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## **INSIGHT: Advance Pricing Arrangement Series—Europe**

In the years following the introduction of the Organization for Economic Cooperation and Development (OECD) action plan on Base Erosion and Profit Shifting (BEPS), KPMG is expecting a significant increase in transfer pricing controversy. This rise of transfer pricing controversy is fueled by an increase in exchange of information between tax authorities, the number and qualification of tax auditors, tax authority aggressiveness, tax authorities' use of technology to identify transfer pricing risks and inconsistencies, developing tax laws and regulations, and public pressure on governments to increase revenues generated from corporate income taxes.

Tax authorities have been fighting tax evasion and aggressive tax avoidance through increased transparency. The importance of providing greater tax certainty to taxpayers to support trade, investment and economic growth remain an important focus area for both taxpayers and governments. At the same time, the European economy is encountering the debt crisis, Brexit, trade wars, and tariff discussions. Against this background, multinationals have an increasing demand for legal and planning certainty. Thus, KPMG has seen an increase of Advance Pricing Arrangement (APA) applications covering countries in Europe.

This article analyzes these programs in Belgium, Denmark, Germany, Italy, the Netherlands, Poland, Portugal, Spain, Sweden, Switzerland, Ukraine, and the UK.

### **HISTORICAL OVERVIEW**

#### **Belgium**

In Belgium, both bilateral APAs (BAPAs) and multi-lateral APAs (MAPAs) are possible in application of article 25 of most of the double tax treaties concluded by Belgium. The first MAPA was concluded in Belgium in early April 2004. The taxpayers benefiting from these early MAPAs were financial services companies.

In addition to the BAPA/MAPA-program of the International Relations department of the Belgian Central Tax Authorities, another service of the Belgian tax authorities is dealing with unilateral APAs (UAPAs). It is the Ruling Commission or Service for Advance Decision in Tax Matters that has been responsible for issuing UAPAs since 1993.

#### **Denmark**

The Danish Competent Authority is responsible for agreeing to all APAs and transfer pricing Mutual Agreement Procedure (MAP) requests. BAPAs have been agreed using the provisions of double taxation conventions. During the early years, a small team of specialists were identified to deal with MAP and BAPA requests. The first milestone arrangement was between Denmark and Japan in the mid-1990's. In 2009, a BAPA between Denmark and China attracted considerable media interest as Denmark was the first European country to conclude a BAPA with China.

Today the competent authority of Denmark has substantial experience in negotiating BAPAs and has over the last decade concluded many of them. In general, many taxpayers have submitted BAPA applications in Denmark as a result of an often elongated transfer pricing examination in Denmark or abroad, and this has been an effective way of resolving transfer pricing disputes.

#### **Germany**

The German Ministry of Finance started discussions about the introduction of APAs nearly 20 years ago and drafted its first APA guidelines in 2000. The discussion to establish rules for BAPAs in Germany gained speed when the German, French, Spanish, and British tax authorities concluded a MAPA for the Airbus group in 2004. The German Ministry of Finance subsequently centralized the administrative competence for BAPAs in the Federal Central Tax Office (FCTO) in Bonn. In 2006, the German Ministry of Finance issued a BAPA circular defining the BAPA procedures and providing guidance with regard to the negotiation of BAPAs. Taxpayers may apply for BAPAs or MAPAs. MAPAs are treated as a combination of BAPAs. UAPAs are generally not accepted (with rare exceptions, e.g. if no double tax treaty is in place).

#### **Italy**

The Italian APA procedure was introduced in 2003 (with specific reference to UAPAs) and was implemented in 2004 through a decree which provided guidelines and discussed procedural issues. It took effect in February 2005 after the favorable advice of the European Commission. The domestic procedure allowed a resident taxpayer to file an APA request on the basis of article 25(3) of the OECD's *Model Tax Convention on Income and on Capital* (OECD Model Convention).

Starting from 2010, Italy has been prepared to accept applications for BAPAs and MAPAs. At Dec.31, 2014, 32

BAPAs/MAPAs were still in process. At the beginning of 2015, the first BAPAs were concluded.

New rules released at the end of 2015 replaced the former provisions, clarifying and improving the current framework in relation to BAPAs/MAPAs, and the retroactive effects of both UAPAs and BAPAs (roll-back). This provision made the Italian APA system consistent with foreign tax systems by reducing misalignments in the terms of BAPAs/MAPAs.

Starting from Jan. 1, 2015, taxpayers are required to enter into a UAPA procedure for access to the patent box regime, which determines a reduction in taxation for corporate and regional tax purposes on income derived from the exploitation of different categories of intangible assets specifically listed by the law.

### Netherlands

Formal APAs were first introduced in Netherlands in 2001 with the first APA Decree (nr. IFZ2001/292M) being published on March 30 of that year. At that time, the then existing ruling team of the Dutch tax authorities (DTA) was expanded to become one team for Dutch APAs and Advance Tax Rulings (ATRs), with ATRs covering tax and APAs covering transfer pricing aspects. This team has been handling UAPAs and BAPAs since then, jointly with the competent tax inspectors and the specialists of the transfer pricing coordination group of the DTA.

