process



APA/MAP Primer

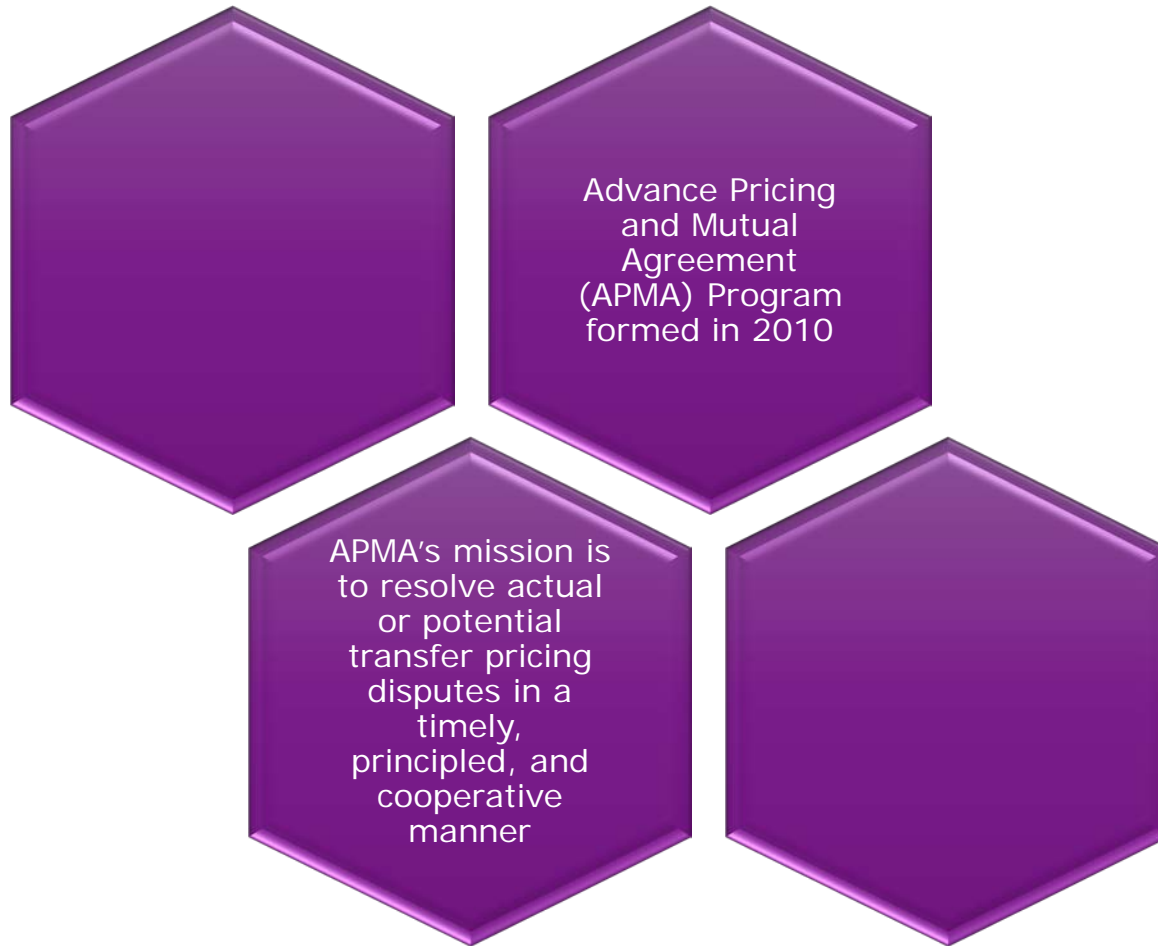
Bilateral APA Process

APA/MAP Primer

Rev. Proc. 2015-40 - IRS Competent Authority Process

- Provides guidance on the process of requesting and obtaining assistance under US tax treaties from the US competent authority
- Requires additional details that taxpayers must provide
- Identifies when the US competent authority will not grant discretionary relief under a treaty

APA/MAP Primer



2018 APMA Statistics

General Descriptions of APAs Executed in 2018

Nature of the Relationships

Covered Transactions, Functions and Risks, and Tested Parties

Transfer Pricing Methods Used

Sources of Comparables, Comparables Selection Criteria, and Nature of Adjustments to Comparables or Tested Party Data

