

An ICAP Primer

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In this article, the authors explain the OECD's international compliance assurance program process and when and how it can be most beneficial for multinationals and tax authorities.

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As revenue authority enforcement activity increases globally and revenue authorities collaborate before approaching multinational enterprises, a process like the international compliance assurance program (ICAP) is the likely future of tax enforcement. This article details the process — from selection to risk assessment and issue resolution, through outcomes — and provides a framework for determining when and how it can be most beneficial for taxpayers and revenue authorities. With a September 30 application deadline for

participating in the next round of ICAP, MNEs will want to consider their options.

I. Introduction

In March 2017, in response to a request from the G-20 leaders at the 2016 summit in Hangzhou, China, the IMF and the OECD issued a report on tax certainty.¹ The 114-page document makes the case for tax certainty — the need for both taxpayers and tax administrations to be able to efficiently and effectively prevent disputes and resolve them when they arise. Tax certainty requires a variety of programs: those that assist in effectively preventing disputes before they arise, those that focus on early issue resolution, and those that effectively and efficiently resolve disputes. The focus on and need for tax certainty has been increasing, as revenue authority enforcement activity continues to rise,² and both MNEs and tax administrations struggle to keep pace with their obligations.

In September 2019 the OECD launched the Tax Certainty Unit, whose work focuses on the mechanisms and tools available to taxpayers and revenue authorities to resolve disputes and, even more appealing, to potentially avoid disputes entirely. Also in September 2019, the OECD hosted its first “Tax Certainty Day,” a two-day session focused on various available and developing dispute prevention/resolution methods. The tax certainty toolbox holds a variety of tools. Advance pricing agreements and the mutual agreement procedure available under income tax treaties provide a tried-and-true approach to resolution of cross-border matters. Joint audits provide another efficient way to

¹ OECD, “Tax Certainty — IMF/OECD Report for the G20 Finance Ministers,” at 5 (Mar. 2017).

² OECD, “Mutual Agreement Procedure Statistics for 2019” (2020).

consider issues in multiple jurisdictions at once and are not uncommon in several EU jurisdictions. Some other jurisdictions offer pre-filing options that permit a taxpayer to obtain certainty on an issue or group of issues before even filing its tax return.

Although APAs can be multilateral, they generally involve only one or two jurisdictions at a time. For an MNE operating in multiple (10 or more) jurisdictions, the possibility of a process that would allow engagement with several jurisdictions at once has been long discussed. In an era of increasing collaboration among tax administrations, the creation of this type of program was the logical next step. The OECD took that step with the creation of ICAP, which launched as a pilot program in January 2018. After two pilots, ICAP became permanent in November 2020. As explained in the ICAP Handbook for Tax Administrations and MNE Groups (ICAP Handbook) published in February, ICAP is:

a voluntary programme for a multilateral co-operative risk assessment and assurance process. It is designed to be an efficient, effective, and co-ordinated approach to provide multinational enterprise groups (MNE groups) willing to engage actively, openly and in a fully transparent manner with increased tax certainty with respect to certain of their activities and transactions.³

Although ICAP admittedly does not provide legal certainty to the MNE, it does provide a clear line of sight into how that MNE is perceived in a number of jurisdictions and ultimately provides a level of comfort regarding the revenue authorities' intentions to engage in a full inquiry of that taxpayer. The ICAP manual is clear on this:

ICAP does not provide an MNE group with legal certainty as may be achieved, for example, through an advance pricing arrangement (APA). It does, however, give comfort and assurance where tax administrations participating in an MNE

group's risk assessment consider covered risks to be low risk. Where an area is identified as needing further attention, work conducted in ICAP can improve the efficiency of actions taken outside the programme, if needed.⁴

Although ICAP is not a tax audit, it is a process that can provide significant comfort to an MNE in relation to its transactions. Thus, it is something that MNEs might want to consider as they explore their options for certainty and come to terms with the challenging enforcement landscape. Those MNEs that have participated in the two pilots have provided positive feedback for the program, which we explore in detail below.