### Poland

APAs (UAPAs, BAPAs, and MAPAs) were first introduced in Poland in 2006. At the very beginning of the APA program in Poland, there was limited interest from taxpayers to negotiate with the authorities aiming to confirm the transfer pricing methodology or pricing policy in the form of the APA. It resulted from the lack of the tradition of negotiations with tax authorities and rather common mistrust towards the fiscal authorities.

The APA procedure was designed in such a way that the discussions were held at the level of the Ministry of Finance, where the group dedicated to deal with APA requests was created. It raised the importance of the proceedings and also underlined the difference between the discussions with the APA competent authority versus the regular tax office. Moreover, the proceedings, although not possible on a no-name basis, are confidential, which means that no information is disclosed by the competent authority to the taxpayer's relevant tax office until the APA is concluded. Therefore, slowly more trust was gained by the authorities and the first negotiations started.

### Portugal

APAs were first introduced in Portugal in 2008. The first UAPA was concluded early 2012, covering the automobile sector for a U.S. subsidiary. The first BAPA was initiated in 2010 and concluded in 2018, involving Germany, also for the automobile sector. The APA program is managed by the Major Taxpayers team which comprises a team of highly qualified tax inspectors. Currently, APAs are being concluded in a much shorter time period (2-3 years).

### Spain

APAs were first introduced in Spain in 1995 when, although there was a transfer pricing provision in the law, such provision was not fully compliant with the *OECD*

*Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations* (*OECD Guidelines*) and tax authorities certainly did not focus on transfer pricing. Therefore, transfer pricing in practice was introduced in Spain through the APA program as both specific transfer pricing audits or MAP were scarce.

During the early years, there were very few requests but enough to identify the problems that were encountered in practice for which the first legislation did not provide an answer. At the same time, a small team of specialists to deal with APA requests was identified.

In 2004, the current corporate tax law was passed, which slightly modified the APA legislation. In particular it introduced a rollback provision. Regulation 634/2015 introduced an APA specific procedure and provided further guidance making the APA program in Spain in practice a very mature and successful option to manage risks.

In 2013, the *Oficina Nacional de Fiscalidad Internacional* (ONFI) was created. The ONFI is a specialized body with approximately 50 officials, most of them with high seniority, knowledge and experience in international matters, who deal with APAs, competent authority procedures, as well as assistance to tax audits in international affairs. This body has provided an adequate structure to deal with all the international challenges, although there is a need to increase resources.

### Sweden

APAs were first introduced in Sweden in 2010. The Swedish Tax Authority handles all applications on its own, and only BAPA or MAPA applications are accepted. The fee for submitting an application is set at SEK 150,000 (approximately EUR 14,000 or USD 16,000) the first time for each country and is a bit lower for APA renewals. Most APA applications concern restructurings in major multinational enterprises (MNEs) or remuneration levels to sales entities.

### Switzerland

The first APA in Switzerland was concluded in the 1990's between a Swiss taxpayer and a related party in the U.S. Since the introduction of the APA program, there has been a significant increase in the number of requests for competent authority assistance in dispute resolutions, as well as APA applications by Swiss taxpayers.

Compared to other competent authorities, the State Secretariat for International Finance (SIF) operates with a rather lean team, and optimizes its processes, for example, by accepting APA filings only via the counterparty jurisdiction. However, the SIF team is experienced in all aspects of transfer pricing and has increased its headcount in recent years.

### Ukraine

APAs were introduced in Ukraine in 2013. In 2015, a working group dealing with APAs was created at the State Fiscal Service of Ukraine for a preliminary pricing agreement. The APA order No. 504 was approved by the Cabinet of Ministers of Ukraine on July 17, 2015. The procedure for mutual agreement procedures in controlled transactions resulting in agreements conclusion which are one-sided, bilateral, and multilateral for the purposes of transfer pricing (see <https://zakon.rada.gov.ua/laws/show/504-2015-%D0%BF>).

APAs are available for large taxpayers only. Taxpayers are considered "large" under the following conditions:

- if their overall revenue, from all types of activity in the four most recent tax (reporting) quarters, exceeds the equivalent of 50 million euros (\$55 million); or

- if the total amount of taxes, fees and payments to Ukraine's state budget for the same period exceeds the equivalent of 1 million euros, based on the average official exchange rate of the National Bank of Ukraine for the same period and provided that the sum of such taxes, fees and charges less customs payments exceeds the equivalent of 500,000 euros.

Such arrangements may be UAPAs, BAPAs or MAPAs.

## United Kingdom

In 1999, APA legislation was introduced into the U.K. and a formal APA program started shortly thereafter. A small number of BAPAs had been agreed to prior to this using the provisions of double taxation conventions. The U.K. competent authority function for transfer pricing, generally housed in Her Majesty's Revenue & Customs (HMRC)'s Head Office Transfer Pricing team, is responsible for agreeing all APAs and transfer pricing MAP requests. Until 2016 HMRC's specialist Oil & Gas office had its own Delegated Competent Authority and agreed to some APAs. Now all APAs are co-ordinated by the HMRC Head Office for Transfer Pricing.