Ranges, Targets, and Adjustment Mechanisms

Critical Assumptions

Term Lengths of APAs Executed in 2018

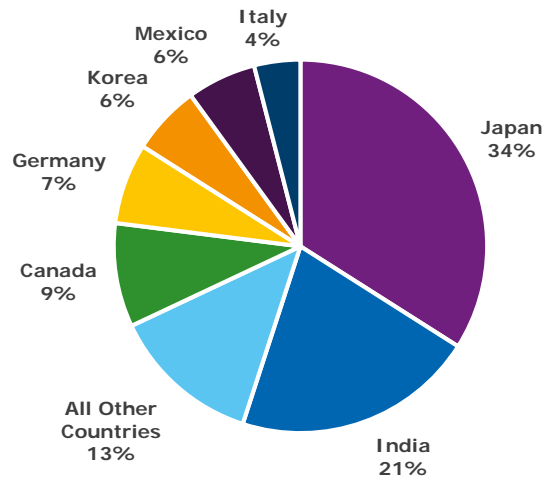
Amount of Time Taken to Complete New and Renewal APAs

Efforts to Ensure Compliance with APAs

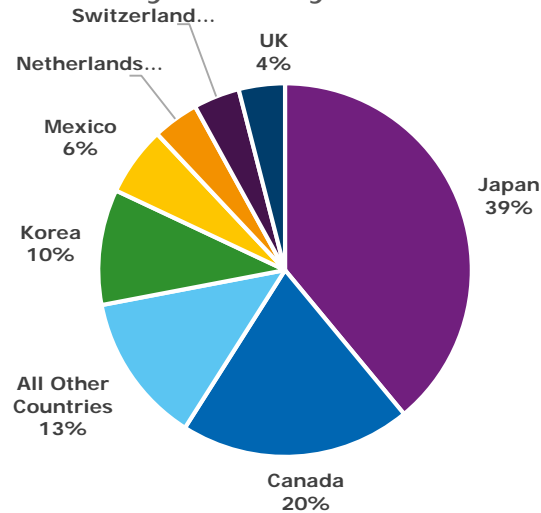
Nature of Documentation Required in Annual Report

2018 APMA Statistics

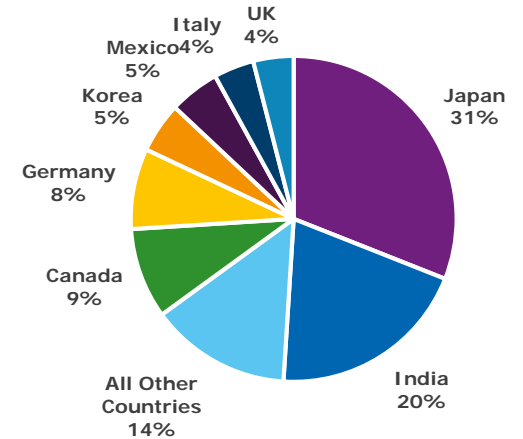
Bilateral APAs Filed by Country 2018



Bilateral APAs Executed by Country 2018



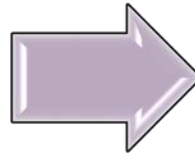
Bilateral APAs Pending by Country 2018



Recent APMA Developments

2018 APMA Reorganization

- Restructured management and realigned teams
- Designed to improve internal processes, resolve disputes and increase taxpayer service