II. What Is ICAP?

ICAP uses the MNE's transfer pricing documentation, including the MNE's country-by-country report, as a starting point. It is then coupled with documentation packages, described in the ICAP Handbook, to provide a clear and efficient route to improved multilateral tax certainty. ICAP focuses primarily on assessing risks associated with transfer pricing and permanent establishment issues but may also consider other issues. During the ICAP process, the MNE's in-country risks are reviewed by tax administrations of the relevant jurisdictions and identified as "low risk" or "not low risk." For jurisdictions determining that the transactions are low risk, the MNE will receive a confirmation letter from the revenue authority. Although all jurisdictions provide this confirmation, there is no template for the letter, and each letter reflects the legal requirements and limitations relevant to the particular jurisdiction. The impact of the "low risk" letter is to provide comfort to the MNE that the jurisdiction will not be commencing an inquiry into its transactions and will not be allocating resources to conduct an audit.

Although ICAP can provide comfort and assurance to taxpayers when tax administrations consider risks to be low risk, it does not provide legal certainty that can be achieved through an APA, joint audit, or the compliance assurance

³ OECD, "International Compliance Assurance Programme: Handbook for Tax Administrations and MNE Groups," at 6 (Feb. 18, 2021) (ICAP Handbook).

⁴ *Id.*

process available in the United States.⁵ However, ICAP may be considered more beneficial for some MNEs than other options like an APA for several reasons. The first is that the time frame for an ICAP risk assessment is shorter than that for most APAs. ICAP takes six to 12 months, while three to four years is typical for a bilateral APA. ICAP can also potentially provide comfort for all of an MNE's transfer pricing and PE risk in the covered jurisdictions, rather than only for specific transactions. The "low risk" letter contemplates that a revenue authority will not be conducting an audit of the taxpayer. Thus, the MNE has broader comfort. Also, ICAP will typically involve six to eight jurisdictions, whereas most APAs are bilateral and will only provide certainty for two jurisdictions. Lastly, if an area is identified as needing further attention, the work conducted in ICAP may result in greater efficiency for actions taken by MNEs and tax administrations outside the program.⁶

A. Evolution of ICAP

The OECD's Forum on Tax Administration (FTA) launched the ICAP program in January 2018 with a pilot including eight tax administrations and five taxpayers. A second pilot program, which included 19 tax administrations and 12 taxpayers, was announced in March 2019.⁷ In November 2020 the FTA announced that the ICAP program would become permanent. It was launched in February, with 20 participating jurisdictions. ICAP has added two participating jurisdictions since February. Alongside the launch of the permanent program, the FTA published an ICAP Handbook, which revised the existing pilot handbook and made changes reflecting input and lessons learned from the two pilot programs. The ICAP Handbook will continue to be revised periodically based on additional experiences of participating tax administrations and MNEs.⁸

⁵ *Id.* at 9. Other jurisdictions have similar programs, which provide legal certainty at the conclusion of the tax audit. For instance, see the horizontal monitoring cooperative compliance program in the Netherlands. Netherlands Tax and Customs Administration, "Guide – Horizontal Monitoring – Tax Service Providers" (Feb. 2016).

⁶ ICAP Handbook, *supra* note 3, at 6.

⁷ *Id.*

⁸ *Id.*

The next deadline for MNEs to apply to take part in the ICAP program is September 30, with the following two deadlines in March and September 2022. It is expected that the FTA will continue to offer twice-yearly opportunities for MNEs to apply to join the program.

B. Participating Countries

The jurisdictions participating in ICAP are: Argentina, Australia, Austria, Belgium, Canada, Colombia, Denmark, Finland, France, Germany, Ireland, Italy, Japan, Luxembourg, the Netherlands, Norway, Poland, Russia, Singapore, Spain, the United Kingdom, and the United States.⁹

As of this date, the FTA is actively soliciting participation from other jurisdictions and MNEs, and there is a concerted effort to bring in additional jurisdictions in both the Latin American and Asia-Pacific regions, two areas that are underrepresented.

C. ICAP Process and Timeline

The ICAP process consists of three distinct stages:

1. selection;
2. risk assessment and issue resolution;
and
3. outcomes.

The timeline anticipated for these ICAP stages is shown in the figure.