An APA Statement of Practice has been published since 1999 and was last updated in November 2016 by APA Lead Nick Stevart. Criteria for admission into the HMRC APA program were tightened at this time reflecting HMRC's experiences, and UAPA applications are now generally discouraged (see <https://www.gov.uk/government/publications/statement-of-practice-2-2010/statement-of-practice-2-2010>).

## CURRENT STATISTICS

### Belgium

As per the end of 2017, 17 BAPAs/MAPAs were in force. Thirteen BAPAs were in force with EU countries and four with non-EU countries. The average time to negotiate BAPAs and MAPAs amounted to 30 months. In 2018, it is estimated that 13 BAPAs/MAPAs have been concluded. A total of 29 were pending in 2018 of which two are MAPAs (involving respectively three and five countries).

The below figures, based on the Annual Reports 2012-2017 published by the Federal Public Service Finance, support the trend that the number of BAPAs and MAPAs are on the rise in Belgium.

BAPAs 2012-2017						
	2012	2013	2014	2015	2016	2017
BAPAs	11	10	6	10	11	15

A much larger number of UAPAs is being concluded by the Ruling Commission. The below quoted numbers are underestimated as some topics, such as UAPAs concerning the patent income deduction or the deduction for innovation income, are *de facto* transfer pricing rulings as well, based on figures as reported in the Annual Reports of the Belgian Ruling Commission (see <https://www.ruling.be>).

Annual statistics of UAPAs on transfer pricing matters		
	UAPAs – In	UAPAs – Out
2013	87	81
2014	74	70
2015	60	62
2016	71	77
2017	73	68

Although a slight decrease of UAPAs is being noticed since the automatic exchange of UAPAs, unilateral transfer pricing rulings in Belgium are still very popular in the country as one of the ways to get more advance certainty on the acceptance of transfer prices or transfer pricing policies by the Belgian tax authorities. The biggest advantage of UAPAs is that field transfer pricing inspectors are bound by the decision of the Ruling Commission insofar that all critical assumptions are complied with by the taxpayer.

### Denmark

In recent years, the competent authority concluded 6-8 BAPAs per year. The on-going BAPAs increased significantly in 2017.

On-going and concluded BAPAs 2010-2017						
	2012	2013	2014	2015	2016	2017
On-going	13	11	19	19	21	27
Concluded	2	5	3	8	7	6

### Germany

The German tax authorities do not publish BAPA statistics locally but they refer to the respective statistics of the EU. The latest statistics that are available for Germany are from 2017 and show the following figures:

### Italy

In 2010, the Italian tax authorities issued a first bulletin including statistics up to Dec. 31, 2009 (see International Standard Ruling Report, Central Directorate for Tax Assessment, International Division, International Ruling Office, Rome, April 21, 2010). These statistics were updated up to Dec. 31, 2012 in a further bulletin issued on March 20, 2013 (see <https://www.agenziaentrate.gov.it/wps/file/Nsilib/Nsi/Schede/Istanze/Accordi+preventivi++imprese+internazionali/Bollettino+Ruling/II+edizione+Bollettino+del+Ruling+di+standard+internazionale/Bollettino+del+Ruling+di+standard+internazionale+II+edizione.pdf>).

UAPA/BAPA requests, ongoing procedures and signed agreements*									
	2004-2005	2006	2007	2008	2009	2010	2011	2012	Total
<b>Requests</b>									
UAPAs	18	10	6	6	12	13	22	27	114
BAPAs						7	3	11	21
<b>Signed Agreements</b>									
	2	2	4	5	6	7	11	19	56
<b>Ongoing procedures</b>									
UAPAs	14	20	16	11	15	18	27	35	
BAPAs						3	10	19	

The Italian tax authorities have not published APA statistics since 2013. The latest statistics available for Italy are the EU statistics from 2017.

The demand for APAs in Italy has consistently increased over the years (150 in 2017) as well as the numbers of APAs granted (36 in 2017) and in force (109 in 2017 involving both EU and non EU countries). At the same time, the average time taken to reach the APA has

increased (55 months for APAs with EU countries and 51 months for non-EU countries).

### Netherlands

According to the latest data publicly available, between 2011 and 2018, 1,748 APAs were signed by the DTA.

APA Requests Processed and APAs Granted over the 2011-2018 Period								
	2011	2012	2013	2014	2015	2016	2017	2018
APA-requests eventually signed	319	321	228	203	236	191	132	118
APA - requests denied	No info	No info	5	3	2	1	4	0
APA - requests withdrawn	No info	No info	23	23	27	14	8	19
<b>Total APA requests processed</b>	<b>No info</b>	<b>No info</b>	<b>300</b>	<b>264</b>	<b>297</b>	<b>235</b>	<b>176</b>	<b>163</b>

As the above table shows, the number of APAs has decreased over the past years. APAs granted in the Netherlands cover a wide range of activities including R&D, logistics, procurement, manufacturing, sales and distribution, head office, administration, IT, and treasury/financing activities. Dutch APAs as shown above cover both UAPAs as well as BAPAs and MAPAs. In 2017, a total number of four BAPAs or MAPAs were issued and in 2018 this number increased to 16. The aim of the Dutch government is to conclude more BAPAs and MAPAs than in the past.