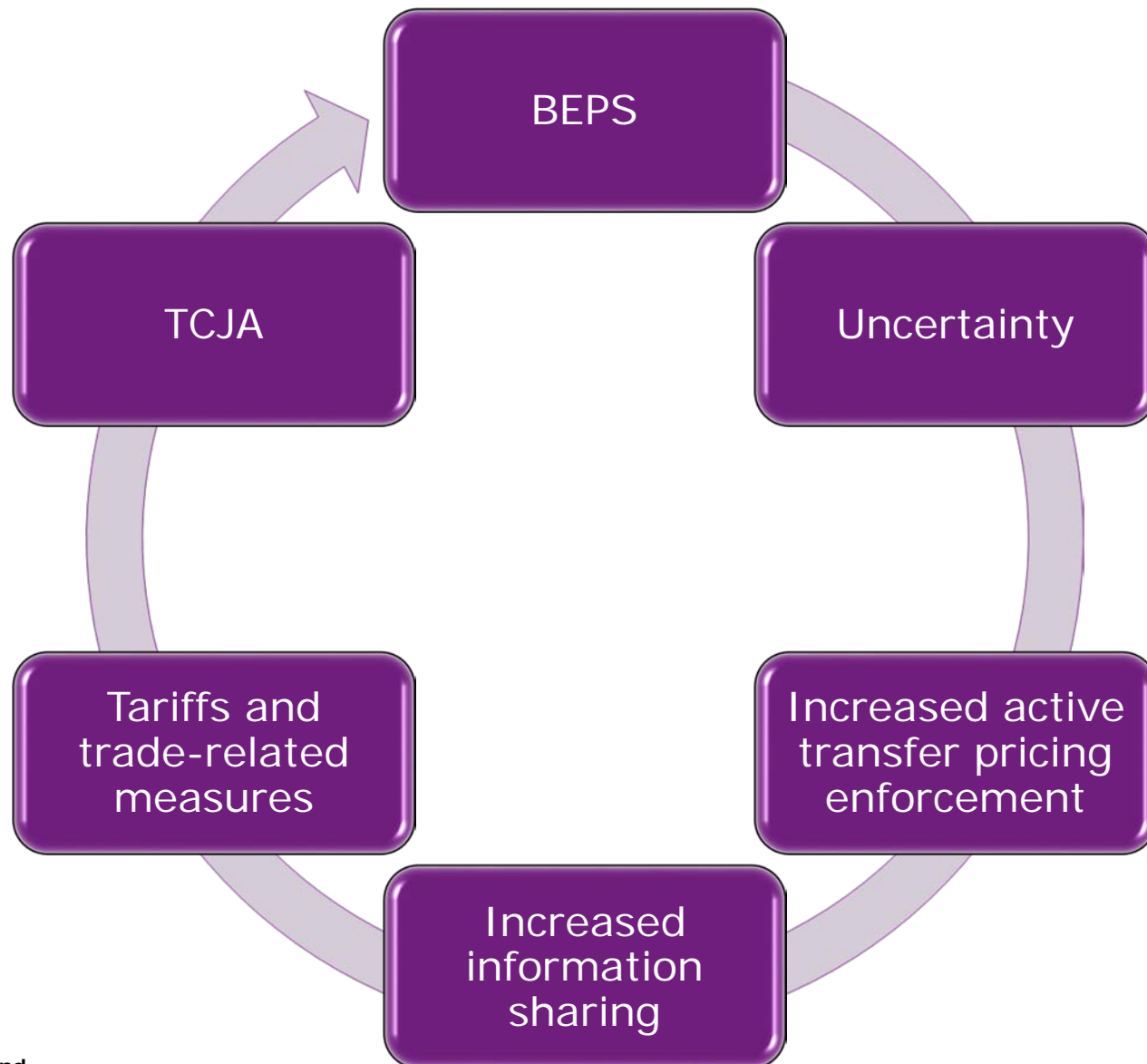
2019 LB&I Memo

- Requires issue teams to consult with APMA on transfer pricing transactions likely to end up in CA proceedings
- Goal to allow APMA to share its experience with examiners

Brave New World

Impact of Changing International Tax Landscape

Impact of Changing International Tax Landscape



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OECD Developments

International Joint Audits

Simultaneous Controls (EU)



- Article 12 of Directive 2011/16/EU
- Simultaneous controls consist of two or more Member States agreeing to audit, in parallel and each in their own territory, one or more related taxpayers which are of common or complementary interest to their respective tax administrations
- The main aim is to exchange the obtained information

Joint Audits (OECD)



- A joint audit involves two or more tax administrations that come together and form a single audit team, in order to examine an issue/set of transactions which pertain to one or more related taxpayers (with cross-border economic activities)
- Both tax administrations will have a common or complementary interest in the taxpayer(s)
- The aim of this exercise is to agree on a single audit report at the end and assess the related taxpayers to tax on this basis
- Through this process, the tax authorities are expected to form a more comprehensive understanding of the audited taxpayers' affairs and conclude with an assessment that does not result in double taxation or non-taxation

Multilateral Controls (EU)



- Within the framework of the EU Fiscalis Programme, a multilateral control is an arrangement where national tax administrations agree to carry out co-ordinated controls of one or more related taxpayers where the control is linked to a common or complementary interest
- The Programme Fiscalis 2020 provides no legal basis itself for the execution of multilateral transfer pricing controls, but finances the meetings of tax officials as well as their participation in administrative enquiries carried out abroad

International Compliance Assurance Programme

Pilot program that uses CbC Reports and other information to facilitate multilateral engagements between MNE groups and participating tax administrations

- Benefits:
 - Improved risk assessment based on fully informed and targeted use of CbCR information, an efficient use of resources, a faster and clearer route to multilateral tax certainty and fewer disputes entering into MAP
 - Greater certainty for MNEs for their tax risk due to upfront legal certainty and an improved tax risk assessment
 - Remark: ICAP provides “comfort” to MNEs, while other bilateral instruments provide “certainty”

New FTA project mapping out jurisdictions’ differing approaches to risk assessment with a view to increasing mutual understanding, closer cooperation and convergence

Voluntary process available to large MNE groups headquartered in participating jurisdictions