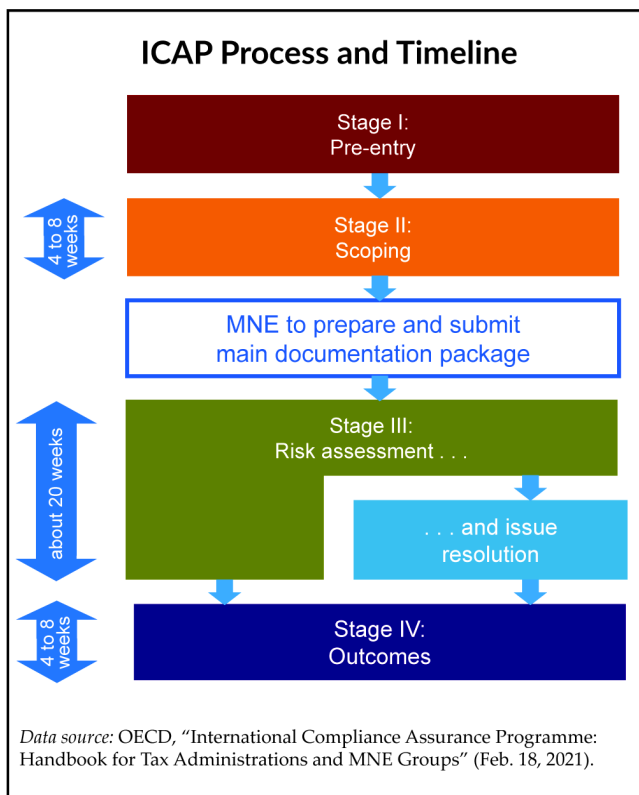
The sections below provide additional detail on these stages.

1. Pre-Entry

Before the start of the formal ICAP process, an MNE will reach out to its lead tax administration to begin informal discussions and to inquire about the possibility of participating in ICAP. Typically, the lead tax administration will be that of the jurisdiction of the ultimate parent entity (UPE) of the MNE and will also be a covered tax administration for the MNE's ICAP risk assessment.¹⁰ In some cases, the UPE may be in a nonparticipating jurisdiction, or the UPE tax

⁹ OECD, "International Compliance Assurance Programme (ICAP) – Tax Administrations Participating in ICAP" (July 30, 2021).

¹⁰ ICAP Handbook, *supra* note 3, at 15.



administration is not willing to act as lead tax administration. In this case, the MNE should approach a tax administration in another jurisdiction in which it has substantial operations to invite that tax administration to act as a surrogate lead tax administration.¹¹ The MNE will need to disclose the identity of its UPE jurisdiction, explain why that jurisdiction cannot or will not act as a lead tax administration, and confirm the UPE's commitment to active and open participation in the ICAP process.

The pre-entry conversations between the MNE and lead tax administrations will focus on the suitability of ICAP for the MNE, the MNE's expectations of ICAP, the potential scope of the ICAP risk assessment, and the provision of some preliminary high-level information for review.¹²

2. Selection

The selection stage begins when an MNE submits its selection documentation package to its lead tax administration.¹³

The selection documentation package includes the MNE's most recent CbC report, master file, and standard ICAP templates provided by the lead tax administration. These allow an MNE to indicate with which jurisdictions it seeks to engage. While a requested jurisdiction may decline to participate, a jurisdiction that was not requested by the MNE may choose to participate. The MNE does not have the right to decline that jurisdiction's involvement. The lead tax administration will review the selection documentation package for completeness and will share the package with the other tax administrations in jurisdictions in which the MNE has one or more constituent entities.¹⁴

At this point the tax administrations will discuss and determine which tax administrations will participate. Each tax administration, including the lead tax administration, has discretion to decide whether it will act as a covered tax administration in an MNE's ICAP risk assessment. In general, the ICAP risk assessment and assurance process will be most effective when covered tax administrations are in jurisdictions in which the MNE derives a significant proportion of its global revenue and in which key activities are undertaken. The covered tax administrations for a particular MNE's risk assessment should be those in jurisdictions that have existing international agreements in effect to allow the exchange of tax information with the lead tax administration and with all other covered tax administrations.¹⁵ In many cases the Multilateral Convention for Mutual Administrative Assistance in Tax Matters will be used to provide the legal basis for exchange of information, but other agreements such as exchange of information articles of income tax treaties and tax information exchange agreements may also be used, as appropriate.¹⁶ If fewer than three tax administrations (including the lead tax administration) agree to participate in the MNE's ICAP risk assessment, the ICAP process ends, and

¹¹ *Id.*

¹² *Id.* at 34.

¹³ *Id.* at 11.

¹⁴ *Id.*

¹⁵ *Id.* at 16.

¹⁶ *Id.*

the MNE will be notified by the lead tax administration.¹⁷

During the selection stage, the participating tax administrations may also identify other routes to greater tax certainty that may be more appropriate for a particular transaction and will communicate these to the MNE.¹⁸ Tax administrations may also exclude transactions from ICAP if, for example, those transactions are covered by APAs or would more suitably be covered by APAs or other options.