### Poland

The first APA was issued in 2006, however the APA program for many years was limited in practice to rather few cases of very large multinational taxpayers willing to secure their major transactions.

Please see below annual statistics up to 2017, as presented by the Ministry of Finance (see <https://www.podatki.gov.pl/ceny-transferowe/procedury-map-i-apa-statystyki/uprzednie-porozumienia-cenowe-apa/statystyki/>):

Annual Statistics of Concluded APAs			
	Unilateral APA	Bilateral APA	Multilateral APA
2006	1	0	0
2007	2	0	0
2008	6	0	0
2009	2	0	0
2010	7	0	0
2011	2	2	0
2012	5	0	0
2013	4	0	0
2014	0	0	1
2015	5	1	0
2016	5	1	0
2017	7	4	0
<b>Total:</b>	<b>46</b>	<b>8</b>	<b>1</b>

There were eight UAPAs in progress, 13 BAPAs, and 1 MAPA. APA applications accelerated dramatically in 2018 partly due to the new restrictions of the tax deductibility of intangible transactions, which can be overcome with an APA. This acceleration is, also a result of audit activity by the tax authorities, which convinced many taxpayers to seek a vaccine against the unpredictability of the outcome of potential transfer pricing audits. The exact statistics are not yet published, however anecdotal evidence suggests that there were almost 50 applications for new APAs (UAPAs and BAPAs) in December. This means that in one month there was a greater number of new APA cases initiated

than the total amount of successful APA proceedings in the years 2006-2017.

### Portugal

At the end of 2017, 10 APAs were in force in Portugal. Two BAPAs have been established, one with an EU country and another with a non-EU country and eight UAPAs were in force, six of those covering transactions involving EU countries. The latest statistics that are available for Portugal are from 2017 showing the following figures.

	APA in force	BAPAS and MAPAs in force	UAPA	APA requests	APA granted	APA rejected	APA withdrawn	Average time of negotiation in months
EU	7	1	6	5	3	0	0	Not disclosed
Non EU	3	1	2	1	3	0	0	Not disclosed

Moreover, according to the Combat Tax and Customs Fraud and Evasion Report for 2017, 15 APAs were being negotiated, four of which were renewals, involving both UAPAs and BAPAs. The number of BAPAs has been increasing with reference to the procedures initiated in 2018 and 2019.

One may observe APAs being established and negotiated across different industries, namely by entities operating in the automobile, paper and pulp, retail apparel, telecommunications, electronics, and finance sectors, amongst others, covering different types of transactions such as purchase and sale of goods, specialized services, manufacture of goods, and financial and insurance transactions.

### Spain

According to the latest data publicly available in the 2017 Tax Agency Annual Report, the ONFI participated in managing 138 APAs, compared with 129 in 2016. Of this total number, 39 were finalized, 25 new submissions were accepted, five were rejected and, in nine cases, the companies withdrew the request. Only one case was not accepted.

The APAs that were finalized in 2017 allowed for an estimated gross tax bases under the agreements of about 1.40 billion euros, which is considerably less than the 3.30 billion euros guaranteed in the APAs finalized in 2016, although in that year there were a few very significant agreements for an amount of around 1.80 billion which distorts the comparison.

In 2017, a total of 60 APAs were in force out of which eight were BAPAs, most of which with jurisdictions in the European Union (six) and 52 were UAPAs. The analysis also shows that the agreements signed in 2017 indicated that the conclusion of a BAPA or MAPA request required an average of 24 months between the date a request was officially submitted and opened and the date on which the case was finalized.

There is no public data around the number of renewals, but the first APAs have been expiring and therefore companies are renewing the old agreements. Renewals should be requested six months before the expiry date of the current APAs.

### Sweden

In Sweden, only BAPAs and MAPAs are accepted. According to statistics available, between 2011 and 2015, 44 cases were submitted to the Swedish Tax

Agency. The process is time consuming. For example, only three decisions were made during 2015. In 2016, 12 cases were submitted and eight APAs were accepted during the same year. The latest statistics available from 2017 is shown in the table below.

	APA in force	APA requests	APA granted	APA rejected	APA withdrawn	Average time of negotiation in months
EU	9	6	3	0	1	37
Non EU	9	5	4	1	0	37

### Switzerland

A BAPA procedure was initiated for 44 cases in 2016 while 35 cases were concluded during the year, taking the case inventory to 123 pending cases as on Dec. 31, 2016. In 2017, 95 BAPA cases were submitted and 60 cases were concluded, taking the inventory of total pending cases to 167 as of Dec. 31, 2017 (see <https://www.sif.admin.ch/sif/en/home/bilateral/verstaendigungsverf.html>).