- Identify participating jurisdictions where the MNE has activity and that it wishes to be included in a multilateral risk assessment
- Tax administrations in these jurisdictions will then confirm whether they agree to participate in ICAP for that MNE group, taking into account factors such as the group’s presence in the jurisdiction and its risk profile (case-by-case)
- Multilateral risk assessment conducted under ICAP will not cover all of an MNE group’s tax issues, but will focus on those associated with transfer pricing, permanent establishments and any other material international issues agreed between the group and participating tax administrations
- Case-by-case analysis
- In ICAP 2.0, more tax administrations are willing to participate, increasing the amount of activities MNEs can receive comfort in

International Compliance Assurance Programme

Provide a package of documents (pre-entry package, scoping documentation and main documentation package), including the CbC Report, to the lead tax administration

- Shared among tax administrations participating in the MNE group's ICAP risk assessment.
- Other information held by tax administrations also shared
- MNE only has to provide information relevant for the transactions that fall under the scope of ICAP 2.0

A meeting will be held with the group and all participating tax administrations to discuss the content of the CbC Report and other documentation, to ensure a full and consistent understanding of the group's profile and activities

Initial risk assessment will be conducted by each participating tax administration

- Whether they can gain comfort, the MNE group poses no or low risk in the areas covered by ICAP
- If not, a more detailed and comprehensive risk assessment will be conducted
- Participating tax administrations will work collaboratively, and the MNE group will be kept informed via the lead tax administration

Following the conclusion of the risk assessment stage, a meeting will be held with the MNE group to discuss the outcomes of the assessment.

- If there is no or low tax risk on an issue, an assurance letter will be issued setting out these findings, the content of which will vary by jurisdiction
- The timeline for ICAP will depend upon a number of factors, but in most cases, the period from the initial meeting to the issuance of assurance letters should be within 12 months

EU Joint Transfer Pricing Controls

October 2018 – EU Joint Transfer Pricing Forum recommendations

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

It is preferable to take a cooperative approach based on dialogue and trust. A cooperative approach is characterized by communication between tax administrations and taxpayers:

- 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

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

Members States are encouraged to swiftly lay down the legal framework which would allow them to perform corresponding downward adjustments as a result of a common understanding of the facts and circumstances and the application of the arm's length principle

Member States should use, in appropriate cases, the possibility under Directive 2011/16/EU 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

EU Joint Transfer Pricing Controls

October 2018 – EU Joint Transfer Pricing Forum recommendations

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

It is recommended that Member States participate in coordinated transfer pricing controls unless their refusal is based on a reasonable explanation

It is recommended to agree and sign an audit plan for each coordinated transfer pricing control

It is recommended that Member States agree to a Memorandum of Understanding (MoU), in case they wish to establish sustained coordinated transfer pricing controls program

It is recommended that each coordinated transfer pricing control is finished with a concluding report

Quasi-Multilateral Audits

US tax litigation matters provide a ready opportunity for non-US authorities to seek information

US cases generally receive wide coverage in the tax press

Records are generally public unless subject to a confidentiality order

IRS has a large amount of information that can be shared without notifying the taxpayer and with limited exceptions, as previously discussed

IRS positions and materials may provide foreign tax authorities with additional arguments

BEPS Action Plan – October 2015

Action 14: Making Dispute Resolution Mechanisms More Effective

- Goal of Action 14: Outline effective dispute resolution mechanisms and peer review of countries procedures
- Countries committed to standards that ensure resolution of treaty-related disputes in a timely, effective and efficient manner
 - Terms of Reference
 - Assessment Methodology
 - MAP Statistics Reporting Framework
 - Guidance on Specific Information and Documentation Required to Submitted with a Request for MAP Assistance
- Peer Review ensures taxpayers have access to effective MAP process

BEPS Action Plan – October 2015

Action 14: Making Dispute Resolution Mechanisms More Effective

– Terms of Reference

- Minimum standard approved into a basis for peer review, consisting of 21 elements, which are used to determine how MAP regime performs in four key areas:
 - (1) preventing disputes; (2) availability of access to MAP; (3) resolution of MAP cases; and (4) implementation of MAP agreements
- Includes 12 best practices

– Assessment Methodology

- Provides procedures for peer review and monitoring
 - Stage One: Review of member country's implementation of standards and the practical application
 - Stage Two: Review of member country's corrective measures for shortcomings identified in Stage One

BEPS Action Plan – October 2015

Action 14: Making Dispute Resolution Mechanisms More Effective

- MAP Statistics Reporting Framework
 - Creates a collaborative approach for competent authorities in resolution of MAP cases
 - Provides greater transparency by common reporting standards for inventory, types, and outcomes of MAP cases
- Guidance on Specific Information and Documentation Required to Submitted with a Request for MAP Assistance
 - Members draft their own MAP guidance providing guidance to taxpayers in their preparation of a MAP submission.
 - Members must publish MAP guidance identifying the specific information and documentation that a taxpayer is required to submit with a request for MAP assistance



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