



OECD Stage 2 MAP Peer Review Report for Ireland Shows Progress on Dispute Resolution

Background

The OECD recently published the stage 2 peer review monitoring report (the “**Report**”) for Ireland on the implementation of BEPS Action 14. BEPS Action 14 requires OECD countries such as Ireland to implement certain minimum standards to improve the resolution of tax related disputes between jurisdictions and strengthen the effectiveness and efficiency of the mutual agreement procedure (“**MAP**”). MAP is included in Article 25 of the OECD Model Tax Convention and commits countries to endeavour to resolve disputes related to the interpretation and application of tax treaties.

In August 2018 the OECD published its stage 1 peer review report which assessed Ireland’s compliance with the minimum standards adopted under BEPS Action 14 and made a number of recommendations on actions Ireland should take to meet the minimum standards.

The recently published Report evaluates the progress made by Ireland in implementing the recommendations from the stage 1 peer review and assesses Ireland’s progress on (i) preventing disputes, (ii) the availability and access to MAP, (iii) the resolution of MAP cases and (iv) the implementation of MAP agreements.

International Tax Dispute Resolution Mechanisms Available in Ireland

Ireland has signed comprehensive double taxation agreements with 74 countries, of which 73 are currently in effect. All of these treaties provide for MAP for resolving disputes on the interpretation and application of the provisions of the treaty.

In a European context, Ireland is a signatory to the EU Arbitration Convention which provides for MAP supported by an arbitration procedure for settling transfer pricing and permanent establishment profit attribution disputes. In addition, Ireland has recently adopted Council Directive (EU) 2017/1852 which is aimed at strengthening tax dispute resolution mechanisms in the EU.

Developments Since The Stage 1 MAP Peer Review

The Report assesses the progress made by Ireland and depicts all developments in the period 1 January 2018 to 31 August 2019. In that time, the Report notes positive progress made by Ireland in a number of areas and states that Ireland meets almost all the elements of the Action 14 minimum standard. In particular, the report notes that Ireland:

- (a) has “solved almost all of the identified deficiencies” from the stage 1 report;
- (b) meets the Action 14 minimum standard concerning the prevention of disputes;
- (c) meets the requirements regarding the availability and access to MAP; and
- (d) meets the requirements in relation to the resolution of MAP cases and implementation of MAP agreements.

One of the most significant developments since the release of the stage 1 peer review, and which accounts for much of Ireland's progress, is the ratification by Ireland of the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting ("**MLI**"). Ireland deposited its instrument of ratification for the MLI with the OECD on 29 January 2019 and it entered into force with respect to Ireland on 1 May 2019. Regarding the Action 14 minimum standards, Ireland did not make any reservations to Article 16 of the MLI, which concerns MAP and Ireland also opted for mandatory binding arbitration as a final stage in the MAP process.

Where the adoption of the MLI will not bring one of Ireland's tax treaty's into line with the Action 14 minimum standards the Report notes that Ireland will strive to update those treaties through bilateral negotiations.

Another important and welcome development noted in the Report is the amendment of Ireland's domestic tax legislation in Finance Act 2018 to specifically provide that all MAP agreements can be implemented irrespective of domestic time limits. Prior to this, in the absence of a specific provision in a tax treaty, Ireland's domestic time limits for amending a tax assessment could have fettered the effective implementation of a MAP agreement.

The Report also notes the welcome publication by the Irish competent authority, the Irish Revenue Commissioners, of guidance on the relationship between tax appeals brought before the Irish Tax Appeals Commission ("**TAC**") and the availability of MAP when cases have been settled through the appeals process (the "**MAP Guidance**"). That guidance clarifies that it is not the policy of the Irish competent authority to undertake MAP in parallel with a domestic settlement / resolution process. As such, if a taxpayer wants to pursue MAP in priority to any domestic remedies, the taxpayer will have to stay the domestic proceedings.



OECD Recommendations

For the treaties that will not be updated by the MLI to meet the Action 14 minimum standard, the OECD recommends that Ireland work towards updating these treaties through bilateral negotiations to include the necessary provisions to meet the minimum standard.

Another area singled out for improvement is the average time needed to close MAP cases. The report notes that for the period analysed on average Ireland took 32.86 months to resolve MAP cases. For transfer pricing cases the average increases to 38.29 months. These timelines are above the 24 month target average and are in part due to Ireland's MAP inventory case load increasing by 61% since 1 January 2016. Whilst noting that Ireland has taken several proactive steps in its approach to resolving cases in a timely manner, including:

- (a) the creation of an additional director role within the Transfer Pricing Branch of the competent authority; and
- (b) adding additional resources to the Transfer Pricing Branch by increasing the number of staff from 10 to 15,

the Report nonetheless recommends that Ireland take further actions or devote additional resources to its competent authority so as to ensure that MAP cases are resolved in a timely, efficient and effective manner.



Comment

The Report reflects the improvements Ireland has made in a short period of time in meeting the Action 14 minimum standards. This demonstrates Ireland's continued commitment to implementing recommendations from the OECD BEPS initiative.

The Report also highlights the positive experience of peers in working with the Irish competent authority and specifically notes the principled and pragmatic approach adopted by the Irish competent authority to resolving MAP cases. This also reflects the experience of taxpayers in dealing with the Irish competent authority in recent years. Taxpayers can expect a principled and pragmatic approach, particularly where they approach the Irish competent authority at an early stage of a dispute. Early engagement has been a consistent message from the Irish competent authority in recent years as it provides them with the greatest opportunity to reach a principled outcome.



Taxpayers should therefore seek to engage with the Irish competent authority at an early stage of a dispute. Alternatively, and at the very least, taxpayers should engage with their Irish tax advisors to ensure that they are not agreeing to positions or taking actions that could fetter the ability of the Irish competent authority to effectively engage in MAP discussions.

An important factor to be aware of in this respect is from the MAP Guidance noted above. The MAP Guidance clarifies that where the TAC has made a determination in a case this will not preclude a taxpayer seeking MAP. However, in such circumstances, the Irish competent authority cannot derogate from the TAC determination under any MAP agreement. In such circumstances therefore double taxation will only be fully eliminated if the competent authority of the treaty partner jurisdiction adopts Ireland's position and, clearly, it is not guaranteed that this will be the case. These issues should be factored into a taxpayer's strategy at an early stage when deciding how to approach a dispute.

Clearly a relevant factor in such a decision making process will be the time it takes for a MAP case to be concluded. The increased number of transfer pricing audits in recent years and consequent MAP claims to the Irish competent authority means that it is challenging for MAP cases to be concluded within the targeted 24 month average.

The increase in resources dedicated to the Irish competent authority function in recent years in response to the upward trend in MAP cases is therefore to be welcomed. However, the Report rightly recommends increased resources be made available to the Irish competent authority as the current trend is only likely to continue in the near to medium term. Therefore, in order to keep pace, and to ensure Ireland's dispute resolution mechanisms remain effective for taxpayers, commensurate increases in resources will hopefully be forthcoming.

With the rebuilding of the economy that will be required post the pandemic, however, it remains to be seen if additional resources will in fact be made available. In the meantime, the message from the Report for taxpayers pursuing MAP cases, particularly in a transfer pricing context, is that whilst they can expect a principled and pragmatic approach to resolving their dispute, be nonetheless prepared for a long road.

Please get in touch with any of the contacts listed below or your usual Tax Department contact should you require further information in relation to the material referred to in this briefing note.

Full details of the Tax Department, together with further updates, articles and briefing notes written by members of the Tax team, can be accessed at www.matheson.com.

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