In 2017, the majority of BAPAs between Swiss taxpayers and related parties in foreign jurisdictions under negotiation concerned European partner countries, comprising 52% of the total BAPA cases, with Asian and American jurisdictions accounting for 30% and 15%, respectively. The duration of BAPA/MAP negotiations conducted by the Swiss Competent Authorities varies depending on the case complexity. During 2017, the BAPAs closed during the year were being negotiated in a time period of 32 months on average, marking a significant decrease compared to the average duration of negotiations (43 months) in 2016.

### Ukraine

Currently there are no concluded APAs in Ukraine. According to the tax authorities, two UAPA applications were filed in 2018, and are being considered for conclusion.

### United Kingdom

HMRC publishes APA statistics annually within their wider transfer pricing statistics. The latest statistics were released at the end of July 2018 showing a reduced number of APA applications but an increased number of APAs agreed. Reflecting the fact that most APAs are now bilateral, the APA process takes around three years (see <https://www.gov.uk/government/publications/transfer-pricing-and-diverted-profits-tax-statistics-to-2017-to-2018>).

We expect the numbers of new APA applications to have increased again in the next HMRC statistics published and that HMRC will receive around 20-30 new BAPA applications each year. In addition, all EU member states contribute APA statistics to the EU Joint Transfer Pricing Forum (EUJTPF). The latest statistics published in September 2018 show that most of the U.K.'s APAs do not involve their EU treaty partners (see [https://ec.europa.eu/taxation\\_customs/business/company-tax/transfer-pricing-eu-context/joint-transfer-pricing-forum\\_en](https://ec.europa.eu/taxation_customs/business/company-tax/transfer-pricing-eu-context/joint-transfer-pricing-forum_en)).

	APA in force	APA requests	APA granted	APA rejected	APA withdrawn	Average time of negotiation in months
EU	9	6	3	0	1	37
Non EU	9	5	4	1	0	37

One must note that APAs rejected are *not* included in the APA requests numbers. Rather they are rejected by HMRC at the Expression of Interest stage preventing a request.

## RECENT DEVELOPMENTS

### Belgium

The number of BAPAs and MAPAs whereby Belgium is involved is clearly on the rise. This is a direct consequence of the increased complexity in the tax world as well as uncertainty about the likelihood of taxpayers being confronted with transfer pricing audits in key economies in the years to come.

With the Belgian competent authorities, we have noticed in recent years a clear trend to take a more firm stand and defend their points of view more vigorously towards their foreign competent authority colleagues.

UAPAs in Belgium still play a vital role in the Belgian tax landscape. The Belgian Ruling Commission takes its time to critically review the transfer pricing ruling applications being filed, but remains in a business-minded modus insofar the taxpayer and its adviser respect the OECD aligned rules of the game.

### Denmark

The number of BAPA and MAP applications have increased in the past years. In 2017 the Danish competent authority was allocated more resources and it successfully concluded six BAPAs and resolved 51 MAP cases, which is the highest number of resolved cases ever and double as many resolved MAP cases compared to the previous years. On-going MAP cases at year-end were 148 which is only one case fewer than the year before. Recently, the Danish Tax Agency announced it reorganized its competent authority activities which should lead to a more focused and lean competent authority practice.

Several of the officials within the competent authority office have a background as tax inspectors. This possibly explains why they often request the applicants' transfer pricing documentation from past years.

The competent authority does not reject the possibility of information received being passed on to the national audit team, including with regard to rejected or on-going BAPA applications.

### Germany

German tax authorities are generally open to BAPA requests. However, we see that discussions about state aid, tax benefits, etc. have made them more skeptical when it comes to BAPAs with low tax jurisdictions. If such countries are in the scope of the BAPA, taxpayers should proactively demonstrate the business reasons for the intended transfer pricing structure.

Furthermore, we observe that the German tax authorities are trying to limit the number of MAPs. In this context, they analyze and implement new dispute resolution procedures like joint audits. Even if it is not the goal to limit also the number of BAPA requests, we see that BAPA applications are challenged more often. Thus, a thorough preparation of the pre-filing meeting and the application is highly recommended.

### Italy

During 2017 and 2018, the number of applications for UAPAs and BAPAs submitted to the APA/MAP Office

(Ufficio Accordi preventivi e controversie internazionali which is competent for both UAPAs and BAPAs) continued to increase significantly. However, efficient management of the APA/MAP Office, despite limited resources, allowed the procedure to keep working, albeit with some slowdowns mainly due to the fact that the same Office of the Revenue Agency oversees both MAPs as well as the Patent Box regime (introduced in 2015).

The rising number of applications and pre-filings for both UAPAs and BAPAS, as well as the long duration of the procedures in recent years, make it clear that there is a strong need for adequate resources, such as more personnel and specialized training, in order to increase the number of signed agreements and reduce the average time to complete the procedure.

Currently the Revenue Agency is undergoing a further reorganization, resulting in the continued slowdown of pending APAs. Once the reorganization is concluded, the APA/MAP Office should function in a more rational and efficient manner.