After review and discussion, the participating tax administrations will agree on the scope of the ICAP risk assessment, including covered periods, proposed roll-forward periods, and any excluded transactions or risks.

The periods eligible for review in an ICAP risk assessment are an MNE's tax filing periods for which they have been required to file a CbC report or have filed a CbC report voluntarily under parent surrogate filing rules.¹⁹ In most cases, an ICAP risk assessment will focus on one or two consecutive covered periods, which will be the most recent for which necessary documentation, including the MNE's CbC report, is available.²⁰ The covered tax administrations will also typically aim to provide tax assurance for roll-forward periods, which are the two tax filing periods immediately following the agreed covered periods, provided there are no material changes during those periods.²¹

The participating administrations also agree on the time frame and any additional information that may be needed beyond the standard documentation package, which is described in Section II.C.3 below. The MNE is informed by the lead tax administration of the outcome of these discussions and can decide whether to proceed to the risk assessment stage with the covered tax administrations that have expressed willingness to participate.²²

This initial selection stage should take approximately four to eight weeks from receipt of the selection documentation package.²³

3. Risk Assessment and Issue Resolution

During the risk assessment and issue resolution stage (also referred to as simply the "risk assessment stage") the participating tax administrations engage in a multilateral risk assessment and assurance of the covered risks.²⁴

The process begins with a kickoff meeting of the participating revenue authorities and the taxpayer, which, pre-COVID-19, was held in Paris at OECD headquarters.²⁵ The risk assessment stage begins when the MNE submits the main documentation package, which includes the following core items and any additional items that the participating tax administrations have agreed are necessary:

- updates to any of the documents contained in the selection documentation package;
- a schedule containing specified details of covered transactions;
- the MNE's CbC report, if not already provided with the selection documentation package;
- a completed CbC self-assessment; and
- local files for the covered tax administrations (or equivalent information and documentation).

Approximately four weeks after receipt of the main documentation package, the participating tax administrations will begin a series of multilateral calls and meetings to discuss the documentation provided, initial findings, additional relevant information already held by the covered tax administrations (such as tax returns and financial statements), expectations for the risk assessment, and whether the target timeframe for the risk assessment is reasonable.²⁶ The tax administrations will continue to discuss their findings until each is able to gain comfort

¹⁷ *Id.* at 22.

¹⁸ *Id.*

¹⁹ *Id.* at 17.

²⁰ *Id.*

²¹ *Id.*

²² *Id.* at 12.

²³ *Id.*

²⁴ *Id.*

²⁵

It is unclear at this point how the kickoff will be handled. Throughout COVID-19, virtual platforms and conference calls were used to replace in-person meetings. It would seem likely that this will continue.

²⁶ ICAP Handbook, *supra* note 3, at 24-25.

that the covered risks pose a low risk or determines that such a finding is not possible.²⁷

If one or more of the tax administrations conclude that a covered transaction requires further compliance review, ICAP may also include an issue resolution process. During the issue resolution process, the tax administrations will seek to reach agreement with the MNE on the correct tax treatment of one or more covered transactions, including whether any tax adjustments (and, if relevant and to the extent possible, corresponding adjustments) are needed, allowing a solution to be identified within the ICAP framework.²⁸ Alternatively, the tax administrations or the MNE may agree to address the covered transaction outside of ICAP, for instance with an APA. This focus on issue resolution is a newer aspect of ICAP, having been added in response to comments after the first pilot. The addition is not surprising, as it aligns perfectly with the overall focus on tax certainty and closure. To the extent that an MNE can resolve and close issues within the ICAP process, it is a win-win for both the taxpayer and the revenue authority.

The target time frame for the risk assessment stage is less than 20 weeks but will vary depending on materiality and complexity of the covered risks and may extend beyond 20 weeks, particularly when a risk assessment includes issue resolution.²⁹ Any extension of the risk assessment stage should be to no more than 36 weeks after delivery of the main documentation package.³⁰

4. Outcomes

Once the risk assessment stage is completed for all participating tax administrations, the outcomes stage begins with the lead tax administration issuing a completion letter to the MNE indicating that the ICAP risk assessment and assurance process has concluded.³¹ Each covered tax administration will produce an outcome letter containing the results of its risk

assessment and assurance of the covered risks for the covered periods.³² Although each tax administration determines the design, content, and wording of its outcome letter, the letters typically address the following:

- risk ratings or a description of key findings;
- any agreement reached as part of an issue resolution process, if applicable;
- confirmation of the covered risks that are considered to be low risk, with a statement that it is not anticipated that compliance resources will be dedicated to a further review of these risks for a defined period (generally the covered periods, plus the following two tax filing periods, provided there are no material changes); and
- appropriate caveats or limitations, including any requirements to notify the tax administration of any material changes that affect the covered risks or to provide an annual confirmation of no such changes.³³

The tax administrations will coordinate to ensure that all ICAP outcome letters will be received by the MNE at approximately the same time. Also at this time, the lead tax administration and the MNE will hold a meeting or call to discuss the MNE's ICAP risk assessment, the outcomes of the process, and to invite feedback from the MNE.³⁴ Although the lead tax administration cannot discuss conclusions drawn by other covered tax administrations, it will provide insight into the overall ICAP risk assessment and assurance process and may relay any comments from the MNE to other participating tax administrations.³⁵

When a participating tax administration cannot conclude that a covered risk is low risk or cannot reach a conclusion regarding a covered risk, this will be stated in its outcome letter.³⁶ In this case, the better understanding gained as a result of participation in ICAP may facilitate any future domestic or multilateral actions taken.³⁷ For

²⁷ *Id.* at 12.

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.* at 27.

³¹ *Id.* at 12.

³² *Id.*

³³ *Id.* at 28.

³⁴ *Id.* at 29.

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

instance, the information obtained through the ICAP process may be shared with the tax administration's audit function or may inform further bilateral or multilateral action, such as an APA or joint audit.

The outcomes stage should take approximately four to eight weeks.

III. For Which MNEs Is ICAP a Good Fit?

ICAP is an important addition to the MNE's certainty toolbox. It provides an opportunity to simultaneously engage with multiple revenue authorities, enhance an existing relationship or develop a new one, and obtain a clear line of sight into how the MNE is viewed by the participating jurisdictions. Importantly, it also offers the opportunity for issue resolution, leading to true certainty. While ICAP is an excellent addition to the tax dispute resolution landscape, it is not for every MNE. Below we consider which MNEs might benefit from ICAP.

ICAP will be most relevant for an MNE that operates in a number of the covered jurisdictions, and from which it derives a significant portion of its global revenue. The ability to engage with six to eight participating jurisdictions seems to be the sweet spot for an ICAP participant. To the extent that an MNE does not operate in sufficient jurisdictions, or the relevant jurisdictions do not have existing international agreements to allow for the exchange of tax information, the program may not make sense.

Some MNEs may participate in ICAP to develop or solidify strong relationships with the revenue authorities in the jurisdictions in which they operate. Transparency, collaboration, and open communication are the bedrock of ICAP, and are also generally characteristic of a good working relationship with revenue authorities. ICAP is an excellent way to demonstrate to revenue authorities that the MNE is serious about engaging and collaborating. An MNE that is not truly committed to transparency, collaboration, and open communication would not be a good fit for this program and should likely not participate.

While an MNE would certainly hope that all jurisdictions conclude that it is low risk and not in need of further review, it is unlikely that this will be the case in every jurisdiction. Accordingly, the MNE should be prepared for ICAP to lead to

future revenue authority engagement and possible APAs. In addition, as noted earlier in this article, the MNE should be prepared for the possibility that a jurisdiction that the MNE did not identify for participation may choose to participate. Thus, the MNE may be obligated to engage with a jurisdiction not of its own choosing.

In today's difficult tax disputes landscape, in which certainty is both elusive and critical, ICAP should be considered by MNEs that:

- operate in many of the participating jurisdictions, and are open to engaging with any of the participating jurisdictions, if required;
- seek a collaborative and open process with revenue authorities;
- have sufficient resources to respond to information requests promptly and appropriately; and
- are prepared for a "not low risk" determination that may lead to additional revenue authority inquiries or the need to pursue an APA.

All indications are that revenue authority enforcement activity will continue to rise and that MNEs will be subjected to more scrutiny in the coming months and years. The existence of a program like ICAP may be a harbinger of the future of tax enforcement, an environment in which the revenue authorities collaborate with each other and approach the taxpayer together. It is a process that can ultimately be more efficient for both revenue authorities and taxpayers.³⁸ ■

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