### Poland

As of Jan. 1, 2018 a limitation of tax deductibility of certain costs was introduced in the Polish Corporate Income Tax (CIT) Act. This limitation regards the cost deductibility of various intercompany charges. For example, it covers costs relating to the purchase of advisory services, market research, advertising services, management and control, data processing, insurance, guarantees and any similar services and also the fees for the use of intangible assets. The costs resulting from the above mentioned charges may be tax deductible only within the limit of PLN 3,000,000 annually (approximately USD 800,000 and EUR 700,000). This limit may be increased by the 5% of tax adjusted earnings before interest, taxes, depreciation, and amortization (EBITDA).

The above mentioned restrictions do not apply to transactions for which a taxpayer obtained an APA with the Polish tax authorities. These regulations created an outburst of interest towards the APA proceedings. The Polish Ministry of Finance realized that the APA competent authority was under a serious threat of receiving an inflow of a large number of applications for APAs (both UAPAs and BAPAs) concerning purely intercompany services. This may paralyze the normal APA program. The current APA team is still relatively small, and such an increase of the number of new applications will affect the ability to proceed with the cases currently in progress, not to mention potential new APA proceedings. Therefore, an alternative solution is being considered.

The Ministry of Finance announced that it is currently working on a simplified UAPA procedure. This completely new concept will be designed for the transactions which may be affected by the limitations of the tax deductibility. According to the draft regulations, the simplified UAPA procedure would be available to cover the purchase of some low-value adding services and royalties for the right to use simple intangibles. Such UAPAs could be concluded for up to three years. There is an intention to introduce the simplified UAPAs from July 1, 2019. However, as the potential scope of transactions to which simplified UAPAs may be used is fairly limited and there are certain minimum profitability requirements to initiate the procedure and to maintain the

validity of the simplified UAPAs, there is a risk that they will not be as popular as has been initially expected.

### Portugal

As foreseen in the Strategic Plan to Combat Tax and Customs Fraud and Evasion for 2018-2020 Government Report, APA negotiations have been established as a priority in order to ensure predictability in the tax treatment given to certain transactions within economic groups. Indeed, an increase of the number of APAs being established with the PTA has been observed.

### Spain

There are no recent developments in reference to new regulations or guidelines provided by the Tax Agency. However in practice a number of new trends are identifiable.

It is important to note that a BAPA can be negotiated in the course of a MAP request. Based on the Peer Review of BEPS Action 14 published by the OECD, the ONFI is responsive and active in competent authority procedures with a good reputation from its peer countries. Tax authorities may even express their wish to invite the company during negotiations to file a request for an APA, which is a mandatory requirement to expand the competent authorities' conversations to the future.

The scope of the APA in Spain is not limited. Therefore, it can cover either one transaction or the overall profitability of the company. Another trend we are identifying is that there is a clear preference to cover the overall remuneration of the Spanish company more than in reference to one single transaction, unless the reference is done to a financial transaction. In particular, when the company is in a loss position, it is difficult to make progress in an APA covering only some of the transactions.

The ONFI expects the taxpayer to contribute and be open during the process. In general, the APA teams take the cases with proper consideration and companies can expect to have the cases progressing at a good speed. In particular, the authorities are interested in having information on similar APAs concluded in other jurisdictions. The lack or serious delay in responses can result in the ONFI considering that the conduct of the taxpayer does not merit having an agreement in a cooperative environment and may end up with either a rejection or an invitation for the taxpayer to withdraw the APA request.

Most of the APA officials have an audit background. This circumstance explains why normally they seek to have comfort through the request of additional information from past years.

Another circumstance that needs to be managed is the accounting principles companies use to provide data to the tax authorities. It is typical to provide data in U.S. GAAP or IFRS and this is particularly so when segregated data are needed. Spanish legislation introduced a modification in its transfer pricing provision by which data needed to be provided in Spanish GAAP. This often increases conflicts in an audit environment as sometimes the requests can be very burdensome. The APA program is extremely useful in this circumstance as tax officials are normally more open to look into the data as used by the company. However, frequently the final agreement contains a reference to the statutory accounts which can include a sort of a floor or

another mechanism that combines the needs of the company while complying with the local provisions.

### **Sweden**

The number of applications have increased in the past years and we have seen that the Swedish Tax Agency has employed more people recently. Hence, there is more focus on APAs in general now.

### **Switzerland**

Swiss taxpayers face an increasingly complex international tax landscape, combined with a significant increase in the transparency requirements of their respective global organizations. With increased resources and information in the hands of the tax authorities, this leads to a sharp rise in transfer pricing audits globally. The Swiss tax authorities also focus on transfer pricing topics within domestic tax audits. As a consequence, Swiss taxpayers are more frequently looking into options on how to mitigate transfer pricing risks, including the use of BAPAs/MAPAs. Recent data shows that with the significant increase in the number of APA cases submitted, the number of APA cases successfully concluded has also increased. These figures show that the SIF in Switzerland tries to accelerate the processing of APA cases while at the same time prioritizing the best possible results for the Swiss taxpayer.

## **KEY TAKEAWAYS**

### **Belgium**

Key to success for obtaining BAPAs/MAPAs in a smooth way is managing the communication lines between the various competent authorities and the taxpayers.

Especially in Belgium's small and open economy, where the department of the tax authorities that handles the BAPAs/MAPAs is rather small in size and has to operate in a lean and efficient way in order to make optimal use of its limited resources, it is crucial that all procedures and corresponding deadlines are being respected and that all involved competent authorities are informed in a similar way, regarding content, underlying documentation and timing.

The same applies for UAPAs. Transparent ways of communicating between the taxpayer and the Belgian Ruling Commission, as well as between the Belgian ruling authorities and their foreign counterparts, are key to achieving an outcome that will survive the test of time.

### **Denmark**

Key to success for obtaining BAPAs and MAPAs as smooth as possible, is managing the process in a proactive way, keeping communication lines between the various competent authorities and the taxpayers transparent.

### **Portugal**

Due to the complexity and the potential for conflicts that may arise between taxpayers and tax authorities, special attention should be given to the business model and the allocation of profits between the parties. UAPAs, BAPAs, and MAPAs can offer certainty that the tax authorities will accept the selected transfer pricing methodology to be used for related-party transactions over a fixed period of time, and this will result in the

elimination or reduction of double taxation. MAP backed by arbitration, as provided in the Double Tax Treaties (currently, the only Portuguese treaty containing MAP arbitration is with Japan) or the EU Arbitration Convention procedure may eliminate or reduce any double taxation, however the processes are as a rule much longer than those carried out through an APA.

The successful conclusion of an UAPA or BAPA/MAPA depends mainly on the communication established with the PTA. Transparency and cooperation are a must. When initiating an APA, we recommend attending a meeting with the PTA at the preliminary phase to provide the framework of the business and also to evaluate the information, documentation, and transfer pricing analysis to be provided by the taxpayer to the PTA. Further meetings are also recommended with the PTA as necessary, even during the competent authority negotiation phase.

### **Germany**

Uninterrupted flow of information among the tax authorities involved and the taxpayers, timely coordination, and an APA process free of interruptions are the decisive factors for a successful conclusion of the BAPA procedure. This is especially true in Germany, as under the federal structure of the German tax authorities, the German BAPA team usually consists of the Competent Authority team, the local field tax auditors and the federal tax auditors. Furthermore, while there was an increase in hiring on the Competent Authority level, the capacity is still limited given the same department has to deal with a high number of MAP cases.

### **Italy**

The procedure for the conclusion of both UAPAs and BAPAs requires a high degree of collaboration between the tax administration and the taxpayer as well as a significant disclosure of information by the taxpayer. It is crucial that all procedures and corresponding deadlines are being respected and that all involved competent authorities are promptly and fully informed regarding content, underlying documentation and timing.

Underlying the APA procedure, is a relationship of transparency, trust and collaboration between the tax authorities and the taxpayer that can never fail without causing the extinction of the procedure.

For an MNE, it is often worth making this effort of transparency and mutual cooperation in order to build a reliable tax framework, prevent potential transfer pricing disputes, and reduce the risk of international double taxation.

### **Poland**

In the past, Poland was known as a country where discussions with the tax authorities had always been difficult. The unwritten rule was to keep the contact with the tax office to an unavoidable minimum. For this reason the initial reaction for introduction of the APA possibility into the Polish legal system was rather skeptical. Only few perceived APAs as an opportunity.

As the statistics show, the APA program began very slowly. It was difficult to change the perception of the taxpayers and see a partner where it used to see an antagonist. However over the years, the APA competent authority gained a certain level of confidence from taxpayers. Moreover, in the present times of rather aggressive approaches from the tax offices focused mostly on

tax collection, APAs are seen predominantly as a defense measure to secure the transaction and avoid problems.

The post-BEPS era of tax transparency and exchange of information brings yet new challenges. Increasing scrutiny of the conditions of doing business with related parties and in depth analyses of arm's-length nature of the transactions, raises even higher the attractiveness of the APAs (especially BAPAs). Most recently, the APA program in Poland gathered an unexpected momentum due to the introduction of restrictions on the tax deductibility of certain related party costs. It appears that after more than a decade of APAs being used rather selectively, they will be finally utilized more frequently.

### Netherlands

Companies can obtain certainty with respect to potential tax and transfer pricing consequences of entrepreneurial decisions in advance. The aim of APAs is to grant all Dutch taxpayers, including multinationals, certainty within the boundaries set by Dutch tax law, tax treaties and OECD guidance.

The Dutch APA practice was changed effective July 1, 2019. In the new practice, the current substance requirements will be replaced by the requirement of economic nexus in the Netherlands. Under the new policy, there will be a publication of tax rulings.

The new APA and ATR procedure, effective 7/1/19, imposes a new disclosure requiring the publication of summary reports on every APA issued, but also of every APA request rejected. We can expect greater scrutiny of APA requests and no advance certainty on certain types of intercompany transactions for which an APA was previously possible. The new International Tax Certainty Board has been set up, also effective 7/1/19.

### Spain

Companies can rely on the APA program in Spain when the case is solid and reasonable. Companies should be ready to be proactive and responsive during the process. The length of the process is normally reasonable when well managed. Spain has a history of ensuring that their APAs are principle-based. Therefore bilateral as well as unilateral APAs have an arm's-length basis. The audit environment is aggressive. Therefore managing risk upfront through an APA, especially with regards to transactions that take place indefinitely can be a good option to consider.

### Switzerland

The SIF has taken continuous steps to improve dispute resolution mechanisms for Swiss taxpayers in ensuring a smooth APA procedure. Free lodgment of applications, easy and reliable access to the APA team, and a relatively informal communication style ensure that the Swiss Competent Authorities are efficiently working on decreasing the duration to conclude an APA for Swiss taxpayers, despite a significant increase in the caseload.

### United Kingdom

The BAPA program in the U.K. is well-established. The most common treaty partners for APAs currently are the U.S., Japan, and India, although HMRC agrees to APAs with a wide range of treaty partners. HMRC's Statement of Practice sets out the required information but the specific information required for each case is best discussed with HMRC at the Expression of Interest stage. Key, particularly post-BEPS, is that sufficient focus is given to people functions across the value chain in the functional analysis.

### Appendix: Statistics on APAs in the EU at the End of 2017\*

\*EU Joint Transfer Pricing Forum, Statistics on APAs in the EU at the End of 2017, Meeting of Oct. 24, 2018.

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## Appendix: Statistics on APAs in the EU at the End of 2017

	What types of Advance Pricing Agreement (APA) options are available?	Total Number of all APAs in force at the end of 2017		Total Number of Bilateral and Multilateral APAs in force at the end of 2017		Total Number of Unilateral APAs in force at the end of 2017		Number of APA requests received in 2017		Number of APAs granted in 2017		Number of APA applications rejected in 2017		Number of APA applications where the taxpayer withdrew its request in 2017		Average time in months to negotiate bi- or multilateral APAs	
		EU	NON-EU	EU	NON-EU	EU	NON-EU	EU	NON-EU	EU	NON-EU	EU	NON-EU	EU	NON-EU	EU	NON-EU
<b>Belgium</b>	Unilateral (Advance rulings); Bilateral; Multilateral	569	245	13	4	556	241	348	186	568	243	-	1			30	30
<b>Denmark</b>	Bilateral, Multilateral, Advance rulings	3	16	3	16	-	-	1	10	-	5	-	-	-	1	-	22
<b>Germany</b>	Bilateral; Multilateral (Unilateral rulings on transfer pricing are only available under exceptional circumstances specified in a 2006 Federal Ministry of Finance circular)	16	23	16	23	-	-	16	20	11	17	1	-	1	4	36 (average for APAs granted 2017)/ 38 (overall average for APAs granted 2015, 2016 and 2017)	47 (average for APAs granted 2017)/ 51 (overall average for APAs granted 2015, 2016 and 2017)
<b>Italy</b>	Unilateral, bilateral and multilateral APAs are available pursuant to Article 31-ter of the President Decree n° 633/1973, newly introduced by Legislative Decree n° 147/2015, and the MAP Article of the relevant Tax Treaty.	49	60	1	3	48	57	78	72	15	21	4	1	5	12	55	51
<b>Netherlands</b>	Netherlands * see explanation note	No						176		132		4		40		2 years	
<b>Poland</b>	Unilateral; Bilateral; Multilateral	17	6	2	3	15	3	10	2	6	2*	-	-	-	-	22	34
<b>Portugal</b>	The Tax Code on CIT (Art. 7 138) and the Ministerial Order n.º 620-A/2008, July 16 allow unilateral, bilateral and multilateral APAs	3		1	1	6	2	5	1	3	3						
<b>Spain</b>	Unilateral; Bilateral; Multilateral	46	14	6	2	40	12	19	9	10	3	1	1	3	2	24	26.5
<b>Sweden</b>	APA legislation from Jan. 1, 2010. Only bilateral or multilateral APAs.	9	9	9	9	-	-	6	5	3	4	-	1	1	-	37	37
<b>UK</b>	Unilateral; Bilateral	17	73	17	40	-	33	5	21	2	21	-	6	-	10	53	35

NL Columns 1-6 not administered; Columns 8, 10, 12, and 14: Split EU and non-EU not administered. Numbers align with APA 2017 annual report.

PL \* In Poland it is possible to grant an unilateral APA which covers a transaction consisted of several identical transactions with several related entities in different countries (for example service center in Poland). To issue a single APA instead of many, such transactions should be identical in kind and share the merits, facts and circumstances (one of the features is for example identical wording of the contracts). The reason is not to multiply fees and APA decisions for the minor – in terms of value – identical transactions conducted with many related entities (if treated separately such transactions will not be the subject of APA examination because of the value/fee ratio).  
In 2017, two such unilateral APAs were granted. In both transactions several EU and non-EU countries were involved. For the purpose of JTPF statistics, those APAs were identified as granted for non-EU countries only, to prohibit the multiplication of the records.

UK (1) Given the nature and complexity of some unilateral APA's the UK does not record central data on the how each covered transaction is split across EU and non-EU member states. Allocated to non-EU categories. (2) Average time in months: this is data for the APA's granted in the year.